



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

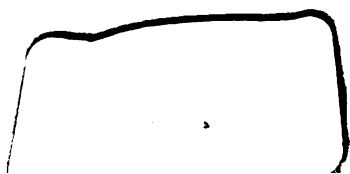
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



J2/S
JAE
v. 2

Est. Brit. Privy Council. Judicial Committee.

JUDGMENTS

OF

THE PRIVY COUNCIL

ON

APPEALS FROM INDIA.

BY

D. SUTHERLAND,

MIDDLE TEMPLE.

VOL. II.

Under the Patronage of the Governments of Bengal, Madras, and the N. W. Provinces.

CALCUTTA: THACKER, SPINK, AND CO.

BOMBAY: THACKER AND CO., LIMITED.

LONDON: W. THACKER AND CO., 87, NEWGATE STREET.

1878.

PREFACE.

THE present volume contains a collection of the Judgments of the Judicial Committee of Her Majesty's Privy Council on Indian Appeals, in continuation of those printed in my two previous volumes; and includes the very last judgment delivered by their Lordships at the close of their last Session. Some of the earlier judgments appeared in my "Weekly Reporter;" but the great majority of the judgments now published have been placed at my disposal by the Registrar to the Privy Council, to whom I take this opportunity of tendering my best acknowledgments for his kindness and courtesy.

October, 1880.

INDEX.

ACCIDENT.

See LANDLORD AND TENANT.
See MARINE.

ACCOUNT.

See ACCOUNT BOOKS.
See JOINT HINDOO FAMILY (2).
See JURISDICTION (8).
See MORTGAGE (8) (14) (15) (16).
See PARTNERSHIP (4) (5).

ACCOUNT BOOKS.

See EVIDENCE (8).
See PRIVY COUNCIL (6).

ACKNOWLEDGMENT. *See* LIMITATION (11).

ACQUIESCENCE.

See CONSENT.
See GOVERNMENT PAPER (2).
See GUARANTEE.

ACT XXXII of 1889. *See* MESNE PROFITS (5).

ACT IV of 1840. *See* POSSESSION (4).

ACT V of 1848. *See* SLAVE.

ACT I of 1845.

s. 21. *See* JOINT HINDOO FAMILY (1).

ACT IX of 1847. *See* ALLUVIAL LAND (7).

ACT XXI of 1850. *See* HINDOO LAW (INHERITANCE) (15).

ACT VIII of 1859.

s. 2. *See* JOINT HINDOO FAMILY (15).
See RES JUDICATA (1) (2) (6).
s. 5. *See* JURISDICTION (8).
s. 18. *See* JURISDICTION (7).
s. 15. *See* DECLARATORY DECREE (1) (8) (5).
s. 82. *See* PRACTICE (18).
s. 102. *See* PARTY TO SUIT (1).
s. 108. *See* PARTY TO SUIT (2).
s. 208. *See* DECREE (1) (2).
s. 289. *See* ONUS PROBANDI (2).
See PRIVY COUNCIL (17).
s. 240. *See* ATTACHMENT.
s. 246. *See* LIMITATION (7).
s. 249. *See* CONTRACT (2).
See SALE (6).
s. 260. *See* SALE (8).
ss. 324 and 325. *See* ARBITRATION (1).
s. 326. *See* ARBITRATION (8).
s. 327. *See* ARBITRATION (8).
s. 353. *See* OUDH TALOOKDARS RELIEF.
s. 376. *See* REVIEW (2).
s. 378. *See* REVIEW (2).
See PAUPER SUIT (2).
See SALE (7).

ACT X of 1859.

s. 15. *See* ENHANCEMENT (1).

ACT XIV of 1859.

s. 1. cl. 5. *See* LIMITATION (7).
s. 1. cl. 12. *See* LIMITATION (6).
s. 1. cl. 18. *See* HINDOO WIDOW (10).
See LIMITATION (18).
s. 3. *See* LIMITATION (7).
s. 5. *See* LIMITATION (4).
s. 11. *See* LIMITATION (7).
s. 14. *See* LIMITATION (14).
s. 15. *See* POSSESSION (5).
s. 20. *See* LIMITATION (12).
s. 21. *See* LIMITATION (8).

ACT XXIII of 1861.

s. 11. *See* INTEREST (4).
See MESNE PROFITS (2).
See PRACTICE (9).

ACT XXV of 1861.

s. 318. *See* POSSESSION (5).

ACT II of 1863. *See* PRIVY COUNCIL (11).

ACT XX of 1863. *See* ENDOWMENT (18).

ACT. VIII of 1865 (MADRAS).

s. 8. *See* POTTAH (2).
See REGISTRATION (8).
s. 8. *See* POTTAH (8).
s. 9. *See* POTTAH (8).
s. 10. *See* POTTAH (8).

ACT XVI of 1865. *See* OUDH SUB-SETTLEMENTS.

ACT XIII of 1866. *See* OUDH SUB-SETTLEMENTS.

ACT XX of 1866.

s. 2. *See* REGISTRATION (8).
s. 17. *See* REGISTRATION (8).
s. 19. *See* REGISTRATION (4).
s. 21. *See* REGISTRATION (4).
s. 22. *See* REGISTRATION (2).
s. 86. *See* REGISTRATION (4).
s. 84. *See* REGISTRATION (8).
s. 88. *See* REGISTRATION (1) (4).

ACT XXVI of 1866.

See OUDH ESTATES (8).
See OUDH SUB-SETTLEMENT (1) (2) (3) (4) (7)

ACT I of 1869.

See OUDH ESTATES (1) (2) (5) (6) (7) (8) (9) (14).
s. 8. *See* OUDH ESTATES (18).
s. 8. *See* OUDH ESTATES (7).
s. 22. cl. 4. *See* OUDH ESTATES (10) (11).
cl. 11. " OUDH ESTATES (13).

ACT VIII of 1869. ("B.C.")

s. 4. *See* ENHANCEMENT (2).
s. 59. *See* SALE (7).

ACT XXII of 1869.

s. 9. *See* JURISDICTION (6).
See JURISDICTION (6).

ACT XXIV of 1870.

s. 10. *See* OUDH TALOOKDARS RELIEF.
See OUDH TALOOKDARS RELIEF.

ACT VIII of 1871.

s. 86. *See* REGISTRATION (6).
See REGISTRATION (6).

ACT IX of 1871.

s. 4. *See* PAUPER SUIT (2).
s. 20. *See* LIMITATION (11).
s. 24. *See* LIMITATION (17).
s. 27. *See* LIMITATION (15) (16).
sch. 2 art. 31. *See* LIMITATION (17).
" " 129. " LIMITATION (9).
" " 145. " LIMITATION (10).

ACT XXIII of 1871. *See* JURISDICTION (4).

ACT I of 1872.

s. 85. *See* HINDOO LAW (INHERITANCE) (12).

ACT IX of 1872.

s. 18 definition 1. *See* CONTRACT (2).
s. 20. *See* CONTRACT (2).
s. 23 cl. 2. *See* CONTRACT (2).

ADJOURNMENT. *See* PRACTICE (7).

ADMISSION. *See* EVIDENCE (2).

ADVERSE POSSESSION.

See ALLUVIAL LAND (2) (4).
See MALGOOZAR.
See ONUS PROBANDI (8).

AGREEMENT. *See* CONTRACT.

ALLUVIAL LAND.

(1) Where land which has submerged re-forms and can be identified as having formed part of a

particular estate, the owner of that estate is entitled to it.—56, 260.

(2) The doctrine in *Lopez's case* (that lands reformed upon old sites belong to the original owners) cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title.—485.

(3) Although, in the case of wandering and navigable streams, the bed of the river may be said temporarily to belong to the public domain, that state of things exists only while the water continues to run over the ground.—*Ibid.*

(4) The right of the original proprietor to reclaim land which has been diluviated and has re-appeared, is subject to the claim of another landed proprietor who, after the first re-appearance of that land, has obtained adverse possession, and has retained such possession for more than the period of limitation, namely, 12 years.—681.

(5) In the absence of proof of a clear and distinct usage, the Privy Council were of opinion that there was no sufficient evidence to justify the finding of the High Court that the settlements made with the plaintiffs, though temporary, were made on the basis that the river Gunduck was the boundary line not only of the two zillahs Sarun and Tirkoot, but of the estates appertaining to those districts; but that the land in dispute was settled with plaintiffs' ancestors as the proprietors of alluvion, and had become an increment to their estate by gradual accretion under Reg. XI of 1822 s. 4 cl. 1.—670.

(6) There is no obligation on the part of Government to assess permanently land which becomes an increment to an estate by gradual accretion under the above clause. Nor does a temporary assessment reduce to a temporary estate, or to an estate of a limited and temporary character, the interest of the holder in the accretion, which was permanent, as being an increment to an estate which was permanent; but it merely fixes the period during which the increment should be subject to the revenue assessed, so that the Government at the expiration of the settlement might be able to raise it according to the value of the land.—*Ibid.*

(7) Where, when a chur was settled by the Government with the defendants as an accretion to lands belonging to them, and on the expiration of that settlement the Government re-settled it with them, and included the lands now in dispute (which were found to have formed in the bed of the river) as part of the said chur in the new settlement: HELD that, even if the Government could not, in consequence of Act IX of 1847, include these lands with the chur without a new survey, they were entitled to take possession of them as lands which originally formed as an island, and were at their first formation surrounded by water which was not fordable, and to oust the plaintiffs who were trespassers, and to put the defendants into possession.—780.

ANCESTRAL PROPERTY.

An *ex parte* decree for money having been obtained against a Hindoo governed by the Mitacshara law, upon a bond whereby he had mortgaged his immoveable —, the same was attached. Prior to the execution sale, the judgment debtor died; and his infant sons and co-heirs, on filing a petition of objections, had been referred to a regular suit. In a suit after the sale by the said infants against the execution creditor and the purchasers, for the adjudication of their right to and confirmation of possession in the property sold, and to have the mortgage bond, the *ex parte* decree, and the execution sale set aside, it appeared that the father's debt had been incurred without justifying necessity: HELD that, as between the infants and the execution creditor, neither they nor the — in their hands was liable for the father's debt; that, as regards the purchasers, they, having purchased after objections filed by the plaintiffs, must be taken to have had

notice, actual or constructive, thereof, and therefore to have purchased with knowledge of plaintiffs' claim, and subject to the result of the suit to which they had been referred; and that, as regards the judgment debtor's undivided share in the estate sold, whether or not his own alienation was valid by the Bengal law, it was capable of being seized in execution, and that the effect of the execution sale was to transfer the said share to the purchasers, the execution proceedings having at the time of the judgment debtor's death gone so far as to constitute in favor of the execution creditor a valid charge thereon which could not be defeated by the judgment debtor's death before the actual sale.—589.

See JOINT HINDOO FAMILY.

APPEAL.

See ARBITRATION (1).

See PRACTICE (2).

See PRIVY COUNCIL (1).

See SPECIAL APPEAL.

ARBITRATION.

(1) A suit having been referred by the District Judge to —, the arbitrators made their award, and the Judge passed a decree in conformity therewith. That decree on appeal was set aside for irregularity, the award having been signed by the arbitrators separately, and ten days not having been allowed for objections; and the case was remanded with a view to these defects being cured. On remand one of the arbitrators in a letter to the Judge tendered his resignation, but was induced to withdraw it. The award was then properly signed, and, after objections heard, duly adjudicated upon under Act VIII of 1859 ss. 824 and 825. A decree was then passed: HELD that no appeal lay from this decision to the High Court, and *a fortiori* none lay to the Privy Council.—145.

(2) Held that the arbitrator who first tendered and then withdrew his resignation, did not formally divest himself of his character of arbitrator, and was therefore not *functus officio* when he signed the award.—*Ibid.*

(3) On an application under Act VIII of 1859 s. 827 to have an award filed in Court, it was held that the word "award" as used in the plaint must be taken to include the whole document scheduled to the plaint, *i.e.*, the formal judgment as well as the decree; also that the earlier Sections of the Act are not incorporated into s. 827 as they are into s. 825, and that the words "sufficient cause" in s. 827 should be taken to comprehend any substantial objection which appears upon the face of the award, or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in England.—342.

(4) Both parties having agreed to the appointment of arbitrators to determine their rights under a will, the Privy Council refused to allow the appellant to take the objection that it was miscarriage on the part of the arbitrators to make their award without having had the whole of the will before them, after the award had been made and on the application to file it.—*Ibid.*

ASSIGNMENT.

See DECREE (1).

See ENDOWMENT (18).

ATTACHED PROPERTY.

See GUARDIAN.

See LIMITATION (7).

ATTACHMENT.

Although, where property has been attached before judgment, it is usual to re-attach it after judgment, that proceeding implies no abandonment of the first — which gives the priority of lien. Accordingly, where there was a valid and substantial — at the date of a mortgage, that alienation, unless it can be shown not to fall within Act VIII of 1859 s. 240, was null and void as

against the attaching creditor and those who claim under him.—755.

See *MESNE PROFITS* (6).
See *ONUS PROBANDI* (2).
See *PRIVY COUNCIL* (17).
See *SALE* (6) (7).

AUCTION PURCHASER.

See *ANCESTRAL PROPERTY*.
See *JOINT HINDOO FAMILY* (1) (4).
See *LIMITATION* (10).
See *MESNE PROFITS* (6).
See *PRINCIPAL AND AGENT* (1).
See *REVIEW* (2).
See *SALE* (7) (8).
See *SHERIFF'S SALE* (1) (8).
See *VENDOR AND PURCHASER* (2) (8).

BAHRULIA CLAN. See *HINDOO LAW (INHERITANCE)* (12).

BANKER. See *EVIDENCE* (8).

BENAMER.

See *POSSESSION* (8).
See *SALE* (1) (8).
See *VENDOR AND PURCHASER* (1).

BHEEL. See *FISHERY (RIGHT OF)*.

BHOWNUGGUR (THAKOOR OF). See *JURISDICTION* (2).
BILL OF EXCHANGE.

An accommodation acceptor was held not released from liability by the drawer's payment of interest in advance with his (the accommodation acceptor's) knowledge and consent.—760.

BIRT TENURE.

See *MORTGAGE* (12).
See *OUDDH SUB-SETTLEMENT* (8) (4) (6).

BOITAKHANA. See *RESIDENCE*.

BONA FIDES.

See *ENDOWMENT* (11) (12).
See *GIFT* (1).
See *GOVERNMENT PAPER* (1).
See *LIMITATION* (4) (12).
See *MESNE PROFITS* (1).
See *MORTGAGE* (11).
See *ONUS PROBANDI* (1).
See *UBERRIMA FIDES*.

BOND.

In the absence of satisfactory proof of fraud or mistake, every presumption ought to be made in favor of statements contained in a — which was deliberately entered into and has been acted upon for many years.—222.

See *LIMITATION* (6).
See *SALE* (2).

BOUNDARY.

See *ALLUVIAL LAND* (5).
See *PRIVY COUNCIL* (8).

BROMUTTUR. See *DECLARATORY DECREE* (2).

BROTHER.

See *BROTHER'S SON*.
See *HINDOO LAW (INHERITANCE)* (6).
See *JOINT HINDOO FAMILY* (11) (16).

BROTHER'S SON. See *HINDOO LAW (ADOPTION)* (8).

BUNDHO. See *HINDOO LAW (INHERITANCE)* (2).

BUTWARRA. See *PARTITION* (2).

CANCELLATION.

See *DECLARATORY DECREE* (6).
See *RELIEF* (2).
See *WILL* (5).

CAUSE OF ACTION.

See *LIMITATION* (2) (17).
See *MORTGAGE* (5).
See *PRACTICE* (18).
See *RES JUDICATA* (1).
See *SALE* (2).
See *VENDOR AND PURCHASER* (1).

CERTIFICATE. See *SALE* (5) (6).

CHESSES. See *TIMBER* (8).

CHAMPRTY.

Although the English laws of maintenance and — are not of force as specific laws in India (whether in

the Presidency towns or the Mofussil), yet contracts of this character ought under certain circumstances to be invalid as being against public policy.—361.

CHHEDRA RAJ. See *HINDOO LAW (INHERITANCE)* (17).

CHILLARKE.—12.

CIVIL PROCEDURE.

See *ACT VIII of 1859*.
See *ACT XXIII of 1861*.

COGNATE. See *HINDOO LAW (INHERITANCE)* (2).

COLLECTOR OF REVENUE.

See *JURISDICTION* (4).
See *TIMBER* (8).

COMMISSION.

See *MANAGER* (1).
See *PARTNERSHIP* (1).

COMPANY.

ratification by — of acts done by the Directors in excess of their authority, cannot authorize them to do similar acts in future. Notice of reports to be presented at half-yearly meetings.—894.

See *PARTNERSHIP* (1).

COMPROMISE.

A — made by a father as guardian of his minor daughter, to his own advantage and her prejudice, was set aside on the ground that she was not sufficiently represented.—41.

See *CONTRACT* (2).
See *MESNE PROFITS* (4).
See *PRIVY COUNCIL* (4).

CONCEALMENT. See *CONTRACT* (2).

CONDITIONAL SALE.

See *CONTRACT* (2).
See *MORTGAGE* (4) (11).

CONFISCATION. See *OUDDH ESTATES* (1) (12).

CONSENT.

See *ACQUIESCENCE*.
See *ENDOWMENT* (7).
See *GUARANTEE*.
See *HINDOO LAW (ADOPTION)* (2) (7) (9) (15).
See *JOINT HINDOO FAMILY* (16).
See *JURISDICTION* (8).
See *LIMITATION* (12).

CONSTRUCTION.

(1) Of "substantial" in Reg. VIII of 1819 s. 8.—72.

(2) Of "defect in procedure" in Act XX of 1866 s. 88.—170.

(3) Of "cause of action" in Act VIII of 1859 s. 2.—218.

(4) Of "award" in an arbitration plaint under Act VIII of 1859 s. 327.—842.

(5) Of "sufficient cause" in same Section.—842.

(6) Of "nothing in the preceding Section shall apply to a judgment in force at the time of the passing of the Act" in Act XIV of 1859 s. 21.—428.

(7) Of "may" in the same Section.—428.

(8) Of "Court of Highest Civil Jurisdiction in any province" in Act II of 1868.—427.

(9) Of latter part of s. 85 Act VIII of 1871.—488.

(10) Of "charge on the inheritance of any estate" in Act XIV of 1859 s. 1, cl. 18.—617.

(11) The — of an ambiguous stipulation in a deed may be governed or qualified by a recital, except where the intention of the parties is clearly to be collected from the operative part of the instrument.—742.

See *COSTS* (2).

See *CUSTOM*.

See *ENDOWMENT* (19).

See *GRANT*.

See *HINDOO LAW (INHERITANCE)* (18).

See *HINDOO WIDOW* (2).

See *LEASE* (4).

See *LIMITATION* (18).

See *MESNE PROFITS* (3).

See *MOKURRURE*.

See *PARTNERSHIP* (1) (4) (5).

See *POTTAR* (1).

See *RESIDENCE* (1).

See *WILL* (2) (5).

CONTRACT.

(1) Held that it would not be equitable to uphold an *ikrarnamah* executed by three young men in favor of their uncles and consins, whereby they parted with half of their property, and executed without any consideration and very shortly after they had come to their property and when they were not fully acquainted with their rights and do not appear to have had any professional advice, and when the appearance of their uncles with a large force, the possession taken of their property, the institution of criminal proceedings, and other circumstances constituted a state of things likely to overawe them and to affect the free exercise of their will.—400.

(2) Held that a mortgage by way of conditional sale on failure to pay by instalments by way of compromise to save a village from sale in execution of a decree, which included future interest on the amount decreed when the decree was silent as to future interest, was not invalid on the ground of concealment of facts, and misrepresentation under definition 1 s. 18 Act IX of 1872, nor illegal and void under cl. 2 s. 23, nor voidable under s. 20; but that there was a mistake of law in supposing that execution could be issued for future interest although not awarded by the decree, and that (except as to one addition to the amount for which the village was ordered to be sold in execution, which addition was disallowed as contrary to Act VIII of 1859 s. 249), the plaintiff had not gained an unconscionable advantage by the transaction, as there was nothing to prevent him from recovering by action as damages interest upon a judgment which could not be levied in execution.—514.

(3) In a suit by a widow to have a — of sale, which her late husband entered into with the defendant, re-formed on the ground that her husband was induced to enter into it by fraudulent misrepresentations on the part of the defendant, the Privy Council, having regard to the probabilities of the case and other circumstances, was of opinion that, although there might be some suspicion of misrepresentations having been made to the husband, no sufficient case had been made out by plaintiff to set aside the — on the ground of fraud; and intimated that, even if plaintiff had been entitled to set aside the — on that ground, it did not follow that she would have been entitled to the relief she prayed for.—677.

(4) Duration and termination of —.—742.

See **CHAMPERTY**.

See **COSTS** (1).

See **DEED OF SALE**.

See **GUARANTEE**.

See **HINDOO LAW** (ADOPTION) (11) (12) (15).

See **INTEREST** (8).

See **JURISDICTION** (8).

See **MAINTENANCE** (1).

See **MORTGAGE** (1).

See **OUDE ESTATES** (1).

See **PARTNERSHIP** (4).

CONVERSION.

See **JURISDICTION** (1).

See **TIMBER** (1).

CO-SHARE.

See **INTEREST** (4).

See **JOINT HINDOO FAMILY** (6) (8) (16).

See **LIMITATION** (10).

See **MANAGER** (1).

COSTS.

(1) A fair agreement to supply funds to carry on a suit in consideration of having a fair share of the property, if recovered, ought not to be regarded as *per se* opposed to public policy; and consequently, in the absence of malice and want of probable cause, an action cannot be maintained for — against a third person on the ground that he was a mover of, and had an interest in, the suit.—861.

(2) Where an Order of Her Majesty in Council, in reversing the decrees of both Indian Courts,

directed that the — of the suit, so far as they had been occasioned by the improper plea of limitation, should be paid by defendants to plaintiffs: **Held**, upon the true construction of the Order, that the intention of the Privy Council was to give plaintiffs the whole — of the suit, so far as they had been paid, whether incurred in the three Courts in which they were directed to be taxed or in the Court of First Instance.—405.

See **INTEREST** (1).

See **PRIVY COUNCIL** (1).

COTTON. See **GUARANTEE**.

COURT FEES. See **PAUPER SUIT** (2).

COURT OF WARDS. See **HINDOO LAW** (ADOPTION) (2).

COUSIN. See **HINDOO LAW** (INHERITANCE) (16).

CRIMINAL PROCEDURE. See **ACT XXV** of 1861.

CUSTOM.

A — is a rule which, in a particular family or in a particular district, has, from long usage, obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly.—304.

See **ALLUVIAL LAND** (5).

See **DESAI** (2).

See **ENDOWMENT** (1) (15) (16).

See **GUARANTEE**.

See **HINDOO LAW** (1).

See **HINDOO LAW** (ADOPTION) (9) (19).

See **HINDOO LAW** (INHERITANCE) (12).

See **HINDOO WIDOW** (7).

See **MORTGAGE** (1).

See **OUDE ESTATES** (8).

See **RES JUDICATA** (3) (4) (5).

CYPRUS. See **WILL** (2).

DAMAGES.

See **CONTRACT** (2).

See **INTEREST** (8).

See **MALICIOUS PROSECUTION**.

See **MEASURE OF DAMAGES**.

See **SALE** (2).

See **TIMBER** (1) (2).

DAUGHTER.

See **COMPROMISE**.

See **DAUGHTER'S SON**.

See **GIFT** (6).

See **HINDOO LAW** (INHERITANCE) (1) (8) (7) (11)

(12).

See **OUDE ESTATES** (13).

DAUGHTER'S SON. See **OUDE ESTATES** (11).

DEBTS.

See **ENDOWMENT** (3).

See **JOINT HINDOO FAMILY** (4).

See **WILL** (2).

See **ANCESTRAL PROPERTY**.

See **INTEREST** (4).

DECLARATORY DECREE.

(1) The right given by Act VIII of 1859 s. 15 of obtaining a declaration of title without consequential relief, can be claimed only in those cases where the Court could have granted relief if relief had been prayed for.—77.

(2) A suit instituted by a *zemindar* against his ryots, for the declaration of a *mal* title, by setting aside, not a deed set up, but an allegation made by the defendants of a *bromuttur* title, was held to be not maintainable, because relief could not be granted in the shape of merely setting aside an assertion which may have been merely by word of mouth.—*Ibid*.

(3) Act VIII of 1859 s. 15 must be construed upon the principles, and by the light of the decisions, of the English Courts of Equity upon the 15 and 16 Vict. c. 86 s. 50, which is in precisely the same words; and the construction which must be put upon it is that a — cannot be made unless there is a right to consequential relief capable of being had in the same Court, or in certain cases in some other Court.—106.

(4) The mere quieting of doubtful titles is not sufficient reason for a —; and the Court will not

try questions of title as to future interests where neither claimant has a right to present possession, especially questions of title which may never arise.—*Ibid.*

(5) The question whether a right to some consequential relief exists must arise in all suits in which a declaration of title is sought under Act VIII of 1859 s. 15.—529.

(6) A right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstruction, would be sufficient to sustain a —.—*Ibid.*

See DESAI (1).

See HINDOO WIDOW (1) (7) (9).

See JOINT HINDOO FAMILY (11) (15).

See RESIDENCE (1).

DECREE.

(1) No one can be a transferee of a — within Act VIII of 1859 s. 208, if the — was not transferred to him by assignment, or if no incident had occurred (i.e. death, devolution, or succession) on which the law could operate to transfer any estate to him.—371.

(2) Section 208 was not intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a —, nor was it intended to enable them to try an important question, such as the legitimacy of an heir.—*Ibid.*

See DECLARATORY DECREE.

See EXECUTION OF DECREE.

See HINDOO LAW (ADOPTION) (10).

See PRIVY COUNCIL (18).

DEED.

One of the obvious consequences of a long delay in bringing a suit to impeach a — as not genuine is that, after the lapse of years, witnesses disappear, and the recollection of those who survive becomes dimmed and less accurate than it might have been if the enquiry had taken place at an earlier period. In this case the three principal, and two at least of the attesting witnesses, were dead, and the plaintiff was held to have failed in presenting a strong case, as he was bound to do, when he asked the Court to set aside a — which had been acted upon for nearly twelve years.—581.

See CONSTRUCTION (11).

See DEED OF SALE.

See HINDOO LAW (ADOPTION) (3) (18) (19).

See PARTNERSHIP (5).

See REGISTRATION.

DEED OF SALE.

(1) Held that the —, which the plaintiffs sought to set aside as fabricated and fraudulent, had been executed by the principal plaintiff's grandmother, with her knowledge and by her authority, with the intention of vesting the property therein referred to in the defendants.—388.

(2) Plaintiff, a putneedar and durputneedar, granted certain sub-tenures by way of durputnee and seeputnee (reserving the minerals) to the defendants, to whom he, by — executed some ten or twelve years afterwards, transferred all the superior interest which he had, together with the minerals which had been reserved. In a suit to set aside the —, it was held that the defendants were not, at the time of the execution of the —, in a fiduciary capacity or character to the plaintiff, or in a position unduly to influence his judgment; that there was no satisfactory evidence that the defendants had represented to him that he was not parting with his mining rights by the —; and that the evidence of inadequacy of price was not such as to lead to the conclusion that the plaintiff did not know what he was about, or was the victim of some imposition.—455.

See HINDOO WIDOW (7) (8) (9).

See REGISTRATION (2).

DEFECT.

See DEFECT OF PARTIES.

See HINDOO LAW (ADOPTION) (8).

See REGISTRATION (4).

DEFECT OF PARTIES. See JOINT HINDOO FAMILY (6).
DELIVERY.

See GIFT (8) (6).

See HINDOO LAW (ADOPTION) (19).

DESAI.

(1) The Privy Council, in upholding a decision of the High Court that the Watan or property appertaining to the hereditary office of — was partible, accompanied it by a declaration that the decree was to be without prejudice to the defendant's right to such emoluments or allowances for the performance of the duties of the Desaiship as he might be entitled to under any law in force.—767.

(2) The onus of proving impartibility lies upon the — by showing a special tenure, or a family, or district, or local custom, sufficiently strong to rebut the operation of the general law.—*Ibid.*

DESHMUKS. See JURISDICTION (4).

DETINUE. See ENDOWMENT (18).

DISCLAIMER. See MAINTENANCE (1).

DISPOSSESSION.

See LIMITATION (1) (5).

See MORTGAGE (5).

See ONUS PROBANDI (2).

See SHERIFF'S SALE (1) (2) (3).

DISQUALIFIED PROPRIETOR.

See HINDOO LAW (ADOPTION) (2).

DOWER.

Where a Mahomedan lady applied for leave to sue her husband *in forma pauperis* for her —, and the application was rejected, it was held not to constitute a demand for prompt — sufficient to set the period of limitation running.—182.

See GIFT (7).

DOWL. See HUSBAND AND WIFE (1).

DWELLING.

See HOUSE.

See JURISDICTION (8).

See RESIDENCE.

EASEMENT. See LIMITATION (15).

EDUCATION. See JOINT HINDOO FAMILY (7).

ENDOWMENT.

(1) The constitution and rules of religious brotherhoods attached to Hindoo temples are not uniform, but depend on the special laws and usages governing each.—17.

(2) The Privy Council decided against the right of the Zemindar of Ramnad to appoint, confirm, and remove the Pandaram of the Ramaswaram pagoda.—*Ibid.*

(3) Notwithstanding that property devoted to religious purposes is, as a general rule of Hindoo law, inalienable, it is competent for the shebait, as shebait and manager, to borrow money for the proper expenses of keeping up worship, repairing temples, defending litigation, and other like objects; but the power to incur debts must be measured by the existing necessity for incurring them; and judgments obtained against a former shebait in respect of debts so incurred are binding upon succeeding shebait.—102.

(4) A suit was brought by a Hindoo widow to recover her share, as heiress to her husband, in certain family property of which she claimed a portion in her absolute right, and a portion as one of the joint shebait of certain idols. Among other properties plaintiff claimed one-fifth share in a talook, not as a debuttur property, but, in right of her husband, as her absolute property. The first Court found that this share was the property of a certain idol, and held that she had not maintained the allegation in her plaint, and even if entitled to it in her right of joint shebait, she could not recover in that capacity as she had sued as shebait. The Privy Council held the High Court right in treating this objection as one rather of form than of substance, and in giving the relief prayed for.—127.

(5) The defendants having pleaded an agreement by which certain Government paper wherein plaintiff claimed a share had been appropriated to the service of an idol, and which was substantiated by strong evidence and shown to have been acted upon by the parties for years: **Held** that it could not be set aside as colorable merely upon the suggestion that the amount appropriated was exorbitant and that there might have been an intention to defraud.—*Ibid.*

(6) In a suit by appellants to compel defendant to account for certain Government securities alleged by plaintiffs to have been given to defendant by their grandfather impressed with a trust for certain idols, to remove defendant from the office of shebait to those idols, and to appoint one of the plaintiffs in her stead, it was held that it had not been proved with the requisite certainty that those notes were endorsed by the grandfather to the defendant impressed with the trust described in the plaint.—210.

(7) If a deed of — dedicates an estate to the service and worship of a particular idol, though the idol were a family idol, the property would be impressed with a trust in favor of it. Where the temple is a public temple, the dedication may be such that the family itself should not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction.—375.

(8) The *onus* lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship. In this case it was held that there was not only weakness of proof on the part of the plaintiff, but a very strong presumption arising from the conduct of the parties in the suit, that the property in question was not dewuttur as alleged by plaintiff.—*Ibid.*

(9) Plaintiff relied upon certain statements in a mouroose pottah and a bill of sale as an admission which estopped the parties to them from asserting that the lands therein mentioned were not dewuttur. But their Lordships held that the statements must be taken as a whole, and so taking them it would appear that, granting that the lands were dewuttur, the sale would be justifiable, the statement being that the sale was made for the purpose of the repair of the temple of the idol.—*Ibid.*

(10) A shebait has the same or an analogous right to that of a manager of an infant heir, and has authority to raise money for the benefit of the estate.—*Ibid.*

(11) The grant of a mokurruree pottah cannot be said to be an improvident way of raising money, if necessary. It still left a rent for the sustentation of the idol, and if the transaction be *bond fide*, the subsequent sale of part of the rent was justified by the imperious necessity of furnishing the temple which had been commenced.—*Ibid.*

(12) If only part of the money raised was required for the repairs of the idol, the deeds would not be wholly void because some of the money was raised for another purpose. Plaintiff should have offered to reimburse the *bond fide* purchasers so much of the money as had been legitimately advanced.—*Ibid.*

(13) Where an assignment transferred to the plaintiff the Uraima right (or right of management) of a pagoda, and all the rights of the existing trustees, including the right to the custody of certain jewels devoted to the service of an idol, the plaintiff's suit to recover the jewels was clearly not one for specific performance, but in the nature of an action for detinue.—382.

(14) Persons holding such a trust are not legally competent to transfer it at their will.—*Ibid.*

(15) When, owing to the absence of documentary or other direct evidence of the nature of the foundation, and the rights, duties, and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution.—*Ibid.*

(16) Where the custom set up was one to sanction, not merely the transfer of a trusteeship, but the sale of a trusteeship for the pecuniary advantage of the trustee, such a circumstance alone would justify that the decision was bad in law.—*Ibid.*

(17) It is incumbent on the Court, when dealing with the disposition of her property by a purdaneesh woman, to be satisfied that the transaction was explained to her, and that she knew what she was doing. Especially where, for no consideration and without any equivalent, the lady, intending and desiring to retain the estate for her own life and to create an — by way of testamentary disposition of it after her death, executed a deed which deprived her of all her property.—444.

(18) An — of the above description is not of such a public character as to sustain a suit under Act XX of 1863.—*Ibid.*

(19) According to the construction of the will in this case, it was held that the property in dispute was not wholly *dewuttur*, but that the will created a charge upon the property for the expenses of the daily worship of an idol as it was performed at the time of the death of the testatrix, and of the poojahs, shradhs, and religious ceremonies for which provision was made by the will, the charge being termed generally a charge for such religious acts and ceremonies, that the surplus income belonged to the members of the joint family, of whom the respondent was one, and that his interest was liable to be attached and sold in satisfaction of a decree against him personally.—694.

See HINDOO LAW (INHERITANCE) (17).

ENHANCEMENT.

(1) Dependent talooks, created before the Decennial Settlement, when protected from — by Reg. VIII of 1793 s. 51, and when by Act X of 1859 s. 15.—116.

(2) In this case it was held that plaintiff had failed to sustain the burden cast upon him by Act VIII of 1869 (B.C.) s. 4, of proving that the land, of which he sought to enhance the rent, had not been held at a fixed rent from the time of the permanent settlement.—547.

(3) In this suit for enhanced rent, plaintiff started upon the foundation of an enhanced rent which had been found by a recent decree, and which established a *prima facie* case of the rent properly payable by the defendant: and the Subordinate Judge decreed in favor of plaintiff the payment of one year's rent. The High Court reversed his decree peremptorily, dismissing from its consideration the whole of plaintiff's evidence. The Privy Council held that the decree of the High Court could not stand, there being no sufficient reason for disturbing the judgment of the Subordinate Judge.—651.

See JURISDICTION (1).

EQUITABLE RIGHTS.

See DECREE (2).

See MORTGAGE (4).

See OUDE ESTATES (1).

ERROR.

See MESNE PROFITS (8).

See MISTAKE.

See REGISTRATION (4).

See SALE (6).

ESCHEAT.

Where a Hindoo father created a mokurruree tenure within his zemindary in favor of his illegitimate daughter by a Mahomedan lady, and the lawful widows of the father sought to resume the tenure on the death of the illegitimate daughter without heirs: **Held** that, where there is a failure of heirs, the Crown, by the general prerogative, will take the property by —, but subject to any trusts or charges affecting it; and that there is nothing in the nature of a mokurruree under-tenure which might be sold or otherwise alienated independently of the parent estate, to prevent the Crown from taking it, subject to the rent reserved upon it by the zemindar.—257.

ESTOPPEL.

- See ENDOWMENT (9).
 See HINDOO LAW (ADOPTION) (18).
 See LIMITATION (14).
 See OUDH ESTATES (8).
 See RES JUDICATA.

EVIDENCE.

(1) Where a copy of a deed is tendered as —, and the party tendering it fails to comply with the conditions required to make the copy statutory proof of the deed, he is at liberty to give other secondary — of the contents of the deed, if the non-production of the original has been duly accounted for.—87.

(2) An admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact.—94.

(3) Where the fact of payments by a banking firm is distinctly put in issue, the books of the firm being at most corroborative —, the mere general statement of the banker that his books were correctly kept is not sufficient to discharge the burden of proof that lies upon him, particularly if he has the means of producing much better —.—182.

(4) In a suit to recover moneys unaccounted for, where defendants plead payments endorsed on documents, and the endorsements purport to have been signed by the plaintiffs, the formal and regular method of proof is to call on the plaintiffs to admit or deny their signature, and then to call upon witnesses to state whether they saw the plaintiffs sign or could speak to the handwriting or generally what took place.—*Ibid.*

(5) Nothing is more dangerous than to allow parol — to be given of what written documents are alleged to contain, when there is reason to suppose that the documents themselves exist. If a letter exists, it may be found to contain something very different from that which the witness represents to be its contents.—710.

- See ENDOWMENT (6).
 See ENHANCEMENT (8).
 See HINDOO LAW (ADOPTION) (1) (3).
 See HINDOO LAW (ALIENATION) (1).
 See HINDOO LAW (INHERITANCE) (12).
 See JURISDICTION (1).
 See PRACTICE (3) (4) (5) (6) (7) (10).
 See PRESUMPTION.
 See RENT.
 See SPECIAL APPEAL (1).

EXECUTION OF DECREE.

- See ANCESTRAL PROPERTY (1).
 See ATTACHMENT.
 See CONTRACT (2).
 See ENDOWMENT (19).
 See INTEREST (1) (2) (3).
 See JOINT HINDOO FAMILY (18).
 See LIMITATION (8) (10) (12).
 See MERE PROFITS (1) (2) (3) (6).
 See PARTITION (2).
 See POSSESSION (3).
 See PRACTICE (8) (9) (14).
 See RES JUDICATA (2).
 See SALE (1) (8) (4) (5) (6) (7) (9).

EXECUTOR.

- See SALE (1).
 See WILL (1).

EX PARTE.

- See PRIVY COUNCIL (16).

FATHER.

- See ANCESTRAL PROPERTY.
 See COMPROMISE.
 See GIFT (1).
 See JOINT HINDOO FAMILY (14) (15).

FIDUCIARY RELATION.

- See DEED OF SALE (2).
 See SALE (1).

FI. FA. (WRIT OF). See SHERIFF'S SALE.**FISHERY (RIGHT OF).**

Even if the settlement papers of a *pergunnah*

show that all which at the time of the permanent settlement had been settled with the then *zemindars* of the *pergunnah* was a —, that might afford an inference that the soil of the *bheel* remained in the Government, or that at all events any land reclaimed therefrom would be subject to a fresh assessment of revenue; but that circumstance would give no title to the proprietor of one part of the *pergunnah* against the proprietor of another part of it. If what was originally settled was the land covered by the water treated as a *mouzah*, the title to that land would pass under the term *Julkur Khuluk Shajai* to whomsoever that portion of the *pergunnah* might thereafter be transferred.—809.

FOREST. See TIMBER.**FORFEITURE.**

- See LANDLORD AND TENANT.
 See HINDOO LAW (INHERITANCE) (14) (15).

FRAUD.

- See BOND.
 See CONTRACT (3).
 See DEED OF SALE (2).
 See ENDOWMENT (5).
 See LIMITATION (5).
 See PRIVY COUNCIL (2).

GARO HILLS. See JURISDICTION (5).**GIFT.**

(1) The general principle of Mahomedan law that a — is invalid without acceptance and *seisin* by the donee, is subject to the exception that where there is, on the part of a father or other guardian, a *bona fide* intention to make a —, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.—87.

(2) The rule of Mahomedan law that the — of *Mushâ*, or an undivided part in property capable of partition, is invalid, does not apply to definite shares in *zemindari*s which are in their nature separate estates with separate and defined rents.—*Ibid.*

(3) According to Mahomedan law, a mere deed of — without consideration is invalid, unless accompanied by a delivery of the thing given as far as it is capable of delivery, or a *seisin* on the part of the donee.—287.

(4) In order to make a deed of — for a consideration valid, two conditions must concur, (1) an actual payment of the consideration by donee; and (2) a *bona fide* intention by donor to divest himself *in presenti* of the property and to confer it upon donee.—*Ibid.*

(5) The adequacy of consideration for a — is immaterial.—*Ibid.*

(6) Where a Mahomedan of weak intellect and impaired health executed a deed in the form of a *hiba-bil-ewas* (which would, under the Mahomedan law, operate to transfer the property which was the subject of it without delivery of possession) by which he made a — of certain immoveable, as well as a large quantity of moveable, property to his daughter in lien of a diamond ring which he had received from her, and it appeared that there was no intention on his part to make an immediate transfer of the property to her, and that she herself must have perfectly understood that the transaction was not a real one, and where neither she nor her husband was called to prove the transaction to have been a real one, or the manner in which the property was enjoyed between her and her father: the deed was held to be void and of no effect.—601.

(7) Held that the donor in this case, although he may have been a lunatic at an earlier period of his life, appears to have recovered afterwards, and to have been competent to deal with the ordinary affairs of life, and perfectly able to comprehend such a transaction as a — of his property to his wife; that not only was a verbal — made by him in the most formal way, but that soon after an

instrument was executed by him to carry the — into effect; that though the dower agreed upon by him may have been only nominal at the time of marriage, he may have chosen a large dower to be the consideration for the —; that it is not necessary by Mahomedan law that dower should be agreed upon before marriage, but that it may be fixed afterwards; that the sum itself, although a large one, was not excessive compared with the property of the donor: that the precise amount of dower mentioned was not material to sustain the —, because any amount would be a sufficient consideration for that purpose; and that there was a change of possession in conformity with the terms of the —, which, even without consideration, would be sufficient to support the —.—804.

See GRANT.

See WILL (8).

GOVERNMENT.

See ALLUVIAL LAND (6) (7).

See FISHERY (RIGHT OF).

See GOVERNMENT PAPER.

See MOKURRUREE.

See OUDH.

See POSSESSION (5).

See SETTLEMENT OFFICER.

See STATE.

See TIMBER (8).

GOVERNMENT PAPER.

(1) A purchaser, however *bond fide*, of — transferred to him by endorsement purporting to bear the seal of a native lady of rank to whom the — was made payable, but which seal was put on after her death, can gain no title by such unauthorized use of the seal.—175.

(2). A plaintiff, who was aware of the sale of the — under the above circumstances by his brother, may be presumed (even in the absence of direct proof) to have acquiesced in what was done by his brother in the disposal of the —, and therefore is, equally with him, precluded from impeaching the sale.—175.

See ENDOWMENT (5) (6).

GOWA.—1.

GRANDDAUGHTER. See SLAVE.

GRANDSON.

See DAUGHTER'S SON.

See HINDOO LAW (ADOPTION) (9).

GRANT.

(1) If a — be made to a man for an indefinite period, it enures, generally speaking, for his lifetime, and passes no interest to his heirs unless there are some words showing an intention to — an hereditary interest.—458.

(2) If the words in a *sunnud* "You are my sister, I accordingly — to you a talook for your support" had stood alone, it might have been open to question whether an absolute — or a — for life only was intended; but coupled with the words that follow, "being in possession of the lands and paying rent according to the tahoot jumma, do you and the generations born of your womb successively (*santan sreni krame*) enjoy the same," they appear to import an absolute estate, such as would have been given had the words been "your children and grandchildren," and no inference so far arises that the donor had an English estate-tail in his contemplation. The negative words which follow "no other heir of yours shall have right or interest" may be read as referring to the time of the grantee's death, their effect being to make the absolute estate before given defeasible in the event of failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs; and as that event did not occur, it was held that the grantee had an absolute estate which he could dispose of by will.—587.

See PRIVY COUNCIL (7).

GUARANTEE.

It being found that the defendant, in a contract

for the purchase of cotton, used the plaintiffs' name, and that the vendors sold to him on the credit of that name, and further that the defendant had the plaintiffs' authority to use their name, and that their name had been used with their full concurrence in a number of transactions during nine successive days, and that they were present, or some of their agents, when this further transaction of the same kind was entered into, it appeared to their Lordships a fair inference that they were cognisant of and allowed their name to be so used in the last transaction. HELD therefore that they were liable, according to the custom, to the vendors; and that, if there was no actual authority at the time, the defendant's use of their name as his guarantors, and his treating them and holding them out as liable to pay on his behalf the price of this cotton, thereby authorized them, if they thought fit, subsequently to make that payment on his behalf; in other words, that they had a right to ratify the use which he had made of their name, and that they had not deprived themselves of that right by their previous conduct in, for a time, repudiating their liability.—688.

GUARDIAN.

In a case of attached property, a — was held not debarred from bringing a suit on behalf of a minor claimant (a member of a joint Hindoo family) whilst the disability of infancy continued, because it is not the policy of the law to postpone the trial of claims.—286.

See COMPROMISE.

See GIFT (1).

See HINDOO LAW (ADOPTION) (2) (15).

See HINDOO LAW (ALIENATION).

See LIMITATION (7).

See SALE (8).

GUNDUCK. See ALLUVIAL LAND (5).

HEIRS.

See DECREE (2).

See ESCHEAT (1).

See GRANT.

See HEREDITARY.

See HINDOO LAW (ADOPTION) (6) (7).

See MAINTENANCE (1).

See OUDH ESTATES (13).

See SLAVE.

See WILL (8) (4).

HEREDITARY.

See DESAI (1).

See GRANT (1).

See MOKURRUREE.

See TIMBER (8).

HIBA-BIL-EWAZ. See GIFT (6).

HIGH COURT.

See ARBITRATION (1).

See JURISDICTION (7).

See PRIVY COUNCIL (2) (8) (9) (10).

See REGISTRATION (1).

See SALE (5).

HINDOO.

See HINDOO LAW.

See HINDOO LAW (ADOPTION).

See HINDOO LAW (ALIENATION).

See HINDOO LAW (INHERITANCE).

See HINDOO WIDOW.

See HUSBAND AND WIFE.

See JOINT HINDOO FAMILY.

See SHEBAIT.

See TEMPLE (HINDOO).

HINDOO LAW.

(1) The customs of the Jains, where they are relied upon, must be proved by evidence as other special customs and usages varying the general law should be proved; and, when so proved, effect should be given to them. In the absence of proof, the ordinary law must prevail.—572.

(2) The Puchis Sowa.—802.

(3) Hindoo usage to be accepted as governing the —.—812.

See ENDOWMENT (1) (8).

See HINDOO LAW (ADOPTION).

See HINDOO LAW (ALIENATION).

See HINDOO LAW (INHERITANCE).

See OUDH ESTATES (8) (11) (18).

See RES JUDICATA. (8).

HINDOO LAW (ADOPTION).

(1) Where a Hindoo widow had adopted a son in pursuance of an alleged authority by her late husband, and her mother-in-law sued to set aside the adoption as invalid, and the case turned entirely upon the genuineness of the authorisation, the Privy Council declined, in the absence of plaintiff's own evidence in support of her suit, to set aside the High Court's decision in favor of defendant.—252.

(2) The legal prohibition against a disqualified proprietor making an adoption without the consent of his guardian extends to an authority to adopt, but is confined to the proprietors of estates under the Court of Wards, and does not apply to other proprietors who have attained to the age of discretion.—*Ibid*.

(3) Defects in evidence relating to the execution of a deed authorising adoption, where the intention to grant such authority has been proved or may be assumed, are less material than defects in evidence of a testator's knowledge of the effect of dispositions of his property made by his will.—*Ibid*.

(4) Where the widow of a zemindar claimed her husband's estate on behalf of an adopted son, putting in a document authorizing her to adopt, alleged to have been executed by her late husband; and the rival claimant was a half brother of the deceased who would have inherited the estate but for that document, but who was shown to have been on bad terms with the deceased during his lifetime: the Privy Council, dealing with the document as one that bore a genuine signature and was supported by antecedent probabilities, declared in favor of plaintiff's claim.—268.

(5) Though in Madras a Hindoo widow, not having her husband's express permission, may, if duly authorized by his kindred, adopt a son to him, yet the permission must be given by some one within the undivided family and having a direct interest in the estate, and not by a distant relative.—*Ibid*.

(6) Where an estate descends to the natural born son of the original zemindar, and on the death of the son the widow of the original zemindar takes it as mother and heiress of her son, and not immediately from her husband, the widow may adopt a son to her husband.—358.

(7) A passage in the Ramnad case explained to show that all that was there intended to be laid down was that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the Hindoo widow, not from capricious or corrupt motives, or in order to defeat the interests of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband.—*Ibid*.

(8) According to the law of the Benares school, the omission to adopt a brother's son does not invalidate an adoption otherwise regularly made, so as to destroy the civil status of the person thus adopted even after years of recognition; the maxim *Quod fieri non debuit factum valet*, though not recognised by other schools in the same degree as in Bengal, is not applicable to Bengal only.—499.

(9) The right of Jains to be governed by their own peculiar customs and usages, when they are, by sufficient evidence, capable of being ascertained and defined, and are not open to objection on the ground of public policy or otherwise, was admitted in the case of an adoption made by a widow of her grandson without any authority expressly derived from her deceased husband, and without the consent of his kindred, which adoption would be invalid by the ordinary —.—529.

(10) Where, at the suit of the collateral heirs, an adoption by a Hindoo widow in the Dattaka form was, according to the Mithila law, declared void, the Privy Council, in affirming that decision, thought it would be an inconvenient precedent to alter the decree by inserting the words "as against the reversionary heirs of the husband," after the word "void," since the decree could only be binding as between the plaintiffs and the defendants in the suit and could not affect the interests of the defendants as between themselves.—600.

(11) The Privy Council saw no reason for the High Court's reversal of the judgment of the Subordinate Judge in disallowing a conditional adoption set up by the defendant (without any writing in support of it and without offering himself as a witness) whereby the defendant was adopted upon condition that his adoptive father's widow should enjoy the property for life, and that his daughters, the plaintiffs, should take his self-acquired property after her death.—612.

(12) In a suit brought on behalf of respondent as heir of his adoptive father, by virtue of an adoption by his widow after his death, to set aside various dispositions of the property made by the widow before the adoption, the defence was that respondent had been adopted upon the faith of an express written agreement by his father, subsequently ratified by himself when he became of age, that none of the transactions were to be disputed: HELD that the agreement of the natural father was not void, but was, at the least, capable of ratification when his son came of age, and that the son had so ratified it.—668.

(13) The previous setting up by a Hindoo widow of a written authority from her late husband to adopt, which really never existed, was held not to prevent her from falling back upon a verbal permission to adopt, nor to affect the credit of the witnesses who now speak to the verbal authority to adopt and to the alleged exercise of it by her.—719.

(14) Amongst Soodras in Bengal, no ceremonies are necessary to the validity of an adoption, in addition to the giving and taking of a child in adoption.—*Ibid*.

(15) Where there was no sufficient evidence to show that a Hindoo widow had applied to a kinsman to give his assent to her adopting his son without the authority of her late husband, but rather that she had applied to him to give his son to be adopted by her under an authority which she had from her husband when she had no such authority; and where the kinsman did not give his consent to an adoption merely, but stipulated with the widow that, if she adopted his son, he was to become the guardian of the child, by which arrangement not only would he, as a member of the joint family, really get, during the minority, the management of and the interest in five-eighths of the estate, instead of being entitled, in the absence of an adoption, to only one-fourth of the property; but the adopted son was to take no interest in that portion of the estate which the assenting kinsman then claimed as his separate property: HELD that the assent was not one which rendered the adoption valid and binding as against the kinsman's brothers.—740.

(16) *Quære*.—Whether the adoption of a child of a half-sister's daughter is valid.—*Ibid*.

(17) Where the question was whether or not an adoption in the Krittima form had been proved, their Lordships inclined to think the evidence against the adoption somewhat more credible than that in its favor, coupled with the circumstance that the widows appear to have remained in possession of the estate after the death of their deceased husband, and had paid income-tax on the property, and that after the death of the junior widow, on the application of the other widow for a mutation of names, the authorities were satisfied that she was in possession.—758.

(18) Their Lordships saw no reason to differ from the conclusion of the High Court that the intention of the parties at the time of their execution of the deeds of gift and acceptance, was that the adoption was not complete, but that the execution of them was to be a mere step towards a complete and full adoption.—812.

(19) The mode of giving and taking a child in adoption continues to stand on Hindoo law and on Hindoo usage. There cannot be such a giving and taking as is necessary to satisfy the law, even in a case of Soodras, by mere deed, without an actual delivery of the child by the father; and it would seem that, according to Hindoo usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption.—*Ibid.*

See LIMITATION (9).

See RELIEF (2).

See WILL (5).

HINDOO LAW (ALIENATION).

Defendant's father having become insane, his wife as natural guardian of defendant during his infancy executed a *kobala* (purporting to pass half of the defendant's interest, which was then a mere expectancy, the widows being still alive) in favor of plaintiffs who, on the death of the surviving widow, sought to recover from the defendant, then of age, the property that had descended to him from the other branch of the family. HELD that plaintiffs had failed to prove a justifying necessity for this conveyance, and that the suit must on this ground be taken to have failed, without the alternative of a remand, in the absence of explanation as to the non-production of evidence upon this material issue.—784.

See ANCESTRAL PROPERTY.

See MAINTENANCE (2).

HINDOO LAW (INHERITANCE).

(1) According to —, the right once vested in a daughter by inheritance does not cease until her death, notwithstanding she become barren or a widow who has not borne a son. Circumstances of that nature do not destroy a heritable right which has once vested. If two sisters, upon the death of their mother, together constitute their father's heir, then upon the death of one of them, the property which descended to both jointly, survives to the other whose right of survivorship previously acquired by inheritance is not destroyed by her disqualification to inherit at that time by reason of her being a childless widow.—94.

(2) A bhoodoo or cognate only cannot inherit as long as there is a sapinda or samanodaka in existence.—142, 795.

(8) *Quere.*—Is the old rule of Hindoo law obsolete, or does it still exist, that a daughter may be specially appointed to raise a son, and the son of a daughter so appointed is entitled to succeed in preference to more distant male relatives.—142.

(4) Where ancestral property has been held according to the rule of primogeniture, and the family is governed by the Mitachara law, in the event of a holder dying without male issue and the family being undivided, the next collateral male heir would succeed in preference to the widow or daughters of the last possessor.—204.

(6) Though a family might be undivided, the separate property of any member would go according to the law of succession to separate estate. Whether the general status be joint or undivided, property which is joint will follow one, and property which is separate will follow another, course of succession.—*Ibid.*

(6) By the law of the Dayabhaga, a brother of the whole blood succeeds, in the case of an undivided immoveable estate, in preference to a brother of the half-blood.—411.

(7) According to the law of the Benares School,

no preference seems to be given to a daughter who has or is likely to have male issue, over a daughter who is barren or a childless widow.—499.

(8) Held that, as between the descendants of Muttu Vaduga and Dhorai Pandian, the Palayapat of Padamattur was the separate property of the latter; that, on the death of Dhorai Pandian, his right, if he had any left undisposed of in the property, passed to his widow, notwithstanding the undivided status of the family; and that plaintiff who claimed the Palayapat as an impartible and ancient seminary descendible by inheritance to him on the death of Dhorai Pandian without issue, had no title to sue in the life of Dhorai Pandian's widow.—508.

(9) Exclusion of females from inheritance.—540.

(10) Under the Mitachara law a widow's estate, inherited from her husband, is a limited and restricted one only.—572.

(11) A daughter, inheriting from her father, does not stand in a position higher than or different from that of a widow.—*Ibid.*

(12) Wajib-ul-uruz or village administration papers, prepared and attested by Settlement Officers or their subordinates in Oudh, were held admissible in evidence, under Act I of 1872 s. 85, to prove that, in the Bahrulia clan, a custom exists to exclude daughters from succeeding to the inheritance of their father's estate.—704.

(13) Where an ancient seminary, which under the Mahomedan Government was a family raj descendible to a single heir according to the rule of primogeniture, was under the British Government divided into two distinct seminaries, one of which (the larger) was granted to the eldest son, and the other to the second son, their Lordships, without expressing any opinion as to whether the former (with which they had nothing to do in this appeal) was or was not impartible or descendible to a single heir, held, according to the proper construction of the sunnud under which the latter was granted to the second son and his heirs or assigns for ever, that the seminary thereby created for the first time was not impartible or descendible otherwise than according to the ordinary rule of the Hindoo law.—725.

(14) Under the Hindoo law, as administered in the Bengal school, a widow who has once inherited the estate of her husband is not liable to forfeit that estate by reason of unchastity.—765.

(15) *Quere.*—As to the effect of Act XXI of 1850, if the widow had been degraded or deprived of her caste in consequence of her unchastity.—*Ibid.*

(16) Held, after an exhaustive review of the authorities and precedents bearing on the question, that by the — prevailing in Western India, the widow of a predeceased collateral relative (a paternal first cousin in this case) is entitled to succeed in preference to a mere collateral male relative of the propositus.—795.

(17) Held that it was not proved that the sevas in dispute were appurtenant to the Chhedra raj. Even if the question had been one of succession to the raj, treating the Puchis Sowal as a rule of inheritance applicable to the raj and not to the family, and assuming that, according to that compilation, an illegitimate son may succeed to the raj in the absence of other relatives: HELD that it was not proved in this case that there was that absence of other relatives which would entitle an illegitimate son to succeed.—802.

See JOINT HINDOO FAMILY (11) (12) (14).

See LIMITATION (5).

See OUDH ESTATES (4) (18).

HINDOO WIDOW.

(1) Where a — conveyed to a *bona fide* purchaser for value an ancestral estate beyond her own life, and the purchaser paid off a mortgage upon the property existing at the time of the conveyance, it was held, on a suit by a reversioner, that as there

was no proof of necessity justifying an absolute sale of the estate by the —, the plaintiff was entitled to recover the property after her death on payment of the full purchase-money as well as of the mortgage paid by the purchaser.—43.

(2) Where a family settlement by her husband gave to a — an estate for life with power to appropriate the profits, and to his adopted son a vested remainder on her death: HELD that she could make whatever use she chose of the proceeds of her estate, and that the settlement could not be construed so as to change the nature of her estate to that of a —, and consequently change the nature of the reversioner's interest from a vested remainder to a contingent one.—186.

(3) In a suit by the mother of a deceased Hindoo against his — for arrears of maintenance, it was held that the widow's liability was personal and that only her interest was liable to be sold in execution.—207.

(4) According to the Hindoo law in Madras, two or more lawful widows take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyment; and though they have no right to enforce an absolute partition of the joint estate between them, they may agree to an arrangement for separate possession and enjoyment of their respective shares, leaving the title to each share unaffected.—447.

(5) Their Lordships expressed their extreme reluctance to interfere with the decision of the Court below upon a question of maintenance to which a — is entitled, in deciding which they thought that regard should always be had to the value of the estate, as well as to the position and status of the deceased husband and of the widow.—505.

(6) In this case, however, their Lordships raised the maintenance, because there was a departure by the Lower Court from the strict principles which ought alone to have guided it, inasmuch as it allowed as low a maintenance as possible, as a kind of punishment to the widow for having groundlessly resisted the claims of her late husband's adopted son.—*Ibid.*

(7) Unless the plaintiff could establish the family custom he had set up to show that he was entitled to possession during the life of defendant (a —), he was held not entitled to ask for a declaration that a deed of sale executed by her in favor of another party was illegal and inoperative after her death.—540.

(8) Where legal necessity can be proved for raising a portion of the money which formed the consideration for a deed of sale by a —, but not the whole of it, the deed would not be wholly void as regards a reversionary heir, but would be valid as against him to charge the estate for the amount necessary to be raised.—*Ibid.*

(9) Where the evidence was not sufficient to show what portion of the advances made to the — was made for necessary purposes, and it did not appear advisable to remand the case for a further enquiry which, after causing great expense and delay, would not be binding upon the whole family, their Lordships declined to make a declaratory decree with respect to the deed.—*Ibid.*

(10) Where a testator, in giving the whole of his property to his eldest son, recognized the claims, by Hindoo law, of the younger sons and the widows to maintenance, and made specific provisions with regard to the younger sons (giving them the profits of particular villages), but made no specific arrangements for the widows (merely requiring that they should be maintained and treated with proper respect): HELD that the will did not create a right which was a specific "charge on the inheritance of any estate" within the meaning of those words in Act XIV of 1859 s. 1 cl. 13. By Common Law the right to maintenance is one accruing from time to time according to the wants and exigencies of the

widow; and a Statute of Limitations might do much harm if it should force widows to claim their strict rights and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable.—617.

(11) Where a will makes no condition that, to entitle a widow to maintenance, she should reside under the same roof and in joint family with the son, she is left in this respect in the ordinary position of a —, according to which separation from the ancestral home would not generally disentitle her to maintenance suitable to her rank and condition.—*Ibid.*

See ENDOWMENT (4) (5).

See HINDOO LAW (ADOPTION) (1) (4) (5) (6) (7) (9) (10) (11) (12) (13) (14) (15) (17).

See HINDOO LAW (INHERITANCE) (1) (7) (8) (10) (14) (15) (16).

See JOINT HINDOO FAMILY (4) (12) (14).

See LIMITATION (5).

See ODDH ESTATES (4) (13).

See RELIEF (1) (3).

See WILL (5).

HOONDER. See BILL OF EXCHANGE.

HOTCHPOT. See PARTNERSHIP (2).

HOUSE.

See DWELLING.

See JURISDICTION (8).

See MANAGER (2).

See RESIDENCE (1) (2).

HUSBAND AND WIFE.

Where a Hindoo wife is entitled to an absolute estate in certain property, her husband cannot cut down her interest to a life interest by any dowl which he may make.—79.

See JOINT HINDOO FAMILY (4).

IDIOT.

See REGISTRATION (6).

IDOL.

See ENDOWMENT (4) (5) (6) (7) (8) (9) (12) (13) (19).

See HINDOO LAW (INHERITANCE) (17).

See PRIVY COUNCIL (2).

See TEMPLE (HINDOO).

LIARA.

See LEASE (2).

See RIGHT OF OCCUPANCY (2).

ILLEGITIMATE.

See ESOHNAT (1).

See HINDOO LAW (INHERITANCE) (17).

See MAINTENANCE (2).

IMPARTIBILITY.

Effect of —. See JOINT HINDOO FAMILY (10).

See DESAI (2).

See HINDOO LAW (INHERITANCE) (4) (18).

See JOINT HINDOO FAMILY (11) (12).

INADQUACY.

See DEED OF SALE (2).

See GIFT (5).

See SALE (4).

INCOME TAX. See HINDOO LAW (ADOPTION) (17).

INHERITANCE.

See HEIRS.

See HINDOO LAW (INHERITANCE).

INJUNCTION. See DECLARATORY DECREES (6).

INSANE. See HINDOO LAW (ALIENATION).

INTEREST.

(1) Where an order of Her Majesty in Council is silent as to — upon the costs of the decrees, the Indian Court which has to execute the decree has no power to direct payment of those costs with —.—405.

(2) *Semble.*—The existing practice as to Orders in Council as well as to decrees of the Indian Courts is that — cannot be given in execution unless it is specially directed to be given.—*Ibid.*

(3) Future — upon a judgment which cannot be levied in execution, may be recovered by action as damages.—514.

(4) The Court must exercise a judicial discretion in giving effect to Act XXIII of 1861, so as not to grant an inordinate and unusual rate of —. The rate of — to be allowed on a principal debt up to date of decree ought to be that, if any, which has been fixed by contract, express or implied, between the parties. Accordingly in this case, the rate of — allowed among the sharers of joint family property, which was the rate prevailing in the *Mossall*, viz., 12 per cent., was approved of.—788.

See BILL OF EXCHANGE.

See MESNE PROFITS (2) (5).

See MORTGAGE (1) (2) (15) (16).

See OUDH TALOOKDARS RELIEF (1).

See SALE (1).

INTERMEDIATE HOLDER. See REGISTRATION (8).

INTERVENTION. See RELIEF (1).

INTERSTATE. See OUDH ESTATES (11) (18).

IRREGULARITY.

See ARBITRATION (1).

See PRIVY COUNCIL (4).

See SALE (6).

ISSUES.

See EVIDENCE (2).

See SPECIAL APPEAL (1).

JAINS.

See HINDOO LAW (ADOPTION) (9).

See HINDOO LAW (1).

JAINTIA HILLS.

See JURISDICTION (6).

JEWELS.

See ENDOWMENT (18).

JOINDER OF PARTIES.

Persons acting as agents only in the transactions which formed the subject of this action, and being in no way personally liable to the plaintiff, should not have been joined as defendants.—710.

JOINT HINDOO FAMILY.

(1) Notwithstanding anything contained in Act I of 1845 s. 21, the members of a — may sue to enforce rights acquired by them under a purchase, at a sale for arrears of revenue, made by the managing member in his own name, but on behalf of the family, though he is the sole certified purchaser.—81.

(2) It is not necessary for a member of a — to prove possession of a specific share of the joint fund, nor participation in the profits to the full extent of his share. It is very common among joint families that the expenses of the family are paid out of the common fund, and that each member draws a certain sum as he requires it; but there is no account taken between the members of the family to see whether each member receives his full share.—67.

(3) As regards the joint property of a —, there may be a division of right and interest which will operate to change the character of the property from joint to separate, although it may not be intended at once to perfect it by metes and bounds; and therefore the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his allotted share in severalty, severs the joint interest, and extinguishes the rights springing from united family ownership.—151.

(4) Where a member of a — living under the *Mitachara* law, died entitled to an undivided share, leaving two widows who were afterwards sued for debts incurred for his own benefit by their husband, and against whom decrees were obtained by the creditors; and one of the surviving members of the — sought to recover possession of the interests sold in execution of the decree against the widows: HELD that, so far as the interests in suit were not covered by any prior lien, the surviving member was entitled to recover them from the auction purchaser.—286.

(5) Where, however, some of the interests in ques-

tion were covered by a *zur-i-peahgee* mortgage and the exact nature of the lien thus created had not been fully explained in the trial: HELD that the surviving member could not recover his interests until he had satisfied this lien.—161d.

(6) And where, in the same suit, the objection was taken that the claim would not stand because of a defect in the frame of the suit, whereby a co-sharer in the joint family property was not made a party to the suit: HELD that, as the said co-sharer had previously been put in possession of his moiety of the property, and had put in a waiver of all further claims, and no further claimant could possibly arise, the plaintiff's suit was not prejudiced by the defect.—161d.

(7) Their Lordships would require very strong and clear authority to support such a proposition as that, if a member of a — receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property.—887.

(8) Under the *Mitachara* law, the share of one co-sharer in a joint family estate can be sold in execution of a decree against him alone.—467.

(9) Held in this case that the ordinary presumption of Hindoo law applicable to a —, namely that property is ancestral and joint, not self-acquired and separate, was rebutted by the circumstances of the family; and that the *onus* of establishing the contrary, which lay on the member who disputed it, had not been discharged by him.—490.

(10) The impartibility of the property does not destroy its nature as joint family property, or render it the separate estate of the last holder so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate property.—640.

(11) Where it was not very clear whether or not a formal order or decree upon a judgment was drawn up, but by that judgment there was a clear adjudication that the property in question was partible, and that plaintiff was entitled to a moiety of the property left by his father at his death, subject to the incumbrances and alienations of his father and his elder brother which were valid under the Hindoo law: HELD that this judgment must be taken to be equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from the date of that judgment, if they had not previously become so; and that being so, though the actual division of the property was not complete, the case fell within the principle of *Appovier v. Rama Subba Aiyar*, and that there was no ground for the contention that, upon the plaintiff's death, his interest passed to his elder brother, and not to his own representatives in the course of succession as ascertained in the suit.—654.

(12) In a suit for the recovery of the *zemindary* of *Vegayanimpet*, it was not disputed that the *zemindary*, according to an ancient custom, was impartible, and that although it was part of a joint family property, it had for many years been held and enjoyed by the eldest male member in the direct line, but it was found that a partition took place, that the family became divided, and that the *zemindary* was allotted to the then eldest member as his separate share of the joint family property. It accordingly descended to his son, upon whose death it was held that his widow was entitled to succeed.—680.

(13) The purchase of certain property by a member of a —, which was found to have never separated, was held to be a purchase, not on his own account, but for the — and as joint family property, and to be liable to sale in execution of decree.—685.

(14) Defendant's father had sought to recover from the widows of the representative of the other branch of an alleged — governed by the *Mitachara*

shara, possession of their late husband's share of the property. The widows, however, were entitled to succeed on proof of a partition under which their late husband held his share as separate property; but defendant's father, who was only presumptively the reversionary heir next in succession to them, was declared entitled to succeed upon the death of the widows.—785.

(15) In 1861 it was decided by the Supreme Court at Bombay that the respondent could not sue his father and brothers for a declaration of his rights in and an immediate partition of ancestral property, inasmuch as he had no right to compel his father in his lifetime to make a partition of moveable, though it may be ancestral, property, and that the Supreme Court had no jurisdiction to make a partition of the immoveable property which was beyond the limits of its territorial jurisdiction: **HOLD** that this decision did not amount to an adjudication between the brothers as to their rights in the joint ancestral property on their father's death, so as to bar the present suit for that partition under Act VIII of 1859 s. 2.—778.

(16) According to the Hindoo law as received at Bombay, a coparcener cannot, without the consent of his co-sharers, dispose of his undivided share by will.—*Ibid*.

See ANCESTRAL PROPERTY.

See ENDOWMENT (19).

See GUARDIAN.

See HINDOO LAW (ADOPTION) (15).

See HINDOO LAW (ALIENATION).

See HINDOO LAW (INHERITANCE) (4) (5) (8)

(13).

See HINDOO WIDOW (9) (10) (11).

See OUDH ESTATES (8) (14).

See PARTNERSHIP (2) (3).

See VENDOR AND PURCHASER (3).

JOINT PROPERTY.

See HINDOO LAW (INHERITANCE) (1) (5).

See JOINT HINDOO FAMILY (2) (3) (7) (8) (9)

(10) (12) (13).

See INTEREST (4).

See MANAGER.

See OUDH ESTATES (8).

See VENDOR AND PURCHASER (3).

JOINT STOCK COMPANY. See COMPANY.

JUDGE. See PRACTICE (3) (11) (14).

JURISDICTION.

(1) The High Court was held to have no — in special appeal to over-rule the decision of the Judge by allowing a conversion of Azeemabadee rupees into Company's rupees according to a fresh calculation, in a suit for enhancement of rent.—82.

(2) Regarding transfer of certain territory in Kattywar belonging to the Thakoor of Bhow-nuggur from British — to that of the Thakoor.—277.

(3) Consent to the exercise of — cannot be assumed, even if consent would give — in the case.—371.

(4) The right of the Deshmukhs was held to be in the nature of a grant of revenue (their functions being those of a Collector of Revenue for the Government), and therefore excluded from the — of the Civil Courts by the Pensions Act XXIII of 1871.—390.

(5) Act XXII of 1869 was in its general scope within the legislative power of the Governor-General in Council, and so far from being in contravention of the Statute 24 and 25 Vic. c. 104, or of the Letters Patent issued thereunder (as altered by the 28 and 29 Vic. c. 15), such an exercise of the said legislative power as might remove the Garo Hills, etc., from the — of the High Court of Calcutta, is expressly contemplated and authorized both by the Statute and the Letters Patent.—556.

(6) Section 9 of the same Act (entrusting a discretion to the Lieutenant-Governor of Bengal to extend the Act to the Khasi and Jaintia Hills)

was not *ultra vires* of the Indian Legislature; it being conditional legislation, and not a delegation of legislative power.—*Ibid*.

(7) Their Lordships suggested the addition in Act VIII of 1859 s. 13, which authorized the High Court of the district in which a suit for immoveable property situate in the — of different High Courts is brought, to allow the suit to be proceeded with in the district of another High Court, of an express power to the former High Court to transfer the suit to the other Court in the position in which it then stood—*e.g.*, as in this case, with the finding that plaintiff was a pauper.—627.

(8) In a suit for accounts against the manager of a family estate consisting of landed property in several places, at each of which a house was maintained at the expense of the estate, when not only no particular place for rendering the accounts had been fixed either by contract or practice, but the accounts had been rendered and examined at different times in different places: **HOLD** that the defendant's occasional residence, for periods of time more or less considerable, at one of such places constituted a dwelling at that place within the meaning of Act VIII of 1859 s. 5.—788.

See INTEREST (1) (2).

See JOINT HINDOO FAMILY (15).

See LIMITATION (12).

See PRIVY COUNCIL (11).

See REGISTRATION (1).

See RES JUDICATA (2).

See SALE (5).

See SHERIFF'S SALE (1) (2).

See SPECIAL APPEAL (2).

See ULTRA VIRES.

JUS TERTII. See POSSESSION (2).

KABLAS KOER'S TALOOK.—474.

KHAL. See RIGHT OF ACTION (2).

KHASI HILLS. See JURISDICTION (6).

KHOT. See TIMBER (3).

LACHES.

See LIMITATION (3).

See MESNE PROFITS (1).

See PRIVY COUNCIL (16).

See RESIDENCE (1).

See REVIEW (1).

LADAWINAMAH. See DISCLAIMER.

LANDLORD AND TENANT.

Tenants are not concluded by a mistake in settlement papers, nor does Reg. XXV of 1802 provide for forfeiture of rights by parties who by carelessness or accident allow their land to be misdescribed in settlement proceedings.—215.

See DOWL.

See LEASE.

See MOKURRUREE.

See POTTAH.

See PRIVY COUNCIL (7).

See REGISTRATION (3).

See ZUB-I-PESHGEE.

LEASE.

(1) The agreement contained in the pottah to grant a renewal of the — does not create or vest in the lessees a fresh term of years, but merely gives them a right to a renewal if the lessor should attempt to turn them out of possession at the expiration of the term; and it gives the lessor a right to the land, and to rent it to others if the lessees refuse to accept a pottah and execute a kuboolat for the renewed term.—550.

(2) Where nothing is said in the ijara as to the duration of the new —, a term for a longer period than the original term cannot reasonably be implied.—*Ibid*.

(3) The lessor in this case had no right to measure the lands in the absence of the lessees, nor herself finally to determine the rent at which the — should be renewed. If the rent at which

the lessor offered to renew the — was too high, the lessees were not bound to accept it, but could compel the lessor to renew at a proper rate according to the stipulations of the —.—*Ibid.*

(4) The stipulation in a mining — “if you take possession, according to your requirements, of extra land over and above this pottah, we shall settle any such lands with you at a proper rate” was held to entitle the lessee to a — of the additional land only if required for the purposes of the —, but not for the purpose of selling it.—787.

See DOWL.

See MOKURRURREE.

See POTTAH.

See REGISTRATION (8).

See RIGHT OF OCCUPANCY (2).

See ZUR-I-PESHEGEE.

LEGITIMACY.

See DECREE (2).

See ILLEGITIMATE.

See MARRIAGE.

LIEN.

See ATTACHMENT.

See JOINT HINDOO FAMILY (4) (5).

LIMITATION.

(1) Reg. II of 1805 s. 8 must be strictly applied, and the alleged fraudulent or forcible dispossession clearly established.—27.

(2) In a suit to recover possession of certain villages belonging to a talook sold by Government for arrears of revenue, it was held that a new grant of the villages by Government to the second defendant at an increased revenue did not give the plaintiff a new cause of action.—30.

(3) The period of 60 years within which the law allows mortgagors to bring their suit cannot be diminished by any Court of Justice, on the ground of the laches of a party in the prosecution of his rights.—61.

(4) In a suit founded upon a right to redeem, the defendant, in order to claim the benefit of Act XIV of 1859 s. 5, must show (1) that he is a purchaser according to the proper meaning of that term, (2) that he is a *bond fide* purchaser, and (3) that he is a purchaser for valuable consideration.—*Ibid.*

(5) In the case of succession by a reversionary heir after the death of a Hindoo widow who takes by inheritance from her husband and is dispossessed, the period of — as against the reversionary heir, in the absence of fraud, is not to be reckoned from the time when he succeeds to the estate, but from the time at which it would have been reckoned against the widow if she had lived and brought the suit.—94.

(6) In an action brought upon a mortgage bond which combines a personal obligation with the pledge of property, where the claim is founded not upon the contract to pay the money, but upon the hypothecation of the land, and the object is to obtain a sale thereof as against purchasers under a subsequent mortgage bond, the law of — applicable to the suit is Act XIV of 1859 s. 1 cl. 12.—222.

(7) Looking to Act XIV of 1859 s. 1 cl. 5 and ss. 3 and 11, their Lordships had no doubt that the intention of the Legislature was that the period of — resulting from Act VIII of 1859 s. 246, should, in the case of a minor, be modified by the operation of Act XIV s. 11. Consequently an infant may, after the expiration of the year, bring a suit by his guardian whilst the disability of infancy continues.—236.

(8) The words “nothing in the preceding Section shall apply to a judgment in force at the time of the passing of the Act” in Act XIV s. 21 mean that nothing in the preceding Section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act; and the words “but process of execution may be issued” mean that, notwithstanding any-

thing mentioned in the preceding Section, execution might issue either within the time limited by law, or within three years next after the passing of the Act, whichever should first happen. The substitution of the word “must” or “shall” for the word “may” can only be done for the purpose of giving effect to the intention of the Legislature. In the absence of proof of such intention, the word “may” must be taken in its natural, and therefore in a permissive and not in an obligatory sense.—423.

(9) The provision in Act IX of 1871 sch. 2 art. 129 that, with respect to a suit to establish or to set aside an adoption, the time when — begins to run is “the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father,” does not interfere with the right which, but for it, a plaintiff has of bringing a suit to recover possession of real property within 12 years from the time when the right accrued.—598.

(10) Where in a suit by a judgment creditor and execution purchaser of a co-sharer to enforce his rights, it was decided not only that the share of that co-sharer passed to the purchaser under the sale in execution, but that the purchaser was entitled to hold that share in *ijmali* or joint enjoyment with the other co-sharer; and against this decree the co-sharer, whose share had been sold, appealed, but execution was not taken out till after the appeal was finally disposed of: HELD that there was no necessity or duty lying upon the other co-sharer to assert his rights to the sole enjoyment of his share until the execution purchaser was put into possession, or, at all events until the rights of the parties had been finally determined by the dismissal of the appeal, the case being governed by the — prescribed by Act IX of 1871 sch. 2 art. 145.—697.

(11) Plaintiff was held to have failed in taking this case out of the operation of Act IX of 1871 s. 20 by showing that the authority of the person who had signed the acknowledgments relied on as the defendant's agent, had continued to the time when these acknowledgments were signed, or that the defendant had given any special authority to the said agent to sign the acknowledgments.—710.

(12) A proceeding taken *bond fide* and with due diligence before a Judge whom the party *bond fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce a decree within the meaning of Act XIV of 1859 s. 20.—761.

(13) Without deciding whether, in applying — under Act XIV of 1859 s. 1 cl. 13, in the case of a joint family governed by the Mitacshara law, the person on whose death the property which is alleged to be joint has descended must be taken to be the father or grandfather, or some ancestor farther back, their Lordships were not prepared to affirm that the father might not be held to be that person in this case where the claim was twofold, viz. to establish plaintiff's right as a coparcener not only as to his original share in the joint estate, but also as to the moiety of the father's interest to which he became entitled on the father's death by right of survivorship, and to have a partition on that basis.—778.

(14) Held that — could not apply to the suit for the partition of immoveable property, because not only had plaintiff all along been in the enjoyment of part of that property, but he could, under s. 14, exclude from computation the time occupied in the prosecution of the suit of 1861, nor had there been a total exclusion from the joint family estate as a whole; whilst as regards the moveable property the appellant (defendant) was estopped by the proceedings of 1861 from setting up — as a bar to the respondent's claim.—*Ibid.*

(15) Act IX of 1871 contains two distinct sets of provisions, one relating to the — of suits, and

the other to the manner of acquiring title and rights by possession and enjoyment. The object of the latter (s. 27) was to make more easy the establishment of rights of this description by allowing an enjoyment of 20 years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements.—816.

(16) When therefore an artificial pyne was constructed by plaintiffs' ancestors on defendant's land for the purpose of irrigation more than 20 years ago, any Court which has to deal with the subject ought to refer such long enjoyment to a legal origin, and the right so created is not in any degree interfered with by s. 27.—*Ibid.*

(17) Article 81 of the 2nd Schedule, which limits the time for bringing suits for the obstruction of watercourses to two years "from the date of the obstruction," does not apply to continuing nuisances, as to which the cause of action was renewed *de die in diem* so long as the obstructions were allowed to continue, as is expressly provided by s. 24.—*Ibid.*

See ALLUVIAL LAND (4).

See DOWER.

See HINDOO WIDOW (10) (11).

See MORTGAGE (5).

See ONUS PROBANDI (3).

See OUDH SUB-SETTLEMENT (6).

LUNATIC.

See GIFT (7).

See REGISTRATION (6).

MAHOMEDAN LAW.

See GIFT.

See MALGOOZAR.

See SLAVE.

See WILL (1) (3) (4).

MAINTENANCE.

(1) Where M executed on behalf of N a *ladavinamah* or deed of disclaimer, disclaiming all right to an estate to which he was one of the heirs-at-law, upon consideration of receiving a monthly allowance for —, and accepted a *perwannah* securing that allowance to himself and his heirs: HELD that the *ladavinamah* and *perwannah* amounted to a valid contract by which the parties were respectively bound; and that the *ladavinamah* being founded on good consideration, was binding on the heirs, who could not set it aside except by returning the money which had been paid in advance on account of the — allowance.—165.

(2) The illegitimate son of a person belonging to one of the twice-born classes has a right to —. So where a Rajah, having then no legitimate son, but having an illegitimate son, executed a *sunnud* in favor of the latter, who, in pursuance thereof, obtained delivery of possession of a certain village for his —, it was held that the Rajah was acting in the performance of a legal obligation, and that the grant made by the *sunnud* would not fall within the supposed prohibition that a father, having no legitimate son, is by the Mitacshara law incompetent to alienate ancestral estate to a stranger.—486.

See CHAMPERTY.

See COSTS (1).

See HINDOO WIDOW (3) (5) (6) (10) (11).

MALGOOZAR.

Where, on the death of a —, his widow and principal heiress according to the Mahomedan law was admitted to a settlement of the villages held by him, and continued in possession for 19 years when a regular settlement took place with her upon the ground that her long possession was adverse to the rights of the co-heirs: HELD that the widow could not be fixed with a trust except upon clear proof of her consent to the acceptance of that trust; but that if it were clearly made out that she held under a trust, an enlargement of her proprietary interest in the villages upon that regular settlement would not have made her less

a trustee, and she would have taken whatever additional interest she thus acquired subject to the original trust.—623.

MALICIOUS PROSECUTION.

The prosecution of legal proceedings, which are instigated by malice and are at the same time groundless, is a wrong to the person who suffers damage in consequence of them, for which an action will lie.—861.

MALIKHANA.

See OUDH SUB-SETTLEMENT (3).

See MORTGAGE (15) (16).

MANAGER.

(1) Where a testator dealt with the income of his several estates as one fund, and gave that income to his five sons in equal shares with a commission of 10 per cent. from the whole income to the one who was to be —: HELD that this commission was to be calculated, not upon the gross collections, but upon the net income of the whole of the estates, being the fund which, subject to that commission, was divisible amongst the co-shares.—788.

(2) Disallowance of sums laid out by the — on his own account and of expenses incurred for his own private purposes, and charging him with rent of a house which was occupied by him as his own exclusive residence, but which the will directed should, if not sold, be let, approved by the Privy Council.—*Ibid.*

See ENDOWMENT (3).

See JOINT HINDOO FAMILY (1).

See JURISDICTION (8).

See PARTNERSHIP (1).

See SHEBAIT.

MANDAMUS.

See SALE (5).

MAN SINGER'S TALOOK.—458, 649.

MARINE.

Where a collision took place by the stern of the "Dacca" running amidships into the port side of the "Michelino" while at anchor, the burden of proof lay very heavily upon the "Dacca" to show that the collision so caused with a vessel properly at anchor in a proper place was not the consequence of negligence and bad seamanship; and their Lordships were of opinion that the evidence clearly established that the "Dacca" was to blame for not keeping a proper look-out, which reason alone prevented her from seeing the light of the other vessel at anchor.—409.

MARRIAGE.

The acknowledgment by the father and by the whole family of the legitimacy of a son was held to raise some presumption of the — of the mother.—287.

See SLAVE.

MASTER AND SERVANT. See TIMBER (2).

MAXIMS.

(1) Quod fieri non debuit factum valet.—499.

(2) Caveat Emptor.—619.

MEASURE OF DAMAGES. See TIMBER (1).

MEASUREMENT. See LEASE (3).

MESNE PROFITS.

(1) Plaintiffs, guilty of laches, were held not entitled to recover, as against purchasers for valuable consideration without notice of their title, — from any date earlier than that of the institution of the suit.—61.

(2) According to Act XXIII of 1861 s. 11, where a decree is silent touching interest or — subsequent to institution of suit, the Court executing the decree cannot give such interest or —; but plaintiff may still assert his right to such — in a separate suit.—190.

(3) Where a judgment debtor executes an undertaking, by an act of the Court, that, in consideration of his remaining in possession pending appeal, he will, if the appeal goes against him, account in that suit and before that Court for the — in question, he cannot escape from that obligation because,

when he contracted it, the practice of the Court proceeded upon a construction of the law which has since been pronounced to be erroneous.—*Ibid.*

(4) Held in this case that the right to —, according to a stipulation in a deed of compromise, ran from a former decree affirming the compromise, and not from a subsequent decree which simply affirmed, with an explanation, the former decree.—495.

(5) As to interest on —, referring to the proviso at the end of Act XXXII of 1889 and to the resolution of the Sudder Court in 1850, the Privy Council awarded interest upon — from the commencement of suit to the date of decree.—*Ibid.*

(6) In December 1851 the Rajah of Ramnuggur executed a zur-i-peshgee mortgage of certain villages in favor of appellant's predecessors. The respondent's predecessor set up a mokurruree lease of one of the villages alleged to have been granted to them by the Rajah prior to the mortgage. The appellant's predecessors sued to set aside that lease as collusive, and to recover that village with —, and obtained a decree to that effect in 1860. Before execution of this decree was taken out, the Rajah obtained a judgment for some debt against appellant's predecessors, in execution of which he attached and sold their interest in the zur-i-peshgee lease: HELD that the appellant was entitled to recover the — of the property up to the date of sale, the right to these — not having passed to the purchaser of the zur-i-peshgee rights.—778.

Mining.

See DEED OF SALE (2).

See LEASE (4).

Minor.

See ANCESTRAL PROPERTY.

See COMPROMISE.

See GIFT (1).

See GUARDIAN.

See HINDOO LAW (ADOPTION) (15).

See HINDOO LAW (ALIENATION).

See LIMITATION (7).

See REGISTRATION (6).

See SALE (8).

Misdescription. See LANDLORD AND TENANT.

Misrepresentation.

See CONTRACT (2) (3).

See DEED OF SALE (2).

Mis-statement. See PRIVY COUNCIL (1).

Mistake.

See BOND.

See CONTRACT (2).

See ERROR.

See LANDLORD AND TENANT.

See REGISTRATION (2).

Mochulka. See REGISTRATION (8).

Mokurruree.

Where a clause in the kubooleut of what was called a — lease acknowledged a power in the Government to put an end to the lease at the end of one year, but the Government had not done so, it was held that, although it was not properly a — inasmuch as practically the Government could enhance the rent, it must be regarded, as long as it went on, as an hereditary lease, a mourosee pottah; and that as the interest of the grantor, which had not been determined by the Government, was an hereditary interest, there seemed no reason why, upon the construction of the pottah in question, it should be held to be limited to the life of the grantee.—458.

See ENDOWMENT (11).

See ESCHERAT.

See MEANE PROFITS (6).

See ONUS PROBANDI.

Mortgage.

(1) Without some special agreement or some special custom, a mortgagee in possession should not retain both the usufruct and the interest, but the interest should be treated as in satisfaction of the interest on the —.—15, 195.

(2) Where their Lordships thought 42 per cent per annum (the rate of interest agreed upon in a —) unjustly usurious, they (looking to s. 19 cl. 4 of the Punjab Code) allowed 12 years' interest at the rate of 12 per cent. per annum.—85.

(8) Where a — deed, under which the mortgagee was in possession, provided for the payment of the balance before a day fixed, but not until that balance should have been ascertained by an account by the mortgagee, and the consequence of the breach of this obligation to pay the balance was a power to the mortgagee to become the purchaser of the property at a certain valuation: HELD that there was no reason for presuming, at this distance of time, that the very special agreement contained in the deed was carried out between the parties according to its terms, the contemplated settlement of accounts being a necessary preliminary to the performance of that contract.—198.

(4) The practice of the Madras and Bombay High Courts, in applying to mortgagees by conditional sale the practice of the English Courts of Equity of recognising in the mortgagor a right of redemption notwithstanding expiry of time stipulated for foreclosure, as being in contrast with the mode of proceeding followed in Bengal, was condemned as unsatisfactory and calling for the interposition of the Legislature.—*Ibid.*

(5) Plaintiffs, as mortgagees, obtained a decree for possession upon their — deed against defendants as mortgagors. Though this decree gave plaintiffs no title to the land as against the prior mortgagees, it gave them a right and title as against defendants, which right and title were not destroyed by the prior mortgagees subsequently turning plaintiffs out of possession. When, however, plaintiffs paid off the first —, their title, which had all along been a good title as against the mortgagors, was a valid title as against everyone, and the mortgagors had no right to enter upon the possession of their land. The entry of the mortgagors upon that land, to which the plaintiffs had obtained a right under the second —, gave them a cause of action against the mortgagors from the period of such entry.—357.

(6) In giving plaintiffs a decree for possession, their Lordships reserved the question as to the amount for which they were entitled to hold possession of the land under the —, until the defendants sought to redeem the land.—*Ibid.*

(7) Considering that the duties of the Zillah Judge in the matter of foreclosure are of a ministerial nature, and considering the vast importance to mortgagors of the notification by the Judge required by Reg. XVII of 1806 s. 8, and the consequences which follow if they do not redeem within the prescribed time, their Lordships were of opinion that the service of it should be established by evidence in a suit brought to enforce the foreclosure, and that the finding of the Judge is not *prima facie* evidence of the fact of service, shifting the *onus* of proof upon such an important point, and relieving the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate.—480.

(8) The year during which the mortgagor may redeem his property runs, not from the date of the *perwannah* or the issuing of it by the Judge, but from the time of service.—*Ibid.*

(9) Service upon some of the mortgagors would be insufficient to warrant the foreclosure of the whole property or any of it where it is sought to foreclose the whole estate as upon one — against all.—*Ibid.*

(10) The mortgagee, when he seeks to foreclose, must discover and serve the persons who are the then owners of the estate, not excepting purchasers who have not taken possession.—*Ibid.*

(11) Where a vendee took a deed of conditional sale from the vendors to act upon it in case he should think it right, but did not think it right to

do so, and having kept it for a long time without acting upon it in his lifetime, it was held that there was sufficient evidence in this and other circumstances of the case to conclude that it was not a *bond fide* conveyance as against *bond fide* purchasers.—*Ibid.*

(12) Without affirming the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the — must be taken to have been made for the benefit of the mortgagor so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms, it was held in this case that the mortgagor was entitled to redeem the estate upon paying the purchase-money of certain *bi*rt tenures of which the mortgagee claimed a sub-settlement, *plus* the original mortgage-money.—537.

(13) The effect of a sale of a mortgaged estate under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrances, and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hands free from all the incumbrances. There seems to be no reason why the second mortgagee, who might have bought the equity of redemption from the mortgagor, should not, equally with a stranger, purchase the estate when sold under a power of sale created by the mortgagor.—*Ibid.*

(14) There is no ground for the contention that a mortgagee cannot relieve himself from the statutory obligation of filing accounts under Reg. XXXIV of 1808 ss. 9 and 10.—708.

(15) Where, at the time when a — of the malikhana interest of certain talookdars was made, the law by which the contract was governed limited the rate of interest to 12 per cent., and the — provided that the mortgagee should take the income of the malikhana in lieu of interest and so be saved from having to account for them, crediting every harvest with a certain amount of the income as interest at 12 per cent. and taking the remainder of the malikhana (a fixed sum) as an allowance for the costs of collection : HELD that this stipulation was not in the nature of a contract for interest, and that there was no evasion thereby of the law, or any contract to give usurious interest.—*Ibid.*

(16) *Quere.*—Whether, if the surplus malikhana, *ultra* the interest, were a fluctuating instead of a fixed sum, the mortgagees would not be bound to file the statutory accounts.—*Ibid.*

See ANCESTRAL PROPERTY.

See CONTRACT (2).

See ATTACHMENT.

See HINDOO WIDOW (1).

See JOINT HINDOO FAMILY (5).

See LIMITATION (8) (4) (6).

See MEENE PROFITS (6).

See ONUS PROBANDI (1).

See PRIVY COUNCIL (4).

See SALE (2).

MOUROSEE.

See ENDOWMENT (9).

See MOKURRUREE.

MUSHÄ. See GIFT (1).

NAWAB MALKA JAHAN SAHIBA. See OUDH.

NECESSITY.

See ANCESTRAL PROPERTY.

See ENDOWMENT (8).

See HINDOO LAW (ALIENATION).

See HINDOO WIDOW (1) (8) (9).

NEGLECTOR.

See LACHES.

See LANDLORD AND TENANT.

See MARINE.

See TANK.

NEPHEW. See BROTHER'S SON. NOTIFICATION.

See MORTGAGE (7).

See ONUS PROBANDI (2).

See PRIVY COUNCIL (17).

See SALE (6).

NUISANCE.

Continuing —. See LIMITATION (17).

NUNC PRO TUNC. See PRIVY COUNCIL (4) (12).

OBSTRUCTION.

See DECLARATORY DECREE (6).

See LIMITATION (17).

See RELIEF (1).

See RIGHT OF ACTION (2).

OCCUPANCY. See RIGHT OF OCCUPANCY.

ONUS PROBANDI.

(1) In a suit by mortgagees under a *zur-i-peshgee*, not only for possession, but also for setting aside a *mokurruree* lease, which was alleged to have been granted by the mortgagor prior to the mortgage, and under which defendants had been in possession for some time in accordance with a Magistrate's order : HELD that the — was on plaintiff, in impeaching the validity of the *mokurruree* ; but this having been done and a strong *prima facie* case made out, the — was shifted, and it became incumbent on defendants to show that the *mokurruree* was granted before the *zur-i-peshgee*, and that it was granted *bond fide* for a real consideration, and intended to be operative as between the mortgagor and the lessee.—64.

(2) *Quere.*—Whether, under the circumstances of this case, it was not for the plaintiff, who was seeking to oust the defendants from possession, to prove the non-observance of the formalities enjoined by Act VIII of 1859 s. 289, rather than for the defendant, who was in possession, to prove affirmatively that they had been observed.—755.

(3) Plaintiff having proved his title to the land, defendant was bound to prove that plaintiff has lost it by reason of his (the defendant's) adverse possession for twelve years, which burden, it was held, the defendant had not satisfied.—809.

See DEED.

See ENDOWMENT (8).

See ENHANCEMENT (2).

See EVIDENCE (8).

See JOINT HINDOO FAMILY (9).

See MARINE.

See MORTGAGE (7).

See WILL (8).

OUDH.

The effect of Lord Canning's proclamation of 15th March 1858 was to vest in the British Government all landed property in Oudh, so that all who claim title to land there must claim through the Government. Consequently Nawab Malka Jahan Sahiba was held entitled to no more than a permission to occupy for her life the palace to which she asserted a right in perpetuity.—584.

See HINDOO LAW (INHERITANCE) (12).

See OUDH ESTATES.

See OUDH SUB-SETTLEMENT.

See OUDH TALOOKDARS RELIEF.

See PRIVY COUNCIL (11).

OUDH ESTATES.

(1) The Government Letter of the 10th October 1859, published in Schedule I annexed to Act I of 1869, gave the registered talookdar the absolute legal title as against the State and against adverse claimants to the talookdary ; but it did not relieve the talookdar from any equitable rights to which he might have subjected himself with a view to the completion of the settlement by his own valid agreement. Accordingly where a registered talookdar bound himself expressly in writing to respect the rights of his *cestui que trust*, who was the equitable owner, if she permitted him to be alone so registered, a decree of confiscation against her trustee was held not to affect her.—1.

(2) To bring any person within the operation of the above letter, he must be shown to be one with whom a Summary Settlement was made between 1st April 1858 and 10th October 1859 as *talookdar*.—4.

(3) The appellant, because she originally claimed the superior, was held not barred now from asserting any subordinate right to which she may be entitled. Treating her interest, therefore, in the villages in question as that of a subordinate zemindar, or one entitled to make a sub-settlement for them, her liability to pay 10 per cent. to the talookdar, over and above the Government demand, was held to depend upon the Oudh Settlements Act XXVI of 1866.—*Ibid*.

(4) As the proprietor of certain villages and rights within a talook which she acquired by inheritance from her husband, her estate was held to be, not a life interest, but the estate of inheritance of a Hindoo widow with all its rights and liabilities.—*Ibid*.

(5) *Quare*.—Whether, since the passing of Act I of 1869, the re-formation of a sunnud granted to any person within the second Schedule of that Act could be effected without a special Act of the Legislature.—*Ibid*.

(6) The Government letter of 10th October 1859, above referred to, was held not to apply to a Revenue Settlement of Talooka Chillaree with the infant Rajah Digbehoy Sing, which was resumed by Government after his death and before that letter was written; nor was it intended to create in the infant Rajah's grandmother a proprietary right in the talook by virtue of a temporary Revenue Settlement for three years, to which she had been allowed to succeed.—12.

(7) Act I of 1869 cannot apply to a suit commenced in 1867 and finally decided by the Courts in Oudh in 1868; nor where the plaintiff's name does not appear in the first of the lists mentioned in s. 8.—*Ibid*.

(8) HELD that the grant of the property in this case was made to one member of the family for the joint benefit of all the members; that Act I of 1869 conferred title in land; that the grantee acquired a permanent, heritable, and transferable right in the property; that he had by an alienation *inter vivos* transferred the property to the family, to be held by them as joint property; and that the property was divisible among all the members of the family *per stirpes*, which was the prevailing mode according to the Mitacshara law, in the absence of a family custom.—304.

(9) A person who has been registered as a talookdar under Act I of 1869, and has thereby acquired a talookdary right in the whole property, may nevertheless have made himself a trustee of a portion of the beneficial interest in lands comprised within the talook for another, and be liable to account accordingly.—427.

(10) The object of Act I of 1869 s. 22 cl. 4, taking the whole Section together, was held to be that wherever it is shown by sufficient evidence that a talookdar, not having male issue, has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question.—458.

(11) In this case their Lordships were of opinion that the late talookdar died, as he intended to die, intestate (his will whereby he gave his wife power of nominating a successor having been revoked, as the will of a Hindoo may be, by parol); and that the appellant, his daughter's son, was the person who, under the above clause, was entitled to succeed to the talook.—*Ibid*.

(12) Although the title conferred by the British

Government, after the general confiscation of the land of Oudh, is absolute and over-rides all other titles, nevertheless the grantor under the Government may, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee.—472.

(13) Held that the sunnud to Kablas Koer conferred a full proprietary and transferable right in the estate therein described upon her and her male heirs according to the law of primogeniture, and that by virtue of Act I of 1869 s. 3, she must be deemed to have acquired by the sunnud a permanent, heritable, and transferable right in the estate without any trust for the benefit of the reversionary heirs of her husband; and that on her dying intestate, under cl. 11 s. 22 of the same Act, and according to the Mitacshara law, the estate descended as her separate property to her daughter.—474.

(14) HELD that the respondent must be presumed to have held the villages included in the summary settlement and talookdary sunnud made with and granted to him before the passing of Act I of 1869, as representative of and in trust for a joint Hindoo family governed by the Mitacshara law; and that that Act did not operate to change the relative condition of the parties so as to put an end to the trust.—607.

OUDH SUB-SETTLEMENT.

(1) In order to entitle a person to a sub-settlement of lands under Act XXVI of 1866, he must prove that he, or some person under whom he claims, has within the prescribed period held these lands as an under-proprietor under the talookdar, or the predecessor of that talookdar. It is not sufficient for him to show that he has been a proprietor of those lands by a title adverse to the talookdar.—82.

(2) Under-tenures held under contract, or under any arrangement from which a contract may be inferred, are within the definition of sub-proprietary rights given in the Rules annexed to Act XXVI of 1866, and their holders are entitled to a sub-settlement.—566.

(3) HELD that the grant of the birt zemindary interest in this case should be treated as the conveyance of a subordinate zemindary interest, and that the holder of it was entitled to a sub-settlement under Act XXVI of 1866, but without prejudice to the talookdar's right (if any) to malikhana.—567.

(4) It is clear that birtas still subsisting are tenures which would entitle their holders to sub-settlement under Act XXVI of 1866.—687.

(5) The letter of the late Maharajah Sir Man Singh, a talookdar of Oudh, set out in the judgment of the Privy Council, was held to contain a promise for a sub-settlement, which was binding not only upon himself, but upon his successor also.—649.

(6) The provision of limitation (as it is called) in the Circular of 1861 made no distinction between birt tenures and all tenures in the nature of Shankallaps. It applied to all birt tenures, but not to Shankallaps, except those that were of the nature of birt. But that provision was in effect repealed by Acts XVI of 1865 and XIII of 1866, so that a suit of a birteeah became cognisable notwithstanding that he may not have been in possession in 1855.—715.

(7) Plaintiff having been found to have held by an under-proprietary right as distinguished from a holding through privilege in favor, his claim to a sub-settlement was held not barred by the Rules contained in the Schedule to Act XXVI of 1866.—*Ibid*.

See OUDH ESTATES (3).

OUDH TALOOKDARS RELIEF.

The combined effect of Act XXIV of 1870 and of the 8th Rule made under it, being that the manager of an estate is to determine the amount due for

principal and interest up to the date of his determination calculated according to the contract rate (if any), and may allow subsequent interest on the amount so determined (as upon a judgment debt) up to the time of payment at a rate not exceeding 6 per cent., the manager in this case awarded future interest at a higher rate than 6 per cent. The Commissioner on appeal, aware of the difficulty in the way of his hearing the appeal raised by the limitation of appeals prescribed by s. 10 of the Act, erroneously proceeded to act under Act VIII of 1859 s. 333, and varied the manager's order so far as it gave the rate of interest prohibited by law. The Privy Council affirmed this order as just and proper, only varying it as to the date from which the 6 per cent. interest should commence.—562.

PAGODA.

Devaraja Swamis —, and the Adhyapaka mirass right therein.—620.

See ENDOWMENT (2) (13).

PANDARAM. See ENDOWMENT (2).

PARTITION.

(1) The Privy Council agreed with the Lower Courts in declaring the respondent's absolute title (under a final decree in a — suit) to an estate unencumbered by any *pucnee* rights in the appellants.—340.

(2) The plaintiff was held to have derived no title from a *butwarra* without proving the order of — drawn out by the Collector in pursuance of Reg. XIX of 1814 s. 13, by analogy to the rule in England that, if a man claims property under a title derived from a sale in execution of a judgment to which he is a party, it is not sufficient to prove the writ of execution, but he must prove the judgment in order that the Court may see that the writ of execution was warranted by the judgment.—648.

See HINDOO LAW (INHERITANCE) (13).

See HINDOO WIDOW (4).

See JOINT HINDOO FAMILY (3) (11) (12) (14) (15).

See LIMITATION (13) (14).

See OUDH ESTATES (8).

See VENDOR AND PURCHASER (3).

PARTNERSHIP.

(1) Where, by a contract of —, one of the partners was to manage the business, and his remuneration was not to be by salary, but by a commission upon the sales during his lifetime; and on its being found that the concern could not go on except at a loss, and the Company had to be wound up by an order of Court; the Privy Council, acting upon the distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission, and upon a careful construction of the whole agreement, came to the conclusion that, by no fair and reasonable implication, could it be inferred that the partners relinquished their right of dissolving or applying to have the Company dissolved under the circumstances, or that they agreed, if they did exercise this right, to pay the managing partner compensation for the loss of commission not earned.—826.

(2) It appearing that the relation between plaintiff and defendant (two brothers) could not be taken to be strictly that of a joint Hindoo family, since, although joint as to their general concerns, and in some sense joint as members of a family, yet that relation was qualified by the provision contained in a family arrangement whereby each member might take out and use assets derived from a — firm for the benefit of his sole and separate speculations: HELD that plaintiff had failed to make out his right to throw his own and his brother's acquisitions into hotchpot and to claim an equal division of them.—849.

(3) The above arrangement being of such an extraordinary character as to leave it in the power of each member to draw to an unlimited extent upon the assets of the firm, the Privy Council de-

clined to extend the operation of such an agreement one iota beyond its terms, and therefore thought the High Court right in drawing a distinction between pledging the credit of the firm and drawing out money actually belonging to the firm.—*Ibid.*

(4) Where, by an arrangement come to between the parties, part of the balance of account stated as due to plaintiffs by defendants was to be carried to the "block account," and the remainder to the "interest account," and the agreement fixed no time for its duration or for the liquidation of the debt: HELD that, on the true construction of the agreement, either party could determine it when it was found to be working unsatisfactorily, having in this respect the same right as parties under a contract for a — at will.—742.

(5) The construction of an ambiguous stipulation in a deed may be governed or qualified by a recital; but if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled, because it may go beyond what is expressed in the recital. Applying this distinction to the operative part of the instrument in this case, it was held that the security thereby constituted was intended to cover the general balance that might become due from defendants to plaintiffs upon all the accounts between them.—*Ibid.*

See PRIVY COUNCIL (6).

PARTY TO SUIT.

(1) Act VIII of 1859 s. 102 refers to cases of substitution, in case of death of sole or surviving plaintiff, of a legal representative of such plaintiff, where there is no dispute.—871.

(2) Section 103 has reference only to a state of things existing before the hearing or at the hearing of the suit.—*Ibid.*

See DEFECT OF PARTIES.

See JOINDER OF PARTIES.

See PRACTICE (9).

See RELIEF (3).

PAUPER SUIT.

(1) A petition to sue in *formâ pauperis* contains in itself all the particulars that Act VIII of 1859 requires in a plaint.—627.

(2) In this case, the plaintiff, after filing a petition to sue in *formâ pauperis*, and pending an enquiry into his pauperism which was delayed by various orders of the Court raised a loan and paid into Court the amount of stamp fees chargeable under the Court Fees Act, whereby he gave up so much of the prayer of his petition as asked to be allowed to sue as a pauper: HELD that there was nothing in Act VIII requiring the rejection of the plaint under such circumstances, or preventing the petition from being considered as a plaint from the date that it was filed, according to the explanation in Act IX of 1871 s. 4.—*Ibid.*

See DOWER (1).

See JURISDICTION (6).

PAYMENT.

(1) The doctrine of Courts of Equity that a plaintiff who comes to be relieved from his own act must submit to the equitable conditions which the Court may see fit to impose was held inapplicable to the case of the appellant, who was not seeking the aid of the Court, but was himself sued for money paid under no contract or consent of his, but under proceedings taken *in invitum*.—136.

(2) Respondents bought appellant's interest in the surplus proceeds of a revenue-sale subject to the contingency of his succeeding in his suit to set aside the revenue-sale, in which event that interest would be *nil*. HELD that there was no general equity existing between the parties upon which appellant ought to be compelled to restore to the respondents their original position, because the event on which they speculated had gone against them.—*Ibid.*

See EVIDENCE (3) (4).

See GUARANTEE.

See PARTNERSHIP (1)

See PRACTICE (18).

See PRIVY COUNCIL (4).

See VOLUNTARY PAYMENT.

PENSION. See JURISDICTION (4).

PERMANENT SETTLEMENT.

See ENHANCEMENT.

See FISHERY (RIGHT OF).

See PRIVY COUNCIL (7).

PERWANNAH.

See MAINTENANCE (1).

See MORTGAGE (8).

PLAINT.

(1) Rejection of —.—620, 627.

(2) Variation between — and schedule.—783.

See PAUPER SUIT (1) (2).

See PRACTICE (13).

POSSESSION.

(1) A — on the part of one party, which is not shown to have commenced in wrong, can only be disturbed by distinct proof of a superior title in another party.—218.

(2) Their Lordships saw nothing in this case to take it out of the general and well-known rule relating to actions in the nature of ejectment, *viz.*, that plaintiff must recover by force of his own title; and thought that it would be very unjust to allow defendants, who had been for nearly the whole time of prescription in — of villages of which they claimed to be purchasers for value, to be turned out of — by any person other than one who had established a clear title to present.—508.

(3) Plaintiff was held not entitled to recover, his vendor having been found to have purchased *bona fide* for the original judgment debtor at a sale which did not take place until the 1st June 1863 in execution of a decree of the 31st May 1843, and to have allowed the defendant, who claimed as purchaser under a subsequent sale in execution on the 7th June 1855, to be put into —, and to remain in — for 9 years, without contesting his right to the property.—659.

(4) — for three years under an Act IV of 1840 award does not create a title by prescription.—780.

(5) The defendants having been put into — by the Government who were entitled to the lands in dispute, and having been maintained in — by the Magistrate under s. 318 of the Code of Criminal Procedure, if the plaintiffs had wished to contend that the defendants had been wrongfully put into —, and that the plaintiffs were entitled to recover on the strength of their previous — without entering into a question of title at all, they ought to have brought their action within six months, under Act XIV of 1859 s. 15.—*Ibid.*

See ADVERSE POSSESSION.

See ALLUVIAL LAND (7).

See DECLARATORY DECREE (4).

See GIFT (1) (3) (6) (7).

See HINDOO LAW (ADOPTION) (17).

See JOINT HINDOO FAMILY (2).

See LIMITATION (9) (10) (15) (16).

See MORTGAGE (5) (6) (10).

See ONUS PROBANDI.

See RELIEF (1).

See RES JUDICATA (6).

See SALE (8) (9).

POTTAH.

(1) How to construe a — in order to determine whether it conveyed an estate for life only or an estate of inheritance.—159.

(2) The operation of the proviso to Act VIII of 1865 (Madras) s. 8 was not intended to be confined to cases in which suits are brought under ss. 8, 9, and 10, but to apply to all pottahs which come within s. 3.—646.

See LEASE (1).

See REGISTRATION (8)

PRACTICE.

(1) A finding by a Civil Court must be taken altogether.—157.

(2) A party, who is not willing to accept a finding in his favor in a suit, is not in a position to ask for a decree based upon it in the appeal, though he ought to have it in some future proceeding.—*Ibid.*

(3) A Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts.—304.

(4) It is always dangerous, and more especially so in the Mofussil Courts in India, to allow parties to make a new case and to call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it.—*Ibid.*

(5) In a case of conflicting evidence of witnesses who do not commend themselves by the manner in which they give their evidence, it is a safe rule to look to the conduct of the parties.—*Ibid.*

(6) If a Court intends to call for fresh evidence it ought to record its reasons for so doing.—*Ibid.*

(7) A Court ought not to adjourn a case for the production of a document; much less (when it does so) to allow witnesses and several of the parties who were interested in the result, and who had been previously examined, to be recalled and to add to and vary the evidence which they had previously given, in order to prove a case which they had not set up.—*Ibid.*

(8) A judgment-creditor has, by virtue of the judgment, without execution, no right to the property of the judgment-debtor, and is not entitled to recover it from the persons in whose hands it is. The procedure prescribed is to proceed to execute the judgment by attachment and sale if necessary, and not to proceed by action.—330.

(9) There must be two conditions to give the Court jurisdiction under Act XXIII of 1861 s. 11; the question must be between parties to the suit, and must relate to the execution of the decree. A person, by merely applying for execution of the decree, does not constitute himself a party to the suit.—371.

(10) This case was remanded for further enquiry and report by the High Court, the Judicial Committee being dissatisfied with the manner in which the High Court had overruled the Lower Court on a question of fact, by rejecting certain entries (in books which, in the conflict of oral testimony on both sides, were brought into Court to show on which side the truth lay) as not genuine, from their own observation of the books, without taking evidence or rehearing the case on that point.—414.

(11) Officers who act as Judges, if entrusted at the same time with administrative duties, ought to be most scrupulous in the endeavor to form their own opinions independently. They ought not to refer to their superiors, whether judicial or administrative, for opinions to form their own judgments as Judges. If any information from a superior is considered necessary, he ought to be examined as a witness.—427.

(12) When an appellant comes to complain of the judgment of a Court upon a point which does not appear upon its judgment, it would be proper, and at least convenient, that some explanation should be given why the point does not so appear.—617.

(13) In this case the High Court approved of the rejection of the plaint under Act VIII of 1859 s. 32 as disclosing no cause of action either in the allegations respecting the "miras of reciting prayers," and the exclusive right of recital in a stated form and order which the plaintiffs asked the Court to establish and to protect from infringement by the defendants, or in the allegation as to withholding payment of certain specified sums described as "the value of the incomes mentioned in Schedules B and C." The Privy Council, however, considered that the Schedules were more than a mere list of cakes and offerings, to which a money value was assigned, and that they disclosed a claim.—620.

(14) In execution proceedings, the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere

technical grounds when they find that it is substantially right.—685.

See DECREE (2).

See DEFECT OF PARTIES.

See EXECUTION OF DECREE.

See HINDOO LAW (ALIBINATION).

See INTEREST (1) (2).

See JOINDER OF PARTIES.

See JURISDICTION (7).

See PARTY TO SUIT.

See PAUPER SUIT.

See PRIVY COUNCIL.

See RELIEF (3).

See SPECIAL APPEAL.

PRESCRIPTION.

See LIMITATION (15) (16).

See POSSESSION (2) (4).

PRESUMPTION.

See ENDOWMENT (8).

See EVIDENCE (2).

See FISHERY (RIGHT OF).

See GOVERNMENT PAPER (2).

See HINDOO LAW (ADOPTION) (8).

See JOINT HINDOO FAMILY (9).

See JURISDICTION (8).

See MORTGAGE (11).

See PURDANUSHEEN WOMAN.

PRIMOGENITURE.

See HINDOO LAW (INHERITANCE) (4) (18).

See JOINT HINDOO FAMILY (12).

See OUDH ESTATES (18).

PRINCIPAL AND AGENT.

(1) Where a man steps in during an auction sale and assumes the character of a principal agent, and depositing another who is really acting as agent purchases the property, he cannot afterwards be allowed, in equity, to turn round and claim to have purchased not for the principal, but for himself, and to obtain a profit out of his purchase.—122.

(2) In the absence of evidence to the contrary, it was inferred from the facts stated that the agent's service had come to an end, thus making it clear that he could have had no general authority.—710.

(3) Formal notice of termination of the agent's authority is not necessary. It will be enough if the plaintiff knew of the agent having quitted defendant's service, and of his authority having been thus revoked.—*Ibid.*

See JOINDER OF PARTIES.

See LIMITATION (11).

See TIMBER (2).

PRIORITY.

See ATTACHMENT.

See MORTGAGE (5).

See REGISTRATION (5):

PRIVY COUNCIL.

(1) There must be *uberrima fides* on the part of those who come for leave to appeal, on special grounds, to the —. Where the petition contained a material misstatement, the appellant was not allowed the costs of the appeal.—72.

(2) In a suit to set aside two decrees which declared that certain bond-debts, incurred by the shabait of an idol, should be realized from the rents or profits of the dewattur mehal, it was held that the High Court was right in holding that, in the absence of proof of fraud or collusion, it could not reopen and review those judgments, and that the —, since it was not sitting in appeal to determine whether the conclusions of fact or of law on which those decrees were founded were right or wrong, could properly deal only with the operation and effect of the decrees as they stood.—102.

(3) The — may at any stage of an appeal hear the objection that the appeal is without authority because the leave to appeal is *ultra vires*.—148.

(4) Special leave to appeal *nunc pro tunc* was refused in this case where one of the principal questions was that the proper amount was not paid into Court under a compromise, the alleged deficiency being Rs. 7 only; and where the other and sub-

stantial ground was that in a suit for foreclosure of mortgage, before a decree was finally obtained, a compromise was entered, in pursuance of which the mortgagor paid into Court a sum of money which the mortgagee refused to accept, and which the Court thereupon irregularly directed to be repaid to the mortgagor without notice.—*Ibid.*

(5) As a general rule, one appellant to the — cannot hope to succeed upon a pure question of fact as to which the decisions of both Courts below are against him.—157.

(6) If ever the above rule should be adhered to, it should be in a case where the question relates to an item in a partnership account the proof of which depends upon the testimony of native gomasthas supported by native books not produced before the —.—161.

(7) The question as to whether grants made by a zemindar before the permanent settlement are or are not binding on his successors, was not allowed to be raised for the first time in the appeal to the —, their Lordships inclining strongly to the affirmative of the alternative.—215.

(8) In a suit which was essentially one of boundary and on which an order had been previously made by the —, the — declined to go behind that order, and held that so much of the judgment of the High Court as reopened on fresh evidence what had previously been decided must be set aside.—225.

(9) Parties appealing to the — upon the merits ought not to take the general decree of the High Court, but should ask for details.—298.

(10) A suit for possession and redemption, in which a third party intervened claiming that the plaintiff had conveyed to him one half of the property in dispute, was dismissed. On appeal by plaintiff in which the intervenor did not appear, the Lower Appellate Court merely reversed the decree of the First Court, and the High Court affirmed the decree of the Lower Appellate Court. The —, in remanding the case to the High Court to amend their decree in conformity with their judgment, by declaring affirmatively what the plaintiff was entitled to recover, observed that the question ought to have been raised in the High Court.—*Ibid.*

(11) A Commissioner in Oudh has no authority to admit an appeal to the — from a decree of his affirming a decree of the Settlement Officer of that district, notwithstanding that his decree was final; the words "Court of Highest Civil Jurisdiction in any Province" in Act II of 1863 having reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases.—427.

(12) To avoid delay and expense in this case, the — granted special leave to the appellant to appeal, and allowed the case to be argued *nunc pro tunc*.—*Ibid.*

(13) An order of the — cannot be reopened or varied unless by some accident, without any blame, and without any default on the part of the party himself, he has not been heard and an order inadvertently made as if he had been heard; but not on the mere ground that he was not properly represented upon the appeal or cited to appear to it, and where it could not be said that there had been no default on the part of the petitioner.—553.

(14) The objection that the petitioner was never properly made a party to the suit in the Courts below, and that the proceedings in India, so far as he was concerned, were *coram non judice*, was held to be one which could only be properly tried in a new suit, since, if the facts alleged could be established, the final decree in the suit, considered independently of the Order in Council, and merely as a decree of the Indian Courts, would probably not be *res judicata* against the petitioner.—*Ibid.*

(15) In a former appeal the — held that both Courts were wrong on the question of limitation and, as to the other plea in bar, that plaintiff,

whose application to intervene in a former suit between his alleged vendors and the defendants had been refused, could not be bound by the decree in that suit, and remanded the case for trial on the merits. In the present appeal the — declined to allow the question as to whether there ever was a conveyance or not from the plaintiffs' vendors to be re-opened as one decided by their Lordships on the former occasion.—604.

(16) Their Lordships always regret to have to hear an appeal *ex parte*; but their decision upon it, when heard, must stand as if all the arguments which the respondents, if present, could have raised upon the case had been addressed to them; the absent parties must bear the consequence of their own laches.—*Ibid*.

(17) The objection as to the non-observance of the formalities enjoined by Act VIII of 1859 s. 289 was not allowed to be taken for the first time upon appeal before the —, it involving a question of fact.—755.

(18) This case having been heard on special appeal, the — refused to modify the language of the first Court's decree with regard to the enjoyment by the defendant of the water in a certain *tal*, leaving the defendant's exercise of such right, if wasteful or improper, to be the subject of a future enquiry.—816.

See ARBITRATION (1).

See COSTS (2).

See HINDOO LAW (ADOPTION) (10).

See HINDOO WIDOW (5) (6) (9).

See INTEREST (1).

See PRACTICE (10).

PROCEDURE.

See CIVIL PROCEDURE.

See CRIMINAL PROCEDURE.

PROMISSORY NOTES. See GOVERNMENT PAPER.

PROPRIETARY RIGHTS.

See FISHERY (RIGHT OF).

See OUDE ESTATES (1) (4) (6) (8).

See RIPARIAN PROPRIETOR.

See SETTLEMENT OFFICER (1).

See SUB-PROPRIETARY RIGHTS.

See TIMBER (8).

PUBLIC POLICY.

See CHAMPERTY.

See COSTS (1).

See HINDOO LAW (ADOPTION) (9).

PUCHIS SOWAL.

See HINDOO LAW (INHERITANCE) (17).

PUNJAB CODE.

Section 19 cl. 4. See MORTGAGE (2).

PURCHASE MONEY.

See HINDOO WIDOW (1) (8) (9).

See MORTGAGE (12).

See PAYMENT (1) (2).

See SALE (1).

See SHERIFF'S SALE (1) (3).

See VENDOR AND PURCHASER (1).

PURDANUSHEEN WOMAN.

Although if a person of competent capacity signs a deed, the presumption is that he understood the instrument to which he has affixed his name; yet in the case of a —, who had no legal assistance, the ordinary presumption does not arise; and it is incumbent upon the Court to be satisfied, as a matter of fact, that she really did understand the instrument to which she has put her name.—444.

See ENDOWMENT (17) (18).

PUTNEE.

The statutory sale of an under-tenure under Reg. VIII of 1819 cannot be set aside because one of the witnesses to the notice turned out not substantial. Meaning of "substantial" in s. 8.—72.

See DEED OF SALE (2).

See PARTITION (1).

PYNE. See LIMITATION (16).

RAJ. Chhedra —.—802.

RAMESWARAN.—17.

RAMNAD.—17, 358.

RATIFICATION.

See COMPANY.

See HINDOO LAW (ADOPTION) (12).

See TIMBER (2).

RE-FORMATION.

See ALLUVIAL LAND (1).

See CONTRACT (8).

See OUDE ESTATES (5).

REFUND.

See PAYMENT.

See PRIVY COUNCIL (4).

REGISTERED TALOOKDAR.

See OUDE ESTATES.

See OUDE SUB-SETTLEMENT (1).

REGISTRATION.

(1) The High Court N.W.P., having no ordinary Civil jurisdiction, is not competent, under Act XX of 1866 s. 88, to direct the — of a deed, the — of which has been refused by the Registrar and the Registrar-General.—170.

(2) Where a deed of sale is presented for — within the period required by s. 22, and is accepted by the registering officer who, without the vendors appearing, registers it by a mistake, and the — is declared by a competent Court to be invalid, the registering officer may, although the period of four months has expired, proceed to compel the appearance of the vendors, and on their admission, register the deed.—*Ibid*.

(3) Such — may be effected by the registering officer voluntarily, and without an order from the District Court under s. 84, notwithstanding that an application by the parties concerned to have it registered has been refused by the Registrar, and that the Registrar-General has deemed the first (invalid) — to be due.—*Ibid*.

(4) *Semble*.—Every — of a deed is not null and void by reason of a non-compliance with ss. 19, 21, 36, or the like; such errors or defects should be classed under the general words "defect in procedure" in s. 88.—*Ibid*.

(5) Where a deed is tendered for — within the time prescribed by Act VIII of 1871, and registered, it is immaterial that another deed has obtained priority of —.—488.

(6) The latter part of s. 35 of the same Act, taken in connection with the rest of the Act, should be read distributively and be construed to mean that the registering officer shall refuse to register a deed, *quoad* the persons who deny the execution of it, and *quoad* any person who appears to be a minor, an idiot, or a lunatic.—*Ibid*.

(7) In all cases where a registered deed is produced, it is open to the party objecting to the deed to contend that there was an improper —, or that the terms of the — Act in some substantial respects have not been complied with.—*Ibid*.

(8) The pottahs or mochulkas, as defined in Act VIII of 1865 (Madras) s. 3, which are excluded from the operation of Act XX of 1866 by ss. 2 and 17, refer only to leases executed by tenants who are cultivating the land and their immediate landlords, and not to leases granted by zemindars to intermediate holders.—646.

See REGISTERED TALOOKDAR.

REGULATION VIII of 1793.

Section 51. See ENHANCEMENT (1).

REGULATION XXV of 1802.

See LANDLORD AND TENANT.

REGULATION XXXIV of 1803.

Sections 9 and 10. See MORTGAGE (14).

REGULATION II of 1805.

Section 3. See LIMITATION (1).

REGULATION XVII of 1806.

Section 8. See MORTGAGE (7).

REGULATION XIX of 1814.

Section 18. See PARTITION (2).

REGULATION VIII of 1819.

Section 8. See PUTNEE (1).

See PUTNEE (1).

REGULATION XI of 1822.

Section 4 cl. 1. *See* ALLUVIAL LAND (5).
RELIEF.

(1) The intervention of defendant in the proceedings of the Settlement Officer, and the former's objection to the entry on the wajib-ul-urz (or village administration paper) of the widow's adopted son as her successor to the mouzah in question on the ground that the adoption was illegal, is an act of obstruction against which — may be granted if it is shown (which was not in this case) that the entry thus objected to was necessary to the settlement of the mouzah, or the completion of the title, or the right to present possession.—529.

(2) The setting up by the defendant of a fictitious will (oral or written) may be a ground for claiming a cancellation of the document.—*Ibid.*

(3) *Quære.*—Whether, where — against this will was not one of the objects of the original suit by the widow, and the adopted son was afterwards made a co-plaintiff, the suit ought not, for the purpose of such claim, to be considered as a new suit; and whether, the defendant having before that time put forward the claim and persisted in it to the end, — might not, if asked for, have been granted against it.—*Ibid.*

See CONTRACT (8).

See DECLARATORY DECREE (1) (2) (3) (5).

REMAND. *See* HINDOO LAW (ALIENATION).

RENEWAL. *See* LEASE (1) (2) (3).

RENT.

Their Lordships refused to allow an unexplained note embodied in the order of the Settlement Officer to over-ride the former arrangement of the parties, so as to render the respondent, a natural son of the late Rajah Shumshare Bahadar, liable to pay the appellant, the legitimate son and heir of the late Rajah, a — of Rs. 3650 instead of Rs. 2001, in the absence of all evidence as to what was the — actually paid by the respondent after the settlement was made.—690.

See ENDOWMENT (11).

See ENHANCEMENT.

See ESCHEAT.

See LEASE (3).

See MANAGER (2).

RESIDENCE.

(1) Where a testator disinherited his son, and the final decision on the contestation of the will was that, upon the expiration of defendant's life interest, the son was entitled as heir to the estate; and the son brought this suit for a declaration of cesser of defendant's interest by his non-compliance with the condition in the will relating to — in the testator's boitakanah: **Held** that defendant's delay in commencing — was justified by his inability to get possession of the entire house from the trustees, and by the unfit state of the house for — owing to want of repairs.—46.

(2) What acts were held to amount to the use of the house as a —.—*Ibid.*

See DWELLING.

See HINDOO WIDOW (11).

See HOUSE.

See MANAGER (2).

RES JUDICATA.

(1) The expression "cause of action" in Act VIII of 1859 s. 2 cannot be taken in its literal and most restricted sense. Where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the *status* of one of them in relation to the other, it cannot be again tried in another suit between them.—218.

(2) An order declining to execute a decree for want of jurisdiction is not an adjudication within the rule of — or within Act VIII of 1859 s. 2, so as to bar a subsequent application for the execution of that decree.—423.

(3) Held that the decision in a former suit that the plaintiff as mother was the heiress of her son

and was (as such heiress) entitled to possession, was conclusive against the title of the present plaintiff, who was a party to (defendant in) that suit; and that she having taken possession under that decree, the plaintiff was barred by the adjudication from recovering the possession from her upon the ground that (according to the Mitacshara law, and a family custom or kolachar, excluding females from inheritance) she was not the heiress, and that he, as the eldest branch of the family, was entitled to succeed to the property upon the death of her son.—540.

(4) Even if the family usage set up by the plaintiff in the present suit had not been set up by him, as defendant, in the former suit, the adjudication in the first suit would still be a bar to the proceedings in the second, on the ground that the claim was the same in both suits although the allegations were different, and that the plaintiff, as defendant in possession, ought to have resisted the claim in the former suit by setting up the family usage.—*Ibid.*

(5) But although the plaintiff is barred by the former adjudication from setting up the family usage for the purpose of showing that he is entitled to possession during the defendant's life, he is not thereby barred from showing that upon her death, he, if he survives, will be entitled to succeed her.—*Ibid.*

(6) A decree in a former suit was held to be no bar under Act VIII of 1859 s. 2 to the present suit for possession of mouzah M. B., merely because in the schedule to the plaint in the former suit mouzah B, which was the subject of that suit, was described as "mouzah B, usli with dakhili, that is, mouzah B and mouzah M. B.," whereas in the body of the plaint it was described simply as mouzah B.; the description in the body of the plaint, and not that in the schedule, being that upon which the Court was called upon to adjudicate.—783.

(7) The Privy Council held that the respondent was barred from bringing the present suit by the decision of their Lordships in the former suit.—785.

See JOINT HINDOO FAMILY (15).

See PRIVY COUNCIL (14) (15).

REVENUE.

See COLLECTOR OF REVENUE.

See REVENUE SETTLEMENT.

REVENUE SETTLEMENT.

See ALLUVIAL LAND (6) (7).

See OUDH ESTATES (6).

See SETTLEMENT OFFICER.

REVERSIONER.

See HINDOO LAW (ADOPTION) (10).

See HINDOO WIDOW (1) (2) (7) (8).

See JOINT HINDOO FAMILY (14).

See LIMITATION (5).

See RES JUDICATA (5).

REVIEW.

(1) The order of the Lower Appellate Court admitting a — of judgment after the expiration of 90 days from the date of the decree without showing whether there was sufficient cause proved to its satisfaction for the delay, was held to be illegal with all subsequent proceedings under it.—67.

(2) *Quære.*—Whether Act VIII of 1859 s. 376 applies to orders, or merely to decrees. But even admitting that a — can take place of an order rejecting the judgment debtor's objections to a sale in execution, the auction purchaser is entitled to be summoned and heard in support of the order sought to be reviewed, as provided by s. 378.—294.

See PRIVY COUNCIL (2).

REVOCAION. *See* OUDH ESTATES (11).

RIGHT OF ACTION.

(1) There may be, where a right is interfered with, *injuria sine damno* to give a —; but there is no — where there is neither *damnum* nor *injuria*.—656.

(2) So where a riparian proprietor encroached on the bed of a khal in the possession of the Govern-

ment, and built a wall on it, it was held that plaintiff, not having all the rights of a riparian proprietor, had no — for the removal of the wall on the other side, on the ground of the obstruction of his navigation and of danger to his property without at least proving that there had been any interference with the flow of the water, or of such injury to his right as would support an action.—*Ibid.*

See CONTRACT (2).

See COSTS (1).

See INTEREST (3).

See MALICIOUS PROSECUTION (1).

See PRACTICE (8).

RIGHT OF OCCUPANCY.

(1) A — may be acquired in respect of an undivided share of an estate.—550.

(2) Holding as ijaradars prior to and during their lease does not create in them a —. After the lease they hold over subject to the terms of the lease.—*Ibid.*

RIGHTS.

See ENDOWMENT (13).

See EQUITABLE RIGHTS.

See FISHERY (RIGHT OF).

See HINDOO WIDOW.

See PROPRIETARY RIGHTS.

See RIGHT OF ACTION.

See RIGHT OF OCCUPANCY.

See SUB-PROPRIETARY RIGHTS.

See TANK.

RIPIARIAN PROPRIETOR.

See ALLUVIAL LAND.

See RIGHT OF ACTION (2).

SALE.

(1) J, as the executor of his deceased father S, obtained a decree which he held in trust for S's heirs, namely himself and brothers. One of the brothers (H) died, leaving J and M his executors. M then sold to J the interest of H's son for an inadequate consideration. HELD that, according to the rules of equity, the — could not stand, but that J was bound to return to H's sons their share in that estate, upon receiving back the purchase-money; and that the — was equally invalid against any other person for whose benefit the trustee (J) may have purchased secretly in his own name, as it would be against the trustee himself.—52.

(2) In this case it was held that the clause in a mortgage-bond relating to — was in the nature of a penalty, and that the plaintiff who, on a portion of the interest having come into arrears, sued for the full amount of the mortgage-money with interest for twelve years, the full period of the loan, was not entitled to enforce it only upon default in the payment of interest; also that the suit was not maintainable, either as an action for damages for the amount which plaintiff could have obtained by the —, or on the bond itself.—58.

(3) In a suit for possession brought by the holder of a certificate of purchase of property sold at an execution —, it is open to the real owner if in possession (Act VIII of 1859 s. 260 notwithstanding) to show that plaintiff is the apparent owner only (benamedar) and a mere trustee.—122.

(4) Inadequacy of price is in itself no ground for refusing to confirm a — according to Act VIII of 1859 s. 257.—294.

(5) Where a Lower Court, after rejecting the objections to a —, refuses to confirm it or to grant a certificate of confirmation, the High Court may, by a proceeding in the nature of a mandamus, order the Lower Court to do that which it ought to have done.—*Ibid.*

(6) Under s. 249 the amount of Government revenue assessed upon the estate to be sold in execution of a decree should be stated correctly in the notification of —. Specifying a lower amount may be an error, which, if the — is confirmed and he can prove actual damage by the irregularity, would be a sufficient ground for setting aside the

— upon appeal. In the present case the judgment-debtor was held barred from objecting to the notification of — on the ground of error, as it appeared that, in applying for a postponement of the —, he agreed to the attachment and the notification being maintained.—*Ibid.*

(7) In attaching property of a judgment-debtor under Act VIII of 1859, the judgment-creditor can only attach and sell the right, title, and interest of the judgment-debtor; whereas if he sell the tenure under Act VIII of 1869 (B.C.), he would get rid of all under-tenures, and the purchaser be entitled to the whole tenure free from all incumbrances.—57.

(8) Their Lordships expressed their inability to affirm that a minor's interest in expectancy could be made the subject of a —; still less that of a — wholly speculative, as any such — must be, by a guardian acting, or purporting to act, on behalf of the minor.—784.

(9) Where the purchasers at a — in execution on the 16th July 1860 bought, among other things, the right, title, and interest of the judgment-debtors in a decree of the 11th November 1843, and it appeared that the judgment-debtors had obtained from the Civil Court Ameen constructive possession (i.e., possession marked out by sticks and posts) of certain lands which, according to his view, they were entitled to under the decree of the 11th November 1843: HELD that what was sold at the execution — was the unexecuted portion only of the decree of the 11th November 1843.—776.

See ANCESTRAL PROPERTY.

See CONTRACT (3).

See DEED OF SALE.

See ENDOWMENT (9) (11) (16) (19).

See GOVERNMENT PAPER (2).

See GUARANTEE.

See HINDOO WIDOW (1) (3).

See JOINT HINDOO FAMILY (8) (13).

See LIMITATION (6) (10).

See MEANE PROFITS (6).

See MORTGAGE (13).

See PARTITION (2).

See POSSESSION (3).

See PRINCIPAL AND AGENT (1).

See PUTNEE.

See REVIEW (2).

See SALE FOR ARREARS OF REVENUE.

See SHERIFF'S SALE.

See VENDOR AND PURCHASER.

SALE FOR ARREARS OF REVENUE.

See LIMITATION (2).

See PAYMENT (2).

SAMANODAKA. See HINDOO LAW (INHERITANCE) (2).

SANTAN SRENI KRAM. See GRANT (2).

SAPINDA.

See HINDOO LAW (ADOPTION) (7) (15).

See HINDOO LAW (INHERITANCE) (2).

SARUN. See ALLUVIAL LAND (5).

SEAL. See GOVERNMENT PAPER (1).

SEPARATE PROPERTY.

See HINDOO LAW (INHERITANCE) (5) (8).

See JOINT HINDOO FAMILY (3) (7) (14).

See OUDH ESTATES (13).

SESSENDRE.—4.

SETTLEMENT.

See ALLUVIAL LAND (5) (6).

See FISHERY (RIGHT OF).

See HINDOO WIDOW (2).

See LANDLORD AND TENANT.

See MALGOOZAR.

See OUDH ESTATES (1).

See OUDH SUB-SETTLEMENT.

See RENT.

See REVENUE SETTLEMENT.

See SETTLEMENT OFFICER.

See SUB-SETTLEMENT.

See SUMMARY SETTLEMENT.

SETTLEMENT OFFICER.

An officer who is appointed to consider and revise the revenue assessed upon certain estates, has

no power to convey away the proprietary rights of the Government in those estates.—141.

See HINDOO LAW (INHERITANCE) (12).

See RELIEF (1).

See RENT.

SHANKALLAP. *See* OUDH SUB-SETTLEMENT (6).

SHARE.

See ANCESTRAL PROPERTY.

See ENDOWMENT (4) (5).

See GIFT (2).

See JOINT HINDOO FAMILY (2) (3) (4) (6) (8) (14) (16).

See LIMITATION (18).

See RIGHT OF OCCUPANCY (1).

See VENDOR AND PURCHASER (3).

SHEBAIL.

See ENDOWMENT (8) (4) (5) (6) (10).

See PRIVY COUNCIL (2).

SHERIFF'S SALE.

(1) The purchasers at a — under a writ of *fi. fa.*, upon being evicted by the execution-debtor, can recover from the execution-creditor the purchase money which he has paid, if it should turn out that the sheriff had no authority to execute the writ at the place where the property was situate.—519.

(2) A sheriff who seizes property out of his jurisdiction is a trespasser, and in the position of an ordinary person who has sold that which he had no title to sell.—*Ibid.*

(3) The rule of English law, which bars a purchaser by private contract from recovering the purchase money, if evicted by a title to which the covenants do not extend, does not govern a case in which the sale, as regards the owner of the thing sold, is *in invitum* and made under color of legal process.—*Ibid.*

(4) Nor can the rule of English law, as to implied warranty of title in chattels sold, and regarding the application of the maxim *caveat emptor*, be applied to a — of goods under *fi. fa.*—*Ibid.*

SIGNATURE.

See EVIDENCE (4).

See LIMITATION (11).

SISTER.

Half-sister's daughter's child. *See* HINDOO LAW (ADOPTION) (16).

See HINDOO LAW (INHERITANCE) (1).

SLAVE.

Act V of 1843, which was intended to remove all the disabilities arising out of the *status* of slavery, was held to prevent the application of the Willa rule of Mahomedan law, whereby the natural heirs of the emancipated were excluded by the heirs of the emancipator, and consequently to entitle the granddaughters of a — girl (who, after giving birth to their mother, was emancipated by her master on the day previous to the celebration of a *nikah* marriage, by which she became his wife) to succeed to their grandmother as her natural heirs, as they would have done but for that Act.—638.

SON.

See BROTHER'S SON.

See DAUGHTER'S SON.

See HINDOO LAW (INHERITANCE) (3).

See MAINTENANCE (2).

SOODRAS.

See HINDOO LAW (ADOPTION) (14) (19).

SPECIAL APPEAL.

(1) Where an issue was not raised in the Court of First Instance, nor taken in the grounds of appeal, it is too late to set it up for the first time in —, especially if the evidence has not been directed to it.—87.

(2) A Judge cannot be said to act strictly within his power upon a —, if his judgment proceeds upon inferences drawn from the evidence but contrary to the inferences drawn by the two Courts below, and so far involves a review of their decision upon matters of fact.—623.

See JURISDICTION (1).

See PRIVY COUNCIL (18).

SPECIFIC PERFORMANCE. *See* ENDOWMENT (18).

STAMP DUTY. *See* PAUPER SUIT (2).

STATE.

See ESCHEAT.

See GOVERNMENT.

STATUTES.

24 & 25 Vic. c. 104. *See* JURISDICTION (5)

28 & 29 Vic. c. 15. *See* JURISDICTION (5).

SUBORDINATE ZEMINDAR. *See* OUDH ESTATES (8).

SUB-SETTLEMENT.

See OUDH ESTATES (8).

See OUDH SUB-SETTLEMENT.

SUBSTITUTION.

Of "must" or "shall" for "may" when allowable.—423.

See PARTY TO SUIT.

SUB-TENURE. *See* UNDER TENURE.

SUMMARY SETTLEMENT.

See OUDH ESTATES (2) (3) (14).

See REVENUE SETTLEMENT.

SUNNUD.

See GRANT (2).

See HINDOO LAW (INHERITANCE) (13).

See MAINTENANCE (2).

See OUDH ESTATES (5) (13) (14).

SURVIVORSHIP.

See HINDOO LAW (INHERITANCE) (1).

See HINDOO WIDOW (4).

See LIMITATION (13).

See RES JUDICATA (5).

TALOOK.

(1) Maharajah Man Singh's.—458.

(2) Kablas Koer's.—574.

See ENHANCEMENT (1).

See GRANT (2).

See REGISTERED TALOOKDAR.

See TALOOKDAR.

TALOOKDAR.

See MORTGAGE (15).

See REGISTERED TALOOKDAR.

TANK.

The principle that a man, in exercising a right, may be liable, without negligence for injury done to another, was held inapplicable to the statutory duty imposed on semindars of maintaining tanks for purposes of irrigation, as raised in a case where two tanks had burst on defendant's land from influences beyond plaintiff's control.—36.

TEMPLE (HINDOO).

See ENDOWMENT (1) (2) (3) (7) (9) (11) (12).

TIMBER.

(1) In a suit for damages for conversion by defendants of certain — belonging to plaintiff, the principle of estimating the damages adopted was not only to take the value of the — at the place where the principal, if not the only, market for it existed, as the basis of the calculation; but to deduct from the price at which the plaintiff could have there sold it, what it would have cost him to bring it to the market.—525.

(2) In a suit for damages for the obstruction by the defendants' agent of the plaintiff in the exercise of his alleged right to remove — from certain forests in Burmah, it was held that the acts complained of could not be treated as the wrongful acts of a servant or agent committed in the course of his service, because it was not shown that at the time in question the alleged agent was a servant or agent for the purpose of working in the forest on behalf of the defendants, or of doing any class of acts analogous to those complained of, nor was there any proof of the defendants having ever knowingly adopted or ratified those acts, or indeed of the acts having been committed for their benefit.—*Ibid.*

(3) In a suit for a share of the proceeds of certain — alleged to have been cut down by the Government in a village of three-fourths of which plaintiff claimed to be proprietor: HELD that

plaintiff's sunnuds merely gave him a hereditary right, as Collector of Revenue, to the perquisites arising out of certain cesses or dues, but no proprietary right in the village, no interest in the soil, and no right to the —; nor was he entitled to the proprietorship of the soil of the village by reason of his *watani* or hereditary *khoti*, as it was clear that the proprietorship of the soil was not vested in every *khot*, and the clauses of his own agreement negatived such a right.—700.

TIRHOOT.

See ALLUVIAL LAND (5).

TITLE.

See ALLUVIAL LAND.

See DECLARATORY DECREE (1) (2) (4) (5) (6).

See FISHERY (RIGHT OF).

See GOVERNMENT PAPER (1).

See LIMITATION (15) (16).

See MORTGAGE (5).

See ONUS PROBANDI (8).

See OUDH ESTATES (8) (12).

See OUDH SUB-SETTLEMENT (1).

See PARTITION (1) (2) (3) (4) (5).

See POSSESSION (1) (2).

See RELIEF (1).

See SHERIFF'S SALE (2).

See WARRANTY OF TITLE.

TRACHARAMANA.—882.

TRANSFER.

See DECREE (1).

See ENDOWMENT (13) (14) (16).

See GIFT (6).

See JURISDICTION (2) (5) (7).

TRESPASSER.

See ALLUVIAL LAND (7).

See SHERIFF'S SALE (2).

TRUST.

See ENDOWMENT (6) (7) (14) (15) (16).

See ESCHATE.

See MALGOOZAR.

See MORTGAGE (13).

See OUDH ESTATES (1) (9) (12) (14).

See SALE (1) (8).

ULTRA VIRES.

See COMPANY.

See JURISDICTION (1) (5) (6).

See PRIVY COUNCIL (8).

See SHERIFF'S SALE (1), (2).

UNCHASTITY.

See HINDOO LAW (INHERITANCE) (14) (15).

UNDER TENURE.

See ESCHATE.

See MORTGAGE (12).

See OUDH SUB-SETTLEMENT.

See SALE (7).

UNDUE INFLUENCE.

See DEED OF SALE (2).

See HINDOO LAW (ADOPTION) (15).

URAIMA. See ENDOWMENT (13).

USURY. See MORTGAGE (15).

VEGAYANIMA PAT. See JOINT HINDOO FAMILY (12).

VENDOR AND PURCHASER.

(1) Where a *kobala* was entered into with plaintiff by a Hindoo widow as vendor, and was perfectly consistent with her being *benamcedar* and with the allegations in the plaint that her sons caused her to enter into it on their behalf, they being the real owners, the real vendors, and the persons who actually received the purchase money which in a given event was to be returned: HELD that plaintiff had disclosed a cause of action against the sons as well as the mother, and was entitled to an adjudication of the question whether the contract was really entered into by the mother as the agent and on behalf of the sons and by their authority, or whether the plaintiff, knowing the facts, had elected to treat the mother as the sole contracting party.—284.

(2) However nice the distinction between the

rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them.—467.

(8) The purchaser of undivided property at an execution sale during the life of the debtor for his separate debt acquires his share in such property with the power of ascertaining and realizing it by a partition.—*Ibid*.

See GOVERNMENT PAPER (1).

See GUARANTEE.

See HINDOO WIDOW (1).

See LIMITATION (4).

See MESNE PROFITS (1).

See MORTGAGE (10) (11).

See POSSESSION (2) (8).

See SALE.

See SHERIFF'S SALE (1) (3).

VOLUNTARY PAYMENT. See PAYMENT.

WAJIB-UL-URZ.

See HINDOO LAW (INHERITANCE) (12).

See RELIEF (1).

See WILL (1).

WALL. See RIGHT OF ACTION (2).

WARRANTY OF TITLE. See SHERIFF'S SALE (4).

WATAN.

See DESAI (1).

See TIMBER (3).

WATER.

See BHEEL.

See FISHERY (RIGHT OF).

See KHAL.

See PRIVY COUNCIL (18).

See RIGHT OF ACTION.

See TANK.

See WATERCOURSE.

WATERCOURSE.

See LIMITATION (16) (17).

WIDOW.

See HINDOO WIDOW.

See MALGOOZAR.

WILL.

(1) Where a Mahomedan testatrix devised the whole of her property in the course of a *wasil-ul-urz* relating to only a portion of it, and independent testimony of her intention to make this disposition was produced, the disposition was held valid against a claim of possession set up by a rival claimant.—235.

(2) Construction of Major-General Claude Martin's —, and *cyprès* application of the fund for the relief of poor debtors detained in prison in Calcutta, consequent on the abolition of imprisonment for debt.—244.

(8) The policy of the Mahomedan law appears to be to prevent a testator from interfering by — with the course of the devolution of property according to law among his heirs, although he may give a specified portion, such as a third, to a stranger. But a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms, the *onus* of proving which clearly is upon those who seek to set up a proceeding of this sort.—287.

(4) A devise to pious uses which was in such vague terms as to confer the beneficial interest on the executor, was held to be in contravention of the Mahomedan law and invalid without the consent of the heirs.—*Ibid*.

(5) Where a — was to the effect "I declare that I give my property to K whom I have adopted," followed by the direction "my wives shall perform the ceremonies according to the Shastras, and bring him up:" HELD that the gift of his property by the testator to a designated person was absolute, and that the provision "should this adopted son die and my younger brother have more than one son, then my wives shall adopt a son of his"

further indicated that the testator did not contemplate his widows having the power of cancelling the adoption of K and ousting him from the benefit he was to take under the — by declining to perform the ceremonies, but that whether they performed the ceremonies or not, so long as K lived, no other adoption could take place.—338.

See ARBITRATION (4).

See ENDOWMENT (19).

See GRANT (2).

See HINDOO LAW (ADOPTION) (8).

See HINDOO WIDOW (10) (11).

See JOINT HINDOO FAMILY (16).

See OUDH ESTATES (11).

See RELIEF (2) (3).

See RESIDENCE.

WILLA RULE. *See* SLAVE.

WITNESS.

See HINDOO LAW (ADOPTION) (13).

See PRACTICE (3) (5) (7) (11).

See PUTNEE.

ZEMINDAR.

See DECLARATORY DECREE (2).

See ENDOWMENT (2).

See ESCHEAT.

See FISHERY (RIGHT OF).

See HINDOO LAW (INHERITANCE) (18).

See JOINT HINDOO FAMILY (12).

See PRIVY COUNCIL (7).

See SUBORDINATE ZEMINDAR.

See TANK.

See VEGAYANIMAPAT.

ZUR-I-PESHGEE.

See JOINT HINDOO FAMILY (5).

See MESNE PROFITS (6).

See ONUS PROBANDI (1).

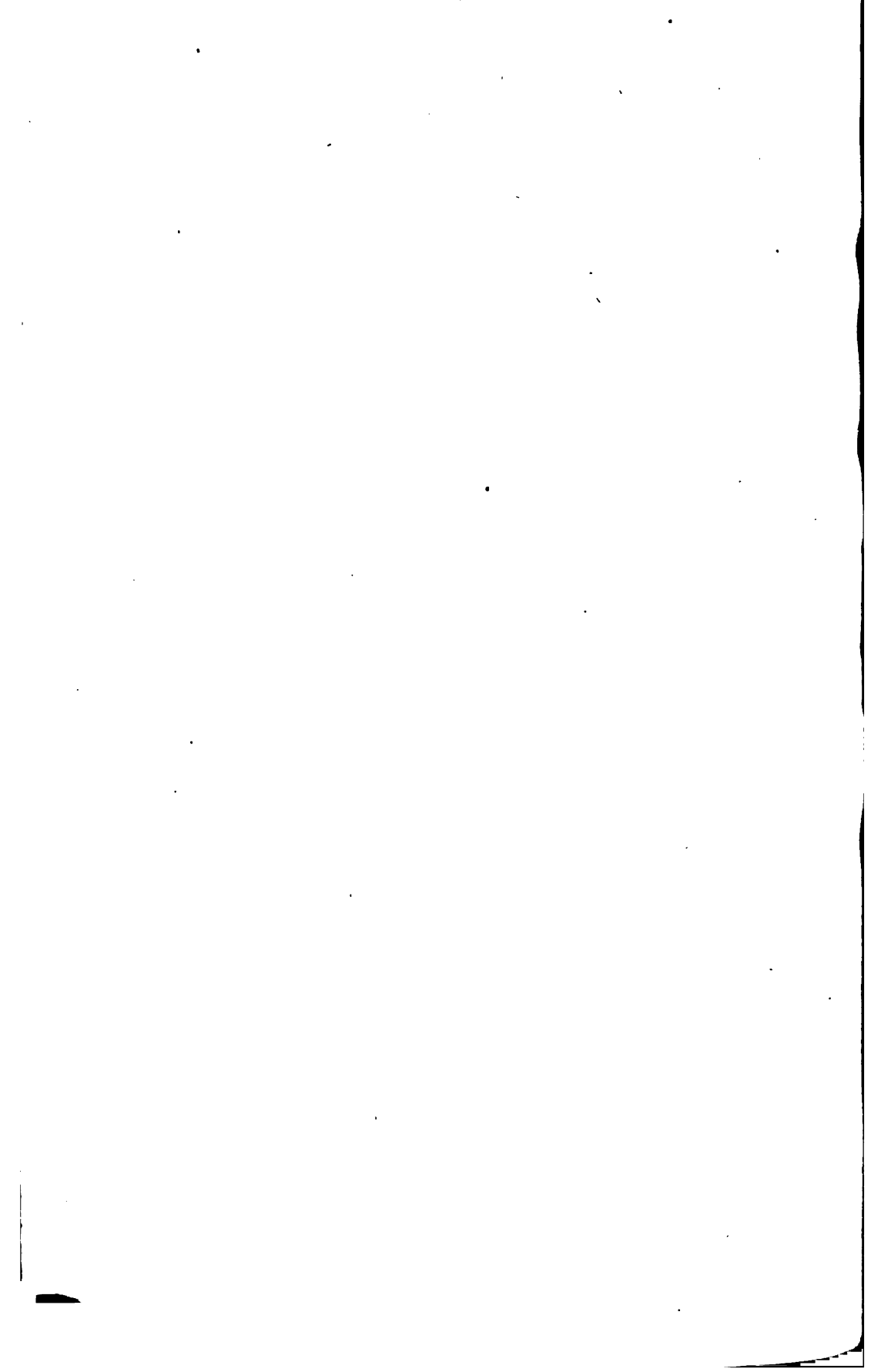


TABLE OF CASES.

ABIDUNNISSA KHATOON *v.* Amirunnissa Khatoon, 371.
 Adit Koer *v.* Gunga Pershad Singh, 600.
 Administrator-Genl. of Bengal *v.* Juggeswar Roy, 455.
 Adrishappa bin Gadgiappa *v.* Gurushidappa bin Gadgiappa, 757.
 Ahmed Abbas Khan *v.* Muthra Dass, 175.
 Ajeet Singh *v.* Shumashere Singh, 67.
 Ameer Hussun Khan *v.* Mukhdoom Singh, 195.
 Ameeroonnissa Khatoon *v.* Abedoonnissa Khatoon, 87.
 Amirtolall Bose *v.* Rajonekant Mitter, 94.
 Arumugam Chetty *v.* Perriyannan Servai, 218.
 Asad Ali Beg *v.* Zaffer Ali Beg, 623.
 Ashgar Ali *v.* Dilrus Bannoo Begum, 444.
 Ashutosh Dutt *v.* Doorga Churn Chatterjee, 694.
 BABOO DEENDYAL LAL *v.* Baboo Jugdeep Narain Singh, 467.
 Baboo Dooli Chand *v.* Baboo Birj Bhookun Lal Awasti, 734.
 Baboo Gunga Persad *v.* Baboo Inderjit Singh, 132.
 Baboo Het Narain Singh *v.* Baboo Ram Pershad Singh, 783.
 Baboo Lekraj Roy *v.* Kunhya Singh, 453.
 Baboo Prem Narain Singh *v.* Baboos Parasram Singh and Bholonath Singh, 400.
 Baboo Prem Narain Singh *v.* Baboo Rooder Narain Singh, 400.
 Badri Pershad *v.* Baboo Murlidhur, 708.
 Bahadur Singh *v.* Dariso Koer, 472.
 " Janki Koer, 474.
 Bajun "Doobey *v.* Brij Bhookun Lal Awasti, 207.
 Balmokund *v.* Sheo Dyal, 304.
 Bannoo *v.* Kaashee Ram, 490.
 Basmati Kowari *v.* Kirut Narain Singh, 753.
 Beerbhoom Coal Company *v.* Boloram Mahata, 737.
 Belchambers *v.* Ashootosh Dhur, 785.
 Bhagbutti Dase *v.* Chowdry Bholanath Thakoor, 186.
 Bhobun Mohini Debia *v.* Hurriah Chunder Chowdhry, 537.
 Bijai Bahadur Singh *v.* Bhyron Bux Singh, 690.
 Bisheswari Debya *v.* Govind Persad Tewari, 284.
 Bissessur Lall Sahoo *v.* Maharaja Luchmessur Singh, Minor under Court of Wards, 679.
 Bombay Burmah Trading Corporation *v.* Mirza Mahomed Ali Sherazee, 625.
 Brij Indar Bahadur Singh *v.* Ramee Janki Koer, 474.
 Burra Lall Opendronath Sahee Deo *v.* Court of Wards 414.
 CHAITANYA CHUNDRAN HARESHCHANDANA JAGADEVU
 BAHADOOR *v.* Collector of Ganjam, 30.
 Chidambaram Chettiar *v.* Gouri Nachiar, 654.
 Chillaree, Ramee of, *v.* Government of India, 12.
 Chintamun Singh *v.* Nowluckho Konwari, 204.
 Chotay Lall *v.* Chunnoo Lall, 572.
 Chowdhry Chintamun Singh *v.* Nowluckho Konwari, 204.
 Chowdhry Murtaza Hossein *v.* Bibi Bechunnissa, 342.
 Court of Wards *v.* Raja Leelanund Singh, 225.
 Cowasjee Nanabhooy *v.* Lallbooy Vullubhooy, 326.

DAMODHAR GORDHAN *v.* Gunesh, 277.
 Darimbya Debbya *v.* Maharajah Nilmoney Singh Deo Bahadoor, 677.
 Deendyal Lal *v.* Jugdeep Narain Singh, 467.
 Delhi and London Bank *v.* Orchard, 423.
 Dewan Manwar Ali *v.* Unnoda Pershad Roy, 697.
 Dhonendro Chunder Mookerjee *v.* Mutty Lall Mookerjee, 52.
 Dinomoyi Debi Chowdhraani *v.* Roy Luchmiput Singh Bahadoor, 710.
 Doolar Chand Sahoo *v.* Lalla Biseahur Dyal, 577.
 " Lalla Chabeel Chand, 577.
 Dooli Chand *v.* Birj Bhookun Lal Awasti, 734.
 Doorganath Roy *v.* Ram Chunder Sen, 375.
 Doorga Persad Singh *v.* Doorga Konwari, 540.
 Dorab Ally Khan *v.* Abdool and Ahmedollah, 519.
 Drig Bijai Singh *v.* Gopal Datt Panday, 715.
 FORESTER *v.* Secretary of State for India in Council, 405.
 GAJADHUR PERSHAD *v.* Widows of Emam Ali Beg, 148.
 Ganendro Mohun Tagore *v.* Rajah Jotendro Mohun Tagore, 46.
 Girdhari Singh *v.* Hurdeo Narain Sahoo, 294.
 Gokuldass Gopuldass *v.* Murli and Zalim, 514.
 Gossain Luchmi Narain Poori *v.* Pokhraj Singh Din Dyal Lal, 581.
 Gour Chunder Roy *v.* Protap Chunder Dass, 760.
 Gouri Shunker *v.* Maharajah of Bulrampore, 567.
 Griaah Chunder Chuckerbutty *v.* Biseswari Debia, 776.
 " Jibaneswari Debia, 776.
 Gunesh Lal Tewaree *v.* Sham Narain, 773.
 Gunga Persad *v.* Inderjit Singh, 132.
 HART *v.* Avigno, 409.
 Het Narain Singh *v.* Ram Pershad Singh, 783.
 Hira Lall *v.* Budri Dass, 761.
 Hurdeo Bux *v.* Jowahir Singh, 427, 607.
 Hurlpurshad *v.* Sheo Dyal, 304.
 Hurronath Roy *v.* Gobind Chunder Dutt, 116.
 Hurropersand Roy Chowdhry *v.* Shamapersand Roy Chowdhry, 495.
 Hurro Soondari Debia Chowdhraani *v.* Kesub Chunder Achariya Chowdhry, 643.
 Hursuhai Singh *v.* Syud Looft Ali Khan, 56.
 IMRIT KONWAR *v.* Roop Narain Singh, 612.
 Indromoni Chowdhraani *v.* Behari Lal Mullick, 719.
 Irvine *v.* Union Bank of Australia, 394.
 JARDINE SKINNER & Co. *v.* Rani Surut Soondari Debi, 550.
 Jeebnath Singh *v.* Court of Wards, 142.
 Joymungul Singh Bahadoor *v.* Mohun Ram Marwaree, 145.
 Juggernath Bhramarbar Roy *v.* Ram Gobind Juggodeb, 802.
 Juggernath Sahoo *v.* Syud Shah Mahomed Hossein, 61.
 Juggodumba Dasse *v.* Tarakant Bannerjee, 604.

Jumona Dasrya Chowdhraim v. Barnasoodari Dasrya Chowdhraim, 252.
Juneswar Doss v. Mahabeer Singh, 222.

KALI KISHEN TAGORE v. Jodoo Lal Mullick, 656.
Kamarunnissa Bibi v. Hussaini Bibi, 804.
Kansai Lal Dutt v. Sreemutty Sudhamoni Dasrya, 210.
Karunabdhii Ganesa Ratnamaiyar v. Gopala Ratnamaiyar, 740.
Khajooroonnissa v. Roomshum Jehan, 287.
Khajooroonnissa v. Ryeasoonnissa, 182.
Kishendatt Ram v. Mumtas Ali Khan, 637.
Kishna Nund Miar v. Superintendent of Encumbered Estates, Mehdowna, 649.
Koer Poreah Narain Roy v. R. Watson & Co., 157.
Konwar Doorganath Roy v. Ram Chunder Sen, 375.
Kriehna Behari Roy v. Banwari Lal, 213.

LAKSHMAN DADA NAIK v. Ramchandra Dada Naik, 778.
Lall Seetla Bux v. Ramee Janki Koer, 474.
Lal Shunker Bux v. Ramee Janki Koer, 474.
Lala Sham Soondur Lal v. Sooraj Lal, 298.
Lekraj Kusar v. Mahpal Singh, 704.
Lekraj Roy v. Kunhya Singh, 453.
Lokhee Narain Roy Chowdhry v. Kallypuddo Bando-padhya, 122.
Luchmun Singh v. Shumshere Singh, 67.
Lulloobhoy Bappuobhoy v. Casibai, 795.

MADRAS RAILWAY COMPANY v. Zemindar of Carvetinagarum, 36.
Maharajah of Bulrampore v. Gopal Datt Panday, 715.
" " " " " Uman Pal Singh, 566.
Maharajah "Drig Bijai Singh v. Gopal Datt Panday, 715.
Maharajah Joymungul Singh Bahadoor v. Mohun Ram Marwarree, 145.
Maharajah Pertab Narain Singh v. Maharanee Subhao Koer, 458.
Maharajah Radha Proshad Singh v. Baboo Umbica Persad Singh, 631.
Maharajah Rajender Kishore Singh v. Rajah Sahab Perhlad Sein, 27.
Maharajah Ram Kissen Sing v. Rajah Sheonundun Sing, 151.
Maharani Rajroop Koer v. Syed Abdool Hossein, 816.
Maashaya Shoshinath Ghose v. Srimati Krishna Soondari, 812.
Mahomed Aga Ali Khan Bahadoor v. Widow of Balmakund, 330.
Mahomed Altaf Ali Khan v. Ahmed Bukah, 235.
Mahomed Ameer Hussun Khan v. Thakoor Monoo Singh, 85.
Mahomed Ewas v. Birj Lal, 438.
Mahomed Shumsool Hooda v. Shewukram, 43.
Malika Jahan v. Deputy Commissioner of Lucknow, 584.
Manwar Ali v. Unnoda Pershad Roy, 697.
Marcar v. Sigg, 742.
Mayor of Lyons v. Advocate General of Bengal, 244.
Meer Mahomed Hossein v. Forbes, 32.
Mehdi Begum v. Roy Huri Kishan, 333.
Mirza Ahmed Abbas Khan v. Sah Muthra Dass, 175.
Mirza Mahomed Aga Ali Khan Bahadoor v. Widow of Balmakund, 330.
Mohima Chunder Roy v. Durga Monee, 79.
Moniram Kolita v. Kerry Kolitany, 765.
Monmohini Dasi v. Itchamoyi Dasi, 161.
Mookerjee v. Mookerjee, 52.
Moulvie Mohamed Shomsool Hooda v. Shewukram, 43.
Mukhun Lal Panday v. Sah Koordun Lal, 170.

Murtam Hossein v. Bibi Bechunnissa, 342.
Muttu Ramalinga Setupati v. Perianayagum Pillai, 17.
Mussumat Adit Kooer v. Gunga Pershad Singh, 600.
Mussumat Bannoo v. Kaashee Ram, 490.
Mussumat Basmati Kowari v. Baboo Kirut Narain Singh, 753.
Mussumat Imrit Konwar v. Roop Narain Singh, 612.
Mussumat Kamarunnissa Bibi v. Hussaini Bibi, 804.

NAGARDAS SAUBHAGYADAS v. Conservator of Forests, 790.
Narain Doss v. Nursingh Doss, 349.
Narayanrao Ramchandra Pant v. Ramabai, 617.
Narain Singh v. Shimbhoo Singh, 857.
Nawab Malka Jahan Sahiba v. Deputy Commissioner of Lucknow, 584.
Nawab Syed Asghar Ali v. Dilrus Bannoo Begum, 444.
Nawab Umat-uz-Zohra v. Nawab Mirza Ali Kadr, 601.
New Beerbhoom Coal Co. v. Boloram Mahata, 737.
Nidhomonni Debya v. Saroda Pershad Mookerjee, 338.
Nilamoni Patta v. Radhamoni Patta, 447.
Nilmoney Deo Bahadoor v. Modhoo Soodun Roy, 547.
Nilmoney Singh Deo Bahadoor v. Kally Churn Bhuttacharjee, 77.
Nittokimsoore Dosses v. Jogendro Naurth Mullick, 595.
Norender Narain Singh v. Dwarka Lal Mundur, 480.
Nursingh Doss v. Narain Doss, 349.

OOMRAO BEGUM v. Nawab Nazim of Bengal, 165.
Orde v. Skinner, 788.

PARCHAT v. Zalim Singh, 436.
Pauliem Valloo Chetti v. Pauliem Sooryah Chetti, 387.
Periasami alias Kottai Tevar v. Representatives of Salugai Tevar, 508.
Phoolbas Koonwur v. Lalla Jogeshur Sahoy, 236.
Poorn Singh v. Government of India, 141.
Poreah Narain Roy v. R. Watson and Co., 157.
Prem Narain Singh v. Parasram Singh, 400.
" " " " " Rooder Narain Singh, 400.
Prosonno "Gopal Pal Chowdry v. Brojonath Roy Chowdry, 340.
Prosonno Kumari Debya v. Golab Chand Baboo, 102.

QUEEN v. Burah, 556.

RADHA GOBIND ROY v. Inglis, 809.
Radha Mohun Mundul v. Jadoomonee Dosses, 127.
Radha Proshad Singh v. Collector of Shahabad, 485.
" " " " " Ramcoomar Singh, 485.
" " " " " Umbica Persad Singh, 631.
Rai Narain Doss v. Rai Nursingh Doss, 349.
Rai Nursingh Doss v. Rai Narain Doss, 349.
Raj Bahadoor Singh v. Achumbit Lal, 598.
Rajah Ameer Hussun Khan v. Mukhdoom Singh, 195.
Rajah Bijai Bahadur Singh v. Baboo Byron Bux Singh, 690.
Rajah Kishendatt Ram v. Rajah Mumtas Ali Khan, 637.
Rajah Mahomed Ameer Hussun Khan v. Thakoor Monoo Singh, 85.
Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai, 17.
Rajah Nilmoney Deo Bahadoor v. Modhoo Soodun Roy, 547.
Rajah Nilmoney Singh Deo Bahadoor v. Kally Churn Bhuttacharjee, 77.
Rajah Parichat v. Zalim Singh, 436.
Rajah Sri Chaitanya Chundra Harischandana Jagadevu Bahadoor v. Collector of Ganjam, 30.
Rajah Vellanki Venkata Krishna Row v. Venkata Rama Lakshmi Narayya, 353.

Rajah Venkati Narasimha Appa Row Bahadur v. Rajah Narayya Appa Row Bahadur, 725.
 Rajah Vurmah Vahlia v. Rani Vurmah Mutha, 382.
 Rajender Kishore Singh v. Sahab Perhlad Sein, 27.
 Rajmohun Roy v. Biseswari Debia, 776.
 " Jibaneswari Debia, 776.
 Rajroop Koer v. Abdool Hossein, 816.
 Ramasawmi Aiyar v. Vencataramaiyan, 663.
 Ramasawmi Chetti v. Collector of Madura, 646.
 Ram Chunder Bysack v. Dinonath Surma Sircar, 659.
 Ram Coomar Coondoo v. Chunder Canto Mookerjee, 361.
 Ramdeen Singh v. Shumshere Singh, 67.
 Ramjiadas and Imtiaz Ali v. Rajah Bhagwan Bax, 562.
 Ram Kissen Sing v. Sheonundun Sing, 151.
 Ram Krishna Das Surrowji v. Surfunnissa Begum, 755.
 Ram Sabuk Bose v. Monmohini Dossee, 72.
 Ram Sahoy v. Balmokand, 304.
 " Sheo Dyal, 304.
 Ram Tuhul Singh v. Biseswar Lall Sahoo, 135.
 Ranees of Chillaree v. Government of India, 12.
 Ranees Khajooroonissa v. Ranees Ryesoonnissa, 182.
 Ranees Lekraj Kuar v. Baboo Mahpal Singh, 704.
 Ranees Rughubuns Kuar v. Baboo Mahpal Singh, 704.
 Ranees Ryesoonnissa v. Ranees Khajooroonissa, 182.
 Ranees Sonet Koer v. Mirza Himmud Bahadoor, 257.
 Ranees Surrut Soondree v. Prangobind Mozoomdar, 657.
 " Soorjya Kant Acharjya, 260.
 " R. Watson and Co., 157.
 Reasut Hossein v. Hadjee Abdoolah, 300.
 Rughoobur Dyal Sahoo v. Maharajah Kishen Pertab Sahi, 670.
 Rughubuns Kuar v. Mahpal Singh, 704.
 Ryesoonnissa v. Khajooroonissa, 182.
 SADASIVA PILLAI v. Ramalinga Pillai, 190.
 Sah Mukhun Lall Panday v. Sah Koondun Lall, 170.
 Sarat Sundari Debya v. Soorjya Kant Acharjya, 260.
 Sayad Mir Ujmuudin Khan v. Zia-ul-Nissa Begum, 633.
 Secretary of State for India in Council v. Forester, 405.
 Seetla Bux v. Janki Koer, 474.
 Seth Gokuldass Gopuldass v. Murli and Zalim, 514.
 Seth Sameer Mull v. Choga Lall, 688.
 Seth Seetaram v. Arjoon Singh, 15.
 Shammarnain v. Administrator General of Bengal, 64.
 Sharn Soondur Lal v. Sooraj Lal, 298.
 Sheo Singh Rai v. Mussamut Dakho and Moorari Lall, 529.
 Sheo Soondary v. Pirthee Singh, 411.
 Shere Bahadur Sing v. Dariso Koer, 472.
 Shosinath Ghose v. Krishna Soondari, 812.
 Shunker Bux v. Janki Koer, 474.
 Shunker Sahai, widow of, v. Rajah Kashi Pershad, 4.
 Skinner v. Orde, 627.
 Sonet Koer v. Mirza Himmud Bahadoor, 257.
 Sookraj Koer v. Government of India, 1.
 Sri Gajapathi Nilamani Patta v. Sri Gajapathi Radhamani Patta, 447.

Sri Virada Pratapa v. Sri Brozo Kishoro Patta Deo, 263.
 Srimati Uma Deyi v. Gokoolanund Das Mahapatra, 499.
 Srimutty Nittokissorees Dossee v. Jogendro Nauth Mullick, 505.
 Strimathoo Moothoo Vija Ragoonadah Ranees Kolandapuree Natchiar v. Dorasinga Tever, 106.
 Stri Raja Vyricherla Raz Bahadoor v. Nadiminti Bagavat Sastri, 215.
 Suraj Bunsu Koer v. Sheo Prosad Singh, 589.
 Surrut Soondree v. Prangobind Mozoomdar, 651.
 " Soorjya Kant Acharjya, 260.
 " R. Watson and Co., 157.
 Syud Meer Wahid Ali v. Ranees Sadha Bibee, 82.

TAGORE v. Tagore, 46.
 Takait Doorga Persad Singh v. Tekaitni Doorga Konwari, 540.
 Thakoor Hurdeo Bux v. Thakoor Jawahir Singh, 427, 607.
 Thakoor Jeebnath Singh v. Court of Wards, 142.
 Thakoor Shere Bahadur Sing v. Thakoorain Dariso Koer, 472.
 Thakoorain Sookraj Koer v. Government of India, 1.
 Thumbassawmy Mudelly v. Mahomed Hossain Rowthen, 198.
 Tiery. Executor of, v. Ashootoah Dhur, 785.
 Tiru Krishnama Chariar v. Krishnasawmi Tata Chariar, 620.
 Toondun Singh v. Baboo Pokhnarain Singh, 31.
 Trilokinath. *In re*, 531.

UJMUUDIN KHAN v. Zia-ul-Nissa Begum, 633.
 Uma Deyi v. Gokoolanund Das, 499.
 Umat-uz-Zohra v. Mirza Ali Kadr, 601.
 Unnoda Dabee v. Stevenson, 41.

VADREVU RANGANAYAKAMMA v. Vadrevu Bulli Ramaiya, 680.
 Valloo Chetti v. Sooryah Chetti, 387.
 Vasudev Sadaashiv Modak v. Collector of Rutnagiri, 391.
 Vellanki Venkata Krishna Row v. Venkata Rama Lakshmi Narsayya, 353.
 Vencatavarada Iyengar v. Venkata Luchmamal, 58.
 Venkata Narasimha Appa Row Bahadar v. Narayya Appa Row Bahadur, 725.
 Virada Pratapa v. Brozo Kishoro Patta Deo, 263.
 Vurmah Valia v. Rani Vurmah Mutha, 382.
 Vyricherla Raz Bahadoor v. Nadiminti Bagavat Sastri, 215.

WAHID ALI v. Ranees Sadha Bibee, 82.
 Watson and Co. v. Moheah Narain Roy, 159.
 Widow of Shunker Sahai v. Rajah Kashi Pershad, 4.
 Wise v. Ameerrunnissa Khatoon, 730.
 " Collector of Backergunge, 730.

ERRATA.

- Page 27. After "appointed" (line 14) insert "to."
" " For "Reg. II of 1805 s. 8" (in short heads) read "Reg. II of 1805 s. 3."
" 136. For "Act XL of 1859" (line 1 of Marginal Note, and line 5 of Judgment) read "Act XI
of 1859."
" " For "was gone" (last line of Marginal Note) read "has gone."
" 656. For "Jadoo Lal Mullick" (end of the page) read "Jodoo Lal Mullick."
" 783. For "See ante p. 131" (in foot note) read "See ante p. 589."

J U D G M E N T S
OF THE
P R I V Y C O U N C I L
ON
A P P E A L S F R O M I N D I A.

The 3rd July 1871.

Present:

Sir James W. Colville, Lord Justice James, Lord Justice Mellish,
and Sir Lawrence Peel.

*Oudh Estates Act (I of 1869)—Government Letter of 10th October 1859—
Trustee.*

On Appeal from the Court of the Financial Commissioner of Oudh.

Mussamut Thakoorain Sookraj Kooer

versus

The Government of India and others.

The Government letter of the 10th October 1859, published in Schedule I annexed to Act I of 1869, gave the registered talookdar the absolute legal title as against the State and against adverse claimants to the talookdaree; but it did not relieve the talookdar from any equitable rights to which he might have subjected himself with a view to the completion of the settlement by his own valid agreement.

In this case the plaintiff (appellant) was the acknowledged *cestui que trust* of the registered talookdar, who had bound himself expressly in writing that he would respect her rights if she permitted him to be alone so registered. She being clearly the equitable owner, the decree of confiscation against her trustee could, on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which in effect made her a sufferer for his offence.

*Sir Roundell Palmer, Q.C., and Mr. Doyne for Appellant.
Mr. Forsyth, Q.C., and Mr. H. C. Merivale for the Government.*

Lord Justice James delivered the judgment of their Lordships as follows:—
Their Lordships do not desire to hear any reply in this case.

The plaintiff, the appellant, is the widow and heir of a deceased Oudh nobleman, the representative of the cadet branch, as the Rajah of Bengha is the representative of the elder branch of a great Oudh family. The Rajah was the talookdar of a great talook. The cadet branch had their separate ancestral estate, the Gowa estate, wholly distinct from and independent of the talook of the elder branch. But many years ago, it was in the then state of things in Oudh thought desirable that both estates should be, as to their relations with the Oudh Government, united in one great talookdaree, the head of the elder branch representing the whole, whether in submission or in resistance to the exactions of the Court of Lucknow; the younger branch continuing, however, in undisturbed and absolute possession as the proprietor of its own villages, and paying only its proper proportion of the jumma assessed on the whole. This

was the state of things at the time of the annexation of Oudh by the British power. While the British authorities were in course of making the settlement of their new acquisition, the husband of the appellant was minded to apply for a distinct settlement with himself, there being no longer the motive, as he thought, for covering himself with the name and protection of the Rajah. He apparently thought that under British law and British rule his estate would be as safe as the domain of the most powerful talookdar.

The Rajah, however, wrote to dissuade him from this step in a letter in which, while desiring to retain the nominal talookdaree of the whole, he acknowledges in the clearest terms the right of his relation, and pledges himself that the possession of the latter shall be respected and safe.

Before anything was done, the great outbreak in Oudh took place. After it was subdued, the arrangements for a settlement were resumed. In the meantime the plaintiff's husband had died; the Rajah hearing that the widow, the plaintiff, was of the same mind as her husband, desirous of placing herself immediately under the British Sircar, wrote her a letter similar to the one he had formerly addressed to her husband.

The summary or provisional settlement was made with the Rajah; but before the Rajah had obtained his regular settlement, and the Sunnud which would have been his formal grant, he incurred the grave displeasure of the authorities. Some arms being found concealed by him, a decree went forth confiscating half his estate. The Rajah concealed from the Government official the real ownership of the plaintiff's villages, and contrived that they should be taken to satisfy the decree of confiscation. The plaintiff naturally remonstrated and petitioned, but in vain; she petitioned again, and again her petition like the first was unheeded. At length, however, she succeeded in obtaining a hearing. She was told to bring, and did bring, her suit for the restitution of her villages. The case was investigated with a care which cannot be too highly praised, and the Assistant Commissioner acting as Judge pronounced in the lady's favour, that she was entitled to have the villages settled with her as a subordinate tenure to the talook. From this decision, an appeal was presented to the Deputy Commissioner, who, thinking that there were some technical deficiencies in respect of some of the details, desired a still further and fuller investigation. The result was, that the Assistant Commissioner re-stated his former conclusion and judgment, but with a modification that the settlement was to be made with her directly, and not as a sub-proprietor; and the Deputy Commissioner, who had evidently taken great pains with the case, affirmed that decision.

The matter should have rested there. It appears, however, that the plaintiff's villages had been included in a grant to an Oudh loyalist, in reward for his loyal services to the State, and it was thought that it would be very embarrassing if the grantee were to be obliged to give up the subject of his grant to the rightful owner; and, accordingly, a further appeal was made to the Chief Commissioner, who reversed the decrees of the subordinate officers, and the poor widow was thereby left stripped of her whole property. From this decree the present appeal is brought.

It has been attempted to be justified on the legislation * which existed in Oudh on the effect of the new settlement, and on the well-known letters of the Governor-General in Council, addressed to the landowners of Oudh; the one announcing the confiscation of existing tenures, and making a *tabula rasa*, the other the letter of grace and restoration. It is contended that the effect of the settlement with the Rajah under the second letter was to make him the absolute owner of the whole estate, including what had been the plaintiff's village.

Their Lordships are satisfied that that legislation and that letter have no such effect. The object and meaning of that letter are well known and very clear.

* Act I of 1869.

Soon after the annexation, it was suggested that the true and normal proprietorship of land in Oudh was that ownership by village communities which had been discovered or established in the North-West Provinces, and that the alleged talookdaree and zemindaree rights were simply a recent usurpation due to the violence and fraud which had marked the last years of the Oudh monarchy; that at all events many of the individual talookdars and zemindars had by violence and fraud or the corruption of the Government possessed themselves of other people's estates. The old question, moreover, was further mooted whether a zemindar was really an hereditary landlord or only a Government functionary.

The talookdars and zemindars were threatened with an universal *quo warranto*.

It was to announce the abandonment of this policy and to quiet men's titles and possessions that the letter was written. It said, in substance, we acknowledge the talookdaree tenure—we acknowledge that that tenure does confer an hereditary lordship descendible in fee simple, and we will not allow the existing titles to be disturbed by old dormant claims. At the same time we preserve, in like manner, all the rights of your subordinate zemindars and ryots, whose rights and the rights of persons entitled to Seer and Nanka you shall respect as we respect yours. For that purpose and to that extent an absolute title was given to the person who was settled with as talookdar, with the fullest powers of alienation, and consequently of binding his right by contract, so that effect may be given to the rights of persons not claiming adversely to the registered title, but claiming, by agreement with him, an old estate, consistently with that title. In English language, it gave the registered talookdar the absolute legal title as against the State and against adverse claimants to the talookdaree; but it did not relieve the talookdar from any equitable rights to which he might have subjected himself with a view to the completion of the settlement by his own valid agreement. In this case the plaintiff was the acknowledged *cestui que trust* of the registered talookdar, who had bound himself expressly in writing that he would respect her rights if she permitted him to be alone so registered.

It would be a scandal to any legislation if it arbitrarily and without any assignable reason swept away such rights; and in this very painful case it is at all events agreeable to their Lordships to find that no such scandal attaches to the laws or regulations or Government Acts in force in Oudh; and that the cruel wrong of which this lady has been the victim is due to the misapprehension of the law by the Commissioner.

It is almost superfluous to observe that the lady being clearly, as she was, the equitable owner, the decree of confiscation against her trustee could on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which in effect made her the sufferer for his offence.

Their Lordships are therefore of opinion and will recommend that the judgment of the Financial Commissioner be reversed, and that the judgment of the Deputy Commissioner affirming the decision of the Assistant Commissioner be affirmed.

The appellant will have her costs of this appeal, and also the costs of the proceedings in both the Courts below.

Their Lordships cannot but express a hope that by an act of prompt justice and a liberal estimate of what is due to this lady, the Government will relieve her from further litigation. She had two decisions in her favour carefully and correctly adjudged, which, as they were consistent with the plainest principles of justice, it should have been the effort of an Appellate tribunal, unless the law controlled it, to maintain.

The 29th July 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Oudh Estates Act (I of 1869)—Order of Government of India of 10th October 1859—
Oudh Sub-Settlement Act (XXVI of 1866)—Jurisdiction of Governor-General
in Council—Re-formation of Sunnud—Subordinate Zemindar—Hindoo Law of
Inheritance—Hindoo Widow.*

On Appeal from the Court of the Financial Commissioner of Oudh.

Widow of Shunker Sahai

versus

Rajah Kashi Pershad.

Quære.—Whether, since the passing of the Oudh Estates Act I of 1869, the re-formation of a Sunnud granted to any person named in the second schedule of that Act could be effected even by the Governor-General in Council, without a special Act of the Legislature.

To bring any person within the operation of the Order of the Government of India (set out in the first schedule of the above Act) which declared that every talookdar with whom a Summary Settlement had been made since the re-occupation of the province, had thereby acquired certain rights, he must be shown to be one with whom a Summary Settlement was made between the 1st April 1858 and the 10th October 1859 as talookdar.

The appellant, because she originally claimed the superior, was held not barred now from asserting any subordinate right to which she may be entitled. Treating her interest, therefore, in the villages in question as that of a subordinate zemindar, or one entitled to and liable to make a sub-settlement for them, her liability to pay 10 per cent. to the talookdar, over and above the Government demand, was held to depend upon the effect of the provisions of the Oudh Settlements Act XXVI of 1866.

As the proprietor of certain villages and rights within a talook which she acquired by inheritance from her husband, her estate was held to be, not a life interest, but the estate of inheritance of a Hindoo widow with all its rights and liabilities.

Mr. Leith, Q.C., and Mr. J. H. W. Arathoon for Appellant.

Mr. Cowie, Q.C., and Mr. J. D. Bell for Respondent.

The respondent, the talookdar of Sessendee, is one of the six loyal talookdars who were excepted by name in Lord Canning's Proclamation of the 15th March 1868, from the general sentence of confiscation thereby pronounced against the landholders of Oudh; and, as such, has had his name entered in the second schedule annexed to the "Oudh Estates Act" (No. 1 of 1869), pursuant to the provisions of the fourth section of that statute. The questions raised by this appeal are, how far the rights of the respondent are affected by the conflicting rights which the appellant possesses in certain of the villages comprised in his talook, and what effect can or ought now to be given to the latter as against him.

The family connection between the parties is of this kind: one Imrit Loll had three sons, Koondun Loll, Mohun Loll, and Seetaram. The pedigree at p. 2 of the respondent's case states that Seetaram left descendants, but that they have no interest in the property; and, however this may be in point of fact, Seetaram may, for the purposes of this appeal, be treated as having died childless. Koondun Loll died in 1838, leaving one son, Shunker Sahai (also deceased), of whom the appellant is the widow, heiress, and representative. The other son, Mohun Loll, died in 1837, leaving a daughter, who is the wife of the respondent.

The talook came into this family by gift from one Bussunt Koonwur. The gift was made nominally to Shunker Sahai, but, as the respondent alleges, really in favour of Imrit Loll. It is immaterial to consider how this was, because it is admitted on all hands that either by virtue of pre-existing family arrangements, or of the proceedings had since the annexation of Oudh, the appellant can now only

claim the whole proprietary right in four, and a one-third share in seven others of the twenty-six villages which compose the talook ; the full proprietary right in the remaining fifteen villages belonging to the respondent.

The fiscal history of the talook is thus given at p. 11 of the Record :—" It is admitted that Mohun Loll died in 1243 F., Koondun Loll in 1244 F., Shunker Pershad in 1248 F.; that from 1243 F. to 1250 F. the engagements for the Government revenue of the Talook were taken from the widow of Mohun Loll, those from 1251 F. to 1256 F. from the widow of Shunker Sahai, those from 1257 F. to 1259 F. from the widow of Mohun Loll, and those from 1260 F. to 1263 F. from Kashi Pershad, who had married Mohun Loll's only daughter, the widows being both alive." Hence it appears that in 1856, when the annexation of Oudh took place, the respondent was the ostensible talookdar, and he appears to have continued to be such at the date of Lord Canning's Proclamation.

The present litigation began in March 1864, when the appellant commenced proceedings against the respondent in the Court of the revenue officer engaged in making the regular settlement. The record, which is in other respects but loosely made up, contains only the pleadings as to one of the seven villages ; and therefore it does not clearly appear what was the precise case which she made in respect of the four villages of which she claimed to be the sole proprietor. The nature of her claims touching all but the one village in question, is only to be gathered from the judgments afterwards to be considered, of which some appear to have dealt with her whole claim.

The plaint set forth in the Record prays, " that the settlement of the proprietary and sub-proprietary rights to one-third share in the village may be made with plaintiff, according to the provisions of s. 167 of the directions to Settlement Officers, and of s. 31 of Circular No. 2, and that the wajiboorlurz (written representation) may be recorded by the petitioner." This prayer, whether it does or does not amount to a prayer for talookdary rights as such, when distinguished from ordinary zemindary rights, as understood in Oudh, unquestionably imports a claim for a direct settlement of the appellant's share of the village with her, independently of any superior.

On the 16th April 1864, the respondent put in a petition insisting on the absolute right conferred upon him by the proclamation of March 1858 ; and objecting to the appellant's being treated even as under proprietor, as, according to the settlement papers, she does not possess these rights. (Appendix, p. 2.)

In answer to this the appellant's agent, on the 11th May 1864, put in a petition in which he entered into the history of the talook before the annexation of Oudh ; insisted in paragraph 4 on the provisions made by the British Government for the protection and maintenance of the rights of persons in possession, and the rights and possession of under-proprietors ; and after stating, in paragraph 7, " That if in consideration of the estate having been formally gained by the husband of petitioner's client who is in the possession of the same, she is entitled according to law to superior right, the objection of the Bajah's mookhtear to the settlement of under-proprietary right with her cannot be held valid ; " he concluded with the expression of a hope that after due enquiry a decree for the possession of the entire estate of Sessendee might be passed in the plaintiff's favour. (Appendix, p. 4.)

Mr. Capper, the Settlement Officer, who tried the case in the first instance, came to the following conclusions :—

First.—That the appellant's claim to the entire talook as given to her late husband, was barred by the grant of the talook by Government to the respondent.

Secondly.—That this did not affect her claim to hold pookhta as under-proprietor, villages which were the proprietary of her husband, and which she was holding in 1855-1856 A.D. ; as to which appropriate orders would be issued.

Thirdly.—That the claim to share in the proceeds of the joint collections of other villages in which she had no distinct proprietary possession in 1855-1856 was.

barred by the rules which admit no share in a talook. And he added the following observations :—"The common collection must be held to be that of the talookdar, and any distribution of the proceeds must be held to be his voluntary act granting maintenance to his relations. By the local rules these can only be enforced when the talookdar has bound himself in writing to continue it. If such document exist, it can be separately adjudicated." (Appendix, p. 11.)

His final decree in the case of the particular village sued for by the plaintiff, set out in the Record, was in these words, "I dismiss the claim of the widow of Shunker Sahai to under-proprietary title in one-third of Mouzah Sessendee Khas, and decree full under-proprietary title to Rajah Kashi Pershad." (Appendix, p. 12.)

On appeal this decree was confirmed by Mr. Currie, the Settlement Commissioner, on the 22nd September 1864. In his judgment (p. 14) he states that, although in the Lower Court the appellant had claimed only one-third of Mouzah Sessendee in under-proprietary right, she had before the Appellate Court laid claim to the whole ; that he refused to admit an appeal for a larger portion than was claimed in the Lower Court ; that her claim, such as it was, was barred by the respondent's sunnud ; that any possession which she may have had in the village was of a proprietary, not of an under-proprietary character, and that possession of a proprietary character could not entitle a person to be recognized as an under-proprietor. He added that, inasmuch as the respondent had voluntarily agreed to allow the appellant to retain possession of her one-third of the profits for the term of her life, the Settlement Officer, if she applied for the benefit of this concession, and gave security not to disturb the respondent further, should take the necessary steps to secure her the rights conceded.

Their Lordships have to observe on this decision that the reasoning on which it is based applies only to the particular village of Sessendee Khas, and the other six in respect of which the appellant claimed one-third of the profits. It has no application to the four villages of which she claimed the full proprietary right, and the Record fails to show distinctly what proceedings were had in respect of the latter after Mr. Capper's judgment of the 23rd May 1864.

From Mr. Currie's order the appellant brought a special appeal before Mr. Davies, the Financial Commissioner, which that officer dismissed on the 6th December 1864, regretting that he was legally debarred from interfering with orders of the Lower Courts. And on the 10th July 1865 he rejected a subsequent petition for review of judgment, stating that "he fully admitted the hardship of the case, but was unable to point out any legal remedy at present." The first of these orders may have been passed under some doubt as to the powers of the Financial Commissioner. But no such doubt can have existed in July 1865, when the petition for review was rejected, since Act XVI of 1865, which received the assent of the Governor-General on the 7th April 1865, had been passed intermediately to remove such doubts. On the 18th July 1865 the appellant presented a long petition to the Financial Commissioner, which was the commencement of the proceedings out of which this appeal has directly arisen (Appendix, p. 18). This document is in terms confined to the previous adjudication concerning the single village of Sessendee Khas. It complains, first, that no distinct issue whether the appellant was or was not in proprietary possession of a third share in Mouzah Sessendee had been regularly settled and tried in the suit. It contends that such possession was established by, amongst other evidence, a Kheut and settlement statement forming part of the proceedings on the summary settlement of 1858. It then contests the conclusions of the Settlement Commissioner, in his order of the 22nd September 1864, to the effect that the appellant's claim was barred by the respondent's sunnud ; and that any possession which she may have had in the village having been of a proprietary, and not of an under-proprietary character, it could not entitle her to be recognised as under-proprietor. It then cites certain paragraphs of a Circular Letter, No. 6 of

1862, and submits that the petitioner's case falls within the 6th of those paragraphs, and entitles her to have it referred for the orders of the Governor-General in Council, in order to have the respondent's sunnud re-formed. The prayer of this petition was that the Court would be pleased to decree to her the continuance and enjoyment of the rights she was entitled to under and by virtue of the Kheut and Settlement Statement A; or to refer the case for the order of the Governor-General in Council, in conformity with the ruling laid down in paragraph 6 of Circular No. 6 of 1862.

This application would seem, from a petition filed by the respondent, on the 21st March 1866 (Appendix, p. 20), to have been heard by the Financial Commissioner on the 1st March, *ex parte*. The petitioner complained of this, and finally begged that if his objections were not still to be heard, his petition might be forwarded to his Excellency the Governor-General in Council, with the report which the Financial Commissioner proposed to make in the case. The first step taken by the Financial Commissioner was to write, on the 28th March 1866, the letter to the Secretary of the Chief Commissioner of Oudh, which is at p. 21 of the Record.

The important paragraphs in that letter are the following :—

"2. The widow brought her claims in the regular way before the Courts, both for the proprietary rights and then for under-proprietary rights; but it was held that her suit for the first was barred by the sunnud being in the name of Rajah Kashi Pershad only, and for the second because any title she may have had independently of our arrangements must have been to full proprietary rights, and that she had none to rights held in subordination to the talooqua.

"3. But having allowed her case to be again argued by Counsel, I find that although the sunnud was made out in the name of Rajah Kashi Pershad alone, it is not in agreement with the orders for the settlement of 1858 A.D.

"4. That settlement was made by a proceeding of Captain L. Barrow, Special Commissioner of Revenue, a translation of which is annexed for reference. It will be seen that after stating that in 1264 F. (1856 A.D.), fifteen villages were settled with the talooqdar (Rajah Kashi Pershad), four* with the widow of Shunker Sahai, and seven with both as co-partners, and that in the co-parcenary villages two-thirds belonged to the talooqdar, and one-third to the widow, the Record goes on as follows: 'It is therefore ordered that the triennial settlement of the talooqua be made with Rajah Kashi Pershad, Talooqdar, on a Jumma of Rs. 23,251, according to the assessment of 1264 F., and that the widow of Shunker Sahai be recorded as co-partner.'

"5. The widow's name was duly entered in the Kheut as one-third owner of the seven villages referred to, but this document would be of no effect *per se*, and apart from the specific recognition of the widow's right in the settlement proceeding.

"6. According to the Governor-General's Order of the 10th October 1859 it is ruled that talooqdars with whom the summary settlement was made, thereby acquired the proprietary title in their talooquas. This order is generally held to be law. It would follow, therefore, that the widow is entitled to have her name entered in the talooqdaree sunnud as owner of the four villages, and in one-third of the seven villages, her proprietary right to which was affirmed by the settlement proceeding."

"13. If the case were within the ordinary jurisdiction of the Courts, nice questions would arise as to the right of the widow of Shunker Sahai to more than a life-interest in her husband's estate, and as to the title of the husband of her brother-in-law's widow to succeed to it. But there is no occasion to discuss these. The talooqdar's title is good under his sunnud, but it appears to me that the widow's is equally good to her share as defined under the proceeding of summary settlement.

"14. It should be mentioned that Rajah Kashi Pershad is one of those talooqdars whose proprietary rights were specially reserved in the Proclamation of the Governor-

* For these four villages the widow has obtained a sub-settlement after a good deal of litigation. Their names are 1, Uttergaon; 2, Deburreha; 3, Bursowan; 4, Kurrowlee.

General, under which the soil of Oudh was confiscated. The Rajah maintains that he thus became proprietor of the whole talooqua, how many soever shareholders there may have been previously. Without discussing this point on its merits, I may observe that it is not available to the Rajah in the particular case, as the terms of the Government Order of the 10th October 1859 are distinct, that those with whom the summary settlement was made became *ipso facto* proprietors without reference to any antecedent rights.

"15. As much stress is laid on the rigid maintenance of the literal terms of the settlement of 1858, and as the widow has gone to much expense to have the case argued on that ground, I hold that it is not open to me to do otherwise than state the case as above for the consideration of the Chief Commissioner."

There is considerable confusion in the Record as to what was done, or intended to be done, on this report. This is a question which will be hereafter considered. One thing is certain, that nothing final was done until the 7th November 1868, when Colonel Barrow, who had then become Financial Commissioner, made an order, of which the substance is contained in the following paragraph:—"On these grounds, therefore, a life interest in the four villages named in the margin is decreed to the widow of Sunker Sahai, who will pay the Government demand, plus 10 per cent. only, to the talookdar: and she will be also entitled to a one-third share of the profits in the seven villages named in margin when the annual accounts are made up." Against this order the appellant, under leave of the Court in Oudh, has appealed to Her Majesty in Council, and the respondent, with the like leave, has preferred a cross appeal.

The appellant in her case describes the order as *a proceeding purporting to be a judgment* of the then Financial Commissioner; and her learned Counsel on the opening of the appeal treated the order as one made *ultra vires*. Their argument on this point seemed to assume that the memorandum of Major MacAndrew, at p. 22 of the Record, was in the nature of an order made by competent authority, which sent the case back to the Judicial Commissioner for adjudication upon one point only, viz., whether, by the summary settlement, the widow was declared entitled to the third of the whole estate, or only to the four villages and one-third of the seven. It seemed also to assume that, by the report of Mr. Davies of the 28th March 1866, whatever power the Financial Commissioner might have had to determine generally the rights of the parties on the merits was spent; and, further, that the Chief Commissioner either had determined to refer the case to the Governor-General in Council, in order to have the respondent's sunnud altered according to the result of Major Barrow's answer to the specific question referred to him, or at least had reserved to himself the power of so determining when he should receive the answer. If this were the true view of the case, it would, in their Lordships' opinion, be a very grave question whether any appeal against the order would lie to Her Majesty in Council. It was indeed suggested that the order, though made without jurisdiction, purported to be a judicial order, and consequently that the appeal would lie. But even if that were so, the utmost their Lordships could do would be to discharge Colonel Barrow's order as made without jurisdiction. They would certainly decline to adjudicate upon the propriety of the re-formation of the respondent's sunnud by the Governor-General in Council, an act to be done, not by any Court of Justice, but by the Supreme Executive Authority in India.

Their Lordships, however, having come to the conclusion that this view of the case is erroneous, do not think it necessary to consider more particularly what could or ought to have been done, had it been correct. They conceive that the argument ascribed a force and an effect to the Memorandum of Major MacAndrew which do not belong to it. That gentleman had no power or authority to direct a judicial enquiry into any matter. He was but the Secretary of the Chief Commissioner, also an executive officer. The Memorandum in question does not even purport to be an extract from a despatch written by the authority of the Chief

Commissioner. It is more like the mere memorandum of a secretary or *précis* writer submitting, for the information of his superior, his own view of the documents on which the latter was to pass an order. Again this paper is dated the 10th April 1866 ; and it appears from the Record that, on that date, the respondent was petitioning the Chief Commissioner (Appendix, p. 22) ; that the appellant's Counsel was addressing the same officer on the 6th October 1866 (Appendix, p. 24) ; that in October 1867 the appellant was memorialising the Governor-General in Council and treating the question as still open ; that the Chief Commissioner had returned the files to the officiating Financial Commissioner, suggesting that this case should be disposed of by mutual agreement or by the talookdar's association ; that some such arbitration was attempted, but that in December 1867 the appellant, dissatisfied with that course of proceeding, prayed that the trial of her case should be sent back to the Financial Commissioner ; and that, finally, both parties appeared by Counsel before Colonel Barrow, as Financial Commissioner, on the 7th November 1868, and argued their respective cases before him. The conclusion, therefore, to which their Lordships have come upon these confused, and perhaps somewhat irregular proceedings, is that the Chief Commissioner never took action upon Mr. Davies' report, in order to have the respondent's sunnud re-formed, or determined to take such action ; but that in November 1868 the case raised by the appellant's petition of the 18th July 1865, was still open for adjudication by the Financial Commissioner ; and that the order under appeal must be taken to be the final judicial order on that petition. The learned Counsel for the appellant, at the close of the argument, seemed to intimate their desire to have the case thus dealt with. The learned Counsel for the respondent, however, did not abandon their contention that the suit had been finally disposed of when Mr. Davies rejected the first petition for review ; and that the petition of the 18th July 1865, and all the subsequent proceedings, were irregular. Looking, however, to the proceedings of the Courts below, to the conduct of the respondent therein, and, indeed, to his printed case filed on this appeal, their Lordships are not disposed to adopt this view, but consider that it is open to them to review, as they will now proceed to do, Colonel Barrow's order on its merits.

The first question is, whether the appellant has made out a title to any talookdary rights. It is admitted on all hands that the respondent's sunnud, whilst it stands, is an effectual bar to her claim of such rights. And, since she has no interest in many of the villages comprised in the talook, it would apparently be necessary, in order to make her a talookdar, not only to re-form the respondent's sunnud, but also to break up the existing settlement, and to resettle the estate in three different portions. Whether, since the passing of "the Oudh Estates Act," the first of these objects could be effected even by the Governor-General in Council without a special act of legislature, seems to their Lordships to be very questionable. The second will be found to be inconsistent with the title to talookdary rights which she sets up. For it is admitted by Mr. Davies, the officer most favourable to her, that the sole foundation on which her title rests is to be found in the summary settlement of 1858, and the effect given thereto by the Governor-General's order of the 10th October 1859. In paragraph 8 of his letter he says distinctly : "It is nothing to the purpose to enquire whether the widow had any rights independent of the summary settlement, or whether under it she got more or less than she was entitled to, as its effect has been made absolute and irrevocable." It is, however, clear that, if the summary settlement did anything, it treated all the twenty-six villages as forming one talook, to be settled for with somebody as talookdar, at one aggregate jumma.

Again, their Lordships are not disposed to assent to the proposition contained in the 14th paragraph of Mr. Davies' letter, to the effect that a title derived from the summary settlement and the Governor-General's order, must be taken to override the rights acquired by the respondent under the proclamation. Before the

summary settlement the respondent had been declared sole hereditary proprietor of the lands which he held when Oudh came under British rule (he seems to have been then talookdar), subject only to such moderate assessment as might be imposed on them; and the proprietary right of all other persons in the soil stood confiscated to the British Government, which reserved to itself the right of disposing of it. He had, therefore, at the date of the settlement, the declared right to engage for the revenue. His doing so could not supersede or detract from the rights which he had already acquired, or become the foundation of his title. On the other hand, the general body of talookdars re-acquired no interest in their forfeited lands until they had been admitted to make the settlement. Accordingly, "the Oudh Estates Act," though it enacts that the estates of both classes of talookdars shall be of the same nature, and be held subject to the same conditions, recognises the distinction between them in the matter of title; and directs that the respondent and the four other loyal talookdars in the same category with him, shall have their names entered in a separate schedule.

Lastly, their Lordships are of opinion that there is no ground for holding that the summary settlement, and the subsequent order of 1859, have conferred talookdary rights on the appellant. The order declared * that every talookdar with whom a summary settlement had been made since the re-occupation of the province, had thereby acquired certain rights. To bring any person within the operation of this clause, he must be shown to be one with whom a summary settlement was made between the 1st April 1858, and the 10th October 1859, as *talookdar*. It does not appear to their Lordships that this can be predicated of the appellant. She never entered into any engagement for the revenue. From the settlement proceedings, the Statement A, and the Roobacarry (Appendix, pp. 45 and 46), it appears that the Rajah was the only person who applied for the settlement; that he sought to settle for all the twenty-six villages as one estate or talook; that he was described on the face of the proceedings as "the talookdar," the appellant being spoken of only as the widow of Shunker Sahai; and that the triennial settlement was then directed to be made, and was made with him, the Kaboolyut being taken from him alone. Undoubtedly the application of the Rajah stated the interest of the applicant both in the four and in the seven villages, and admitted that, in 1856, and immediately after the annexation of Oudh, there had been three distinct settlements of the villages, for which he was then seeking to settle as one entire estate or talook. But this latter fact, though consistent with the fiscal policy which prevailed between the annexation and the mutiny, is alike inconsistent with the policy inaugurated by Lord Canning's Proclamation, with the status of talookdar thereby assured to the respondent, and with the final order of the Settlement Officer. The construction which their Lordships would put on the words "and that the name of Shunker Sahai's widow be recorded as shareholder" is not that the Settlement Officer gave or intended to give to the appellant the right of making a summary settlement as talookdar, but simply desired to place on record, for her benefit, her admitted proprietary and beneficial interest in some, and some only, of the villages which made up the settled talook.

If this be so, the next question is to what, if any, relief is the appellant entitled, though she has failed to establish a title to talookdary, or even to malgoozaree rights. It will be convenient to consider this first with respect to her interest in the seven villages, and afterwards with respect to the four villages, since her interests in the two classes of villages may admit of different considerations.

As to both, however, it is to be observed that the necessary consequence of holding that the twenty-six villages have been conclusively thrown into one talook, of which the respondent is sole talookdar, is that the interest of the appellant in the villages in which she is interested, whatever it may have been originally, has become in some sense subordinate, or sub-proprietary. The Oudh Blue Book, and

* See the second paragraph of the order which is quoted in the next case, p. 14 *post*.

in particular the memorandum of Mr. Charles Currie at p. 216, show how, under the native Government, the great talooks grew up, and how, sometimes by a process of disintegration, sometimes by one of acquisition, they came to include zemindaries in which all proprietary right, short of a nominal superiority, was vested in persons other than the talookdar. In such cases the talookdar alone held, as it were, *de capite* from the State, and alone engaged for the payment of the public revenue; but he held his lands subject to the rights of the proprietors intermediate between him and the cultivators of the soil. It seems to have been the general policy of the Oudh settlement, begun by Lord Canning, and continued by his successors, to perpetuate this system, however much the authorities may from time to time have somewhat oscillated between the policy of creating a landed aristocracy, and that of protecting against such an aristocracy the rights, real or supposed, of others in the soil. Their Lordships can see no reason why the appellant, because she may have originally claimed the superior, should not be allowed to assert in this suit any subordinate right to which she may be entitled. And this, which was originally the view of Mr. Capper, seems to have been finally ruled by Colonel Barrow. And it may be observed that in some of the earlier proceedings she has put her case in the alternative.

Again, Mr. Capper seems to have admitted, as to the seven villages, that though the appellant had not been in independent possession of one-third of the collections of these villages; though the collections were made in common, and, therefore, presumably by the respondent, the talookdar; yet that the latter might have so bound himself by writing as to have incurred the obligation of accounting to her for one-third of the profits. He ultimately dismissed her suit, because her agent had failed to produce a deed in writing so binding the talookdar. Colonel Barrow, however, appears to have held that the admission of the Rajah at the time of the summary settlement, and on other occasions (the former being in the nature of an admission on record), were equivalent to such a deed; and that accordingly the relation of trustee and *cestui que trust* having, so to speak, been established between them, she was entitled to a one-third share of the profits of these villages when the annual accounts were made up. In this part of the Financial Commissioner's Order their Lordships entirely concur.

Colonel Barrow's order also recognises the proprietary interest, treating it as a subordinate interest, of the appellant in the four villages. But the appellant insists that he has improperly subjected her to pay a percentage of 10 per cent. to the talookdar over and above the Government demand. It is somewhat difficult for their Lordships, in the absence from the record of the proceedings relating specifically to these villages, to deal with this portion of the appellant's case. In a marginal note to his letter of the 28th March 1866 Mr. Davies states that the widow had obtained a sub-settlement for these four villages. If that were a final settlement their Lordships, on the materials before them, would not see their way to disturbing it. Colonel Barrow, however, appears to have thought that the amount payable by the appellant to the respondent in respect of these villages was a point open to him for decision; and his finding thereon is now to be reviewed. If there were no positive law on the subject their Lordships would see no ground for subjecting the appellant, who, as zemindar, must be in the collection of the rents, to the payment of more than her proportion of the Government revenue. But the propriety of the imposition of this 10 per cent. seems to depend upon the effect of the provisions of the Oudh Settlement Act, No. XXVI of 1866. That Act was passed to give the force of law to certain rules regarding sub-settlements and other subordinate rights of property in Oudh. They seem to apply to all persons possessed of subordinate rights of property in talooks in Oudh; and the 3rd clause of the 7th of these rules says, "In no case can the amount payable during the currency of the settlement by the under proprietor, to the talookdar be less than the amount of the revised Government demand, with the addition of 10 per cent." Colonel Barrow

appears, therefore, to have made the amount payable by the appellant, the least which, in his view of it, the law permitted.

Their Lordships conceive that they too are bound by this enactment. If the view which they have taken of the respondent's rights as talookdar is correct, it is impossible to treat the interest of the appellant in these villages as other than that of a subordinate zemindar. If she has lost the right of settling directly with Government for the revenue, she must, if she retains any interest in the villages, be treated as one entitled to, and liable to make a sub-settlement for them. And if this be so, she seems to fall within the provisions of the statute.

The only remaining question relates to the extent and nature of the appellant's interest in the property which has been found to belong to her. Colonel Barrow has decreed to her only a life interest. He seems to have had a notion that if her interest were more than this she would have an absolute power of disposing of the villages and of breaking up the talook. This could only have happened had she been found entitled to full talookdary rights; and even in that case it may be doubted whether the effect of the Governor-General's letter of 1859 and the subsequent legislation is to relieve a Hindoo widow, though a talookdar, from the disabilities imposed upon her by the general law. Such a construction seems opposed to the 23rd section of the "Oudh Estates Act," at least as regards a widow who takes a talook by inheritance. The appellant, however, is now to be treated not as a talookdar, but as the proprietor of certain villages and rights within a talook. These she acquired by inheritance from her husband, and her estate is not a life interest, but the estate of inheritance of a Hindoo widow with all its rights and all its disabilities. Their Lordships, therefore, will humbly recommend Her Majesty to vary the order under appeal by declaring that the appellant, as the widow and heiress of Shunker Sahai, is entitled to a Hindoo widow's estate of inheritance in the four Mouzahs, Daberia, Bursooa, Kuroulee, and Ooturgaon, and in a one-third share of the profits in the seven Mouzahs, Sessendikhas, Salsamow, Laloomur, Shahpur, Kharehra, Meerrampur, and Jubrelah, such share to be ascertained and paid when the annual accounts are made up; and that she is further entitled to have a sub-settlement of the said four villages on the terms of paying the Government demand plus 10 per cent.

In this case in which there are appeal and cross appeal, neither of which has been wholly successful, their Lordships think that each party should bear his or her own costs,

The 29th July 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Oudh Estates Act (I of 1869)—Order of Government of India of 10th October 1859
—Talooqua Chillarce—Temporary Revenue Settlement—Hindoo Law of In-
heritance—Female Heiress (Grandmother).*

On Appeal from the Court of the Financial Commissioner of Oudh.

Ranee of Chillarce

versus

The Government of India.

The letter of the Government of India of the 10th October 1859, which is set out in the first schedule to the Oudh Estates Act I of 1869, was held not to apply to a Revenue Settlement of Talooqua.

Chillaree for which the infant Rajah Digbehoy Sing was permitted to engage, and which was resumed by Government after his death and before that letter was written ; nor was it intended to create in the infant Rajah's grandmother a proprietary right in the talook by virtue of a temporary Revenue Settlement for three years to which she had not been allowed to succeed.

The above Act cannot apply to a case in which the suit was commenced in 1867 and finally decided by the Courts in Oudh in 1868 ; nor where the plaintiff's name is not mentioned in the first of the lists mentioned in a. 8.

Mr. Leith, Q.C., and Mr. J. H. W. Arathoon for Appellant.
Mr. Forsyth, Q.C., and Mr. F. Norman for Respondent.

This is an appeal from a decision of Colonel Barrow, the Financial Commissioner of Oudh, dated the 21st October 1868, reversing on special appeal a judgment of the Commissioner of Seetapore.

The suit was brought by the present appellant against the Government of India, the present respondents and others in the Court of the Assistant Settlement Officer of Zillah Seetapore in the course of a regular revenue settlement for the province of Oudh. The object of the suit was to establish the alleged right of the plaintiff to the proprietorship of Talooqua Chillaree. The plaint was filed on the 26th January 1867.

The plaintiff was the mother of Rajah Bulbhtdur Sing, who was killed at Nawabgunj in the year 1858, whilst fighting in open rebellion against the British Government. He left a widow *enceinte*, who shortly afterwards gave birth to a son, Rajah Digbehoy Sing. It was found by the Assistant Settlement Officer, the Court of First Instance, that a summary settlement for the talooqua, comprising ninety-two villages, was made with the infant Rajah Digbehoy Sing by Mr. Forbes ; that it was confirmed by the Financial Commissioner, and that it remained in force until the child's death on the 25th March 1859 (Record, p. 36). The mother died a few days later, leaving the plaintiff, the grandmother, the heiress of the child, according to the Hindoo law. It was also found by the Assistant Settlement Officer, that, "in July 1859, Captain Thomson, the Deputy Commissioner, wrote to the Commissioner giving a statement of the case, and recommending, apparently on grounds of policy, that the talooqua should be resumed ; that the case was forwarded to the Chief Commissioner for orders, who, after consulting the Judicial Commissioner as to the nature of the present claimant's rights, finally rejected her claim and reported the resumption of the estate to the Government of India."

The estate was, in fact, resumed, and in September 1859 an allowance of Rs. 5,000 a-year out of the estate, commencing from the death of the child, was, with the sanction of Government, reserved to the plaintiff for life.—(Letters Nos. 27 and 28 Record, p. 16).

The Assistant Settlement Officer gave judgment in favour of the plaintiff and decreed to her the absolute hereditary and transferable right in all the villages included in the Settlement with Rajah Digbehoy Sing. On regular appeal to the Commissioner, the decree was modified by ordering that the plaintiff was to have only a life interest in the property, and that execution should issue in a month. The effect of those decrees, if upheld, would be to subject the present holders, to whom the greater portion of the estate has been granted for loyal services, to be turned out of possession at any rate during the life of the plaintiff. The Financial Commissioner, upon special appeal, reversed the decision of the lower Courts and dismissed the plaintiff's suit.

It was contended at the bar by the learned Counsel for the respondents, that the revenue settlement with Rajah Digbehoy Sing was never completed, and, indeed, it was so held by the Financial Commissioner in the third reason given in the conclusion of his judgment. But their Lordships are of opinion that the first two lower Courts having substantially found that a revenue settlement was made with the infant, it was not open to the Financial Commissioner on special appeal to overrule those findings. Indeed, the grounds of special appeal to the Financial

Commissioner did not raise the question whether a summary revenue settlement was in fact made with the infant Digbehoy Sing, but merely the questions whether the summary settlement was ratified by the letter of Government of the 10th October 1859, and whether the estate sued for was legally vested in the infant. (See 4th and 5th grounds of special appeal, Record, page 70.)

It appears to their Lordships that it must be assumed, in accordance with the findings of the first two Courts, that a Revenue Settlement was in fact entered into with the infant Rajah, but that the talooqua was resumed by Government after his death, and long before the letter of the 10th October 1859.

It is clear that, by the proclamation of the Governor-General of the 15th March 1858, the authority of which cannot now be disputed, the proprietary right in the talook in question was, together with nearly the whole of the proprietary rights in the soil of the Province of Oudh, confiscated to the British Government; and that that right was liable to be disposed of in such manner as the Government might think fit. It is equally clear that the temporary Revenue Settlement entered into with the infant Rajah did not of itself vest in him the absolute proprietary and inheritable right in the talooqua. The duration of the Revenue Settlement was limited to three years, which period had expired long before the plaintiff's suit was commenced. The sole question is, whether the letter of the Governor-General of India in Council of the 10th October 1859, coupled with that Revenue Settlement, vested an absolute proprietary and inheritable right to the talooqua in the young Rajah, who died on the 25th March 1859, more than six months before that letter was written; or if not, whether it vested in his heirs at law as grantees, an inheritable proprietary right which the deceased Rajah himself never possessed.

The letter, which was from the Secretary to the Government of India, Foreign Department, to the Chief Commissioner of Oudh, is set out in the first Schedule to the Oudh Estates Act, No. 1 of 1869. The second paragraph of the letter is as follows :—

"2. His Excellency in Council, agreeing with you as to the expediency of removing all doubts as to the intention of the Government to maintain the talookdars in possession of the taluqas for which *they* have been permitted to engage, is pleased to declare that every taluqdar with whom a summary settlement *has been made* since the re-occupation of the province, *has* thereby acquired a permanent, hereditary, and transferable proprietary right, viz., in the taluqa for which *he has engaged*, including the perpetual privilege of engaging with the Government for the revenue of the taluqa."

The letter and the recital contained in it show that the object of the Government was to maintain in possession those talookdars who then were in possession under summary settlements entered into with them after the re-occupation of the province. The talookdars who were declared to have acquired the right conferred by the letter, were those who had been permitted to engage. Nothing was said as to the heirs of talookdars who had been permitted to engage, and who had died between the time of the engagement and the date of the letter. It is not necessary to decide whether such heirs, if in possession at the date of the letter, would have been within the spirit or meaning of it. It is clear that the letter, which was a mere act of grace, was not intended to operate as an original grant to such heirs, for, if such were the case, the heir, if a widow, mother, or grandmother, would have taken an estate descendible to her own heirs instead of the estate of a Hindoo female heiress descendible to the heirs of the person to whom she succeeded; and thus the estate would have been taken out of the family of the talookdar who had been permitted to engage. The letter could not operate as a grant of an hereditary estate to a deceased talookdar and his heirs. The only way in which it could operate for the benefit of the heirs of a deceased talookdar, who had been permitted to engage in a summary settlement, would be, by its being treated as a retrospective declaration of the effect of the revenue settlement for which he had been permitted

to engage. Such a construction cannot be put upon the letter with reference to a talookdar who had died long before the date of the letter ; upon whose death the estate had been resumed by Government, and whose heirs had not been permitted by Government to succeed to the talook even during the continuance of the temporary Revenue Settlement.

Their Lordships are of opinion that the letter ought to receive a liberal interpretation in order to effectuate the intentions of the Government ; but they consider that it would be acting in direct opposition to those intentions if the letter were to be read in the sense contended for, as one which pledged the Government to restore a possession to which they had, in fact, put an end, and to vest in a dispossessed claimant an interest which the settlement itself did not give. Such an interpretation would be contrary both to the letter and spirit of the document, and at variance with every legitimate rule of construction. Their Lordships, therefore, concur in the view of the Financial Commissioner that the letter of the Governor-General in Council of the 10th October 1859, did not apply to the Revenue Settlement for which the infant Rajah was permitted to engage and which was resumed by Government after his death, and before the letter was written ; and that it was not intended by that letter to create in the plaintiff a proprietary right by inheritance in the talook by virtue of a temporary Revenue Settlement for three years to which she had not been allowed to succeed. The temporary Revenue Settlement was resumed in 1859, and the suit was not brought until 1867.

Their Lordships are of opinion that Act No. 1 of 1869 cannot apply to this case, in which the suit was commenced in 1867, and finally decided by the Courts in Oudh in 1868 ; but even if the Act could apply by retrospective operation it would not vest a right in the plaintiff, for the word "talookdar" in the 3rd Section of the Act was defined to mean "a person whose name is entered in the first of the lists mentioned in s. 8," and the plaintiff's name has never been entered in such list. The case of the appellant does not appear to their Lordships to fall within either the words or the spirit of the letter of the 10th October 1859, or of the Oudh Estates Act of 1869. They will, therefore, humbly recommend Her Majesty in Council to affirm the decision of the Financial Commissioner with the costs of this appeal.

The 19th February 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Mortgage—Usufruct—Interest.

On Appeal from the Court of the Judicial Commissioner of Oudh.

Seth Seetaram and another

versus

Arjoon Singh and another.

Without some special agreement or some special custom, a mortgagee in possession should not retain both the usufruct and the interest, but the usufruct should be treated as in satisfaction of the interest on the mortgage.

This was a suit brought for the redemption of a mortgage dated in 1851. The defendants denied the execution of the mortgage, and disputed the terms in which the mortgage was said by the plaintiffs to be couched ; they also maintained that the mortgage was subject to a condition that it should be redeemable only

within one year, and therefore that s. 3 of Act XVIII of 1866 relating to the limitation of suits in Oudh prevented its being redeemed. There was also a dispute as to the amount of interest in the mortgage deed. The appeal was against the decision of the Chief Commissioner, Mr. Gore Ouseley, who decided that upon payment of a certain sum of Rs. 15,500, partly in reference to this bond, the plaintiffs had a right to redeem, and that decision was in affirmance of two previous decisions, one by a Mr. Ferar, and another by Mr. Thompson, the officiating Deputy Commissioner, precisely to the same effect. Leave was given to appeal against these previous decisions and against many other orders, but it is not necessary to go further back than the two to which I have referred, although in substance the former orders are, to a great extent at all events, to the same effect. A good deal has been said as to the unsatisfactory nature of the proof by the plaintiffs of the mortgage deed, and undoubtedly there is much force in the observations which have been urged upon that subject. At the same time there has been a finding of three authorities, to say the least, that the mortgage deed did exist; that is a question of fact on which their Lordships are not prepared to say that those authorities were altogether unwarranted in the conclusion to which they came. There is also a finding upon the question of fact upon which the parties were at issue, namely, whether the rate of interest in the mortgage was the ordinary rate of 1 per cent. per mensem, or 3 and a little more per cent. per mensem. The three authorities have found that the interest was 1 per cent. per mensem, and their Lordships are not prepared to reverse that finding. With respect to the mortgage being redeemable, the Courts have also found that the term stated on the part of the defendants was not a term of the mortgage. It should be observed that the mortgage deed was not produced, and the view of the Court upon it was derived from secondary evidence. Upon this subject, namely, as to the time when the mortgage was redeemable, their Lordships are not prepared to say that the authorities were wrong. In fact, a document has been put in dated the 18th May 1869, which is a bond given by the plaintiffs to the defendants, in which at that date the mortgage is spoken of as then existing and as redeemable. That at all events would be sufficient in their Lordships' judgment to support the finding upon this question of fact. The authorities have in effect decreed that the mortgage is redeemable on the payment of interest at the rate of 1 per cent. per mensem up to the 13th August 1860, and that limit appears to have been adopted upon those grounds. In 1867 Mr. Davies, who was then the Financial Commissioner of Oudh, in the decision of the case which then came before him, *Mohomed Husain Khan v. Tikart Roy*, made this observation, "The Financial Commissioner therefore rules that wherever the land mortgaged is in possession of the mortgagee, no interest shall be payable under the terms of the mortgage deed, in addition to the usufruct, after the 13th August 1860," and he decreed accordingly in that case. This decree appears to have been put into the form of a circular and circulated in the province of Oudh, and to have been acted upon for some considerable time, although it appears that Colonel Barrow, the succeeding Commissioner, in 1871, and possibly some time before that, declined to act upon it. It would appear from this decision of Mr. Davies that at the time when he made this decree the law of Oudh was in this state, that a mortgagee could retain the usufruct of the property mortgaged, together with any amount of interest secured to him by the mortgage deed,—a state of the law which is not in conformity with the law which prevails in the rest of India, or, as far as their Lordships are aware, in any civilised country, and it appears to them not consistent with the first principles of justice. Mr. Davies appears to have thought that that state of the law should not be recognised beyond a certain date, and their Lordships infer that after that date the law must be taken to have been altered, at all events so far as this, that without some special agreement or some special custom the mortgagee should not retain both the usufruct and the interest, but that the usufruct should be treated as in satisfaction of the interest on the mortgage.

The Court below have adopted this rule in estimating the interest in the present case, and their Lordships are not prepared to say that they are wrong. Allusion has indeed been made in the course of the argument to a certain decree between these parties, pronounced by Mr. Thornhill in 1857. That decree is not in the Record, but the statement of it appears to be to the effect that Mr. Thornhill decreed that the plaintiff had the power to redeem or might be allowed to redeem on payment within ten days of the principal sum, together with interest at 1 per cent. per mensem, with rests at six months from the date of the mortgage, and it appears that the sum which he arrived at by that mode of calculation was some Rs. 5,700. The plaintiff did not pay that within the time specified, namely, ten days; and the decree, it has been argued, fell to the ground. That may be so; it is enough for their Lordships to say that neither party appears in this present suit to have adopted that decree as part of his case. The plaintiff says that the rate of interest was 1 per cent. in the mortgage deed without any breaks. The defendant does not say that the interest was 1 per cent., with breaks of six months, but that the interest was 3 per cent., or a little more, and the defendant also says that the mortgage was not redeemable after one year. If that be so, Mr. Thornhill's decision was wrong. Neither party, therefore, in this suit adopts that decision, and their Lordships are disposed to concur in what was said by the officiating Judicial Commissioner, Mr. Gore Ouseley, that Mr. Thornhill's order could not be treated as at that time a binding decision. Throwing Mr. Thornhill's order out of the case, therefore, their Lordships have come to the conclusion that no sufficient grounds have been shown them for reversing the decision of the Judicial Commissioner, which, as has been before observed, was in conformity with two other decisions at the least, and to a great extent with two or three more which had preceded them.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the officiating Judicial Commissioner be affirmed, and this appeal dismissed.

The 18th March 1874.

Present :

Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Hindoo Temples (Constitution of)—Special Laws and Usages—Rameswaram Pagoda—Removal of Pandaram.

On Appeal from the High Court at Madras.

Rajah Muttu Ramalinga Setupati and others

versus

Perianayagum Pillai, Guardian, etc.

The constitution and rules of religious brotherhoods attached to Hindoo temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them.

In this case the Privy Council decided against the right of the Zemindar of Ramnad either to appoint or to confirm the election of the Pandaram or head of the pagoda of Rameswaram, and consequently against his pretension to oust the Pandaram from his office because he was not appointed to or confirmed in it by him or his predecessors.

Mr. Mackeson, Q.C., and Mr. Bowring for Appellant.

Mr. Leith, Q.C., Mr. J. B. Norton, and Mr. F. C. J. Millar for Respondent.

Sir Montague Smith gave judgment as follows:—

The question raised in this appeal relates to the right of the zemindars of the large and important zemindary of Ramnad in the Madura district either to appoint,

or to confirm the election of, the Pandaram or head of the celebrated and richly endowed pagoda of Rameswaram.

The possessions of this temple are estimated by the appellant to be of the value of 200,000l.

The plaintiff of the Ranees zemindar (now represented by the appellant, the present zemindar), filed so long ago as the year 1857, sought to oust the original defendant, Ambalavana Pillai, from the office of Pandaram which he *de facto* held.

It alleged that the zemindar was the Dhamarkharta or trustee of the pagoda, and had the right to conduct the management of it. It indirectly also asserted her right to appoint the Pandarams, and concluded with a prayer for a decree to the effect that the zemindar should conduct the management of the pagoda, and that the defendant Pandaram should be removed from the management, and pay over the money in his hands to the zemindar.

The plaintiff also charged the Pandaram with misappropriation of the property, and the prayer for his removal was based on this charge, and also, though vaguely, on the ground of his not having been appointed to, or confirmed in, the office by the zemindar.

The charges of misappropriation were not sustained by the evidence and have been abandoned; so also has the claim of the zemindar to be placed in the direct management of the pagoda, and to have its funds placed in his hands. And the single question argued at their Lordships' bar, and to which issue the cause was brought by consent in the High Court, is, whether the zemindar has established the right to appoint or to confirm the election of the Pandarams of this great pagoda, and was entitled to a decree for the removal of the defendant from the office of Pandaram because he was not so appointed or confirmed.

The early history of the pagoda is obscured by time, and its foundation cannot be shown. But it is evidently an ancient temple of great renown, which has long attracted pilgrims from all parts of India. It is situate on an island in the extreme south of India, connected with the lands of the zemindary by a causeway. The Rajahs of Ramnad were the guardians of this causeway, and had thence acquired the title of Setupati, or Lord of the Causeway.

It is asserted on the part of the Pandaram that the pagoda of Rameswaram was an independent endowment, in which the Rajahs Setupati had no rights of patronage, or control, other than the general authority they assumed as the rightful or *de facto* rulers of the district, to prevent abuses in the management of its affairs, and to see that its laws and usages were properly observed.

The first records in the evidence are some inscriptions on stones found in the walls of the pagoda. The earliest inscription is on a mandapam, and states that the mandapam was erected by Munerama Nathan "as a place to halt for the god Ramesar, who was attached to this pagoda, founded by Mall or Vishnu." Its date is in the Salivahana era 1520, which corresponds with the Christian year 1588. It is evident from this and other inscriptions that the pagoda was an ancient temple at this time.

Subsequently, in the year of the Salivahana era 1607, the Rajah of Ramnad made a gift of five villages, and in 1609 another gift of eight villages to the pagoda. These grants, as the dates show, formed no part of the original endowment of the pagoda, and no condition is found in them creating or reserving any rights of patronage or interference in the affairs of the temple. There is evidence of similar gifts of villages from other Rajahs, among them the Rajah of Sivagunga, showing that the pagoda had been endowed by other donors than the Lord of Ramnad. Indeed, of the seventy villages belonging to the pagoda, thirteen only are proved to have been given to it by that Rajah. The right, therefore, now claimed by the zemindar of Ramnad is not shown to have an origin in the foundation or subsequent endowment of the pagoda.

It may be observed, before further considering the evidence, that the case on both sides is singularly deficient in materials to elucidate the constitution of the community or brotherhood attached to this pagoda, the duties of the Pandarams, and whether they are selected from a particular family or class. The claims of the zemindars also have been put forward in the most uncertain way. They at one time asserted a right to be chief managers, and directly to appoint the Pandarams as sub-managers, but that claim was not strongly urged by Mr. Mackeson at their Lordships' bar. He mainly contended, in his elaborate argument, for the right to have the Pandarams presented to the zemindars for confirmation when nominated or elected by others. It is obvious, however, that there is a great distinction between a right to appoint and one to confirm; and if the latter only is insisted on, it still might be expected that some definite information would be given as to the manner of electing the candidate to be presented for confirmation. The absence of such evidence may perhaps be accounted for by the fact that the claim it was at first attempted to sustain was the right of direct appointment.

It is not, however, unimportant to observe that it appears to be the common practice in the Madras Presidency for Pandarams to appoint their successors. (See Mr. Norton's Leading Cases, p. 592-3.)

But the constitution and rules of religious brotherhoods attached to Hindoo temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them.

That principle was laid down by this Committee in an appeal involving the succession to the office of Mohunt of a richly endowed Mutt in Rajgunge in these terms:—"It is to be observed that the only law as to these mohunts and their office, functions, and duties, is to be found in custom and practice, which are to be proved by testimony." (See 11 Moore, I. A., 428.)*

In this case the burden of proving that the right he claims is supported by usage lies upon the zemindar, and the question to be decided is, whether he has sustained it.

It was contended on his behalf that the zemindar of Ramnad is Dhamarkhata of the pagoda, and that it must be inferred from this title he had the power he claims. But the right to bear this title, and the functions belonging to its holder, are among the disputed questions involved in the general controversy between the parties. The title "Dhamarkhata" may have a definite signification, but their Lordships observe, in the proceedings of this record, it is used in different senses, sometimes to denote a trustee who appoints the Pandaram, or head manager, and sometimes the manager himself. In the long contention which took place between the zemindar and the Pandaram in the collectorate, as to the titles by which each was to address the other, the Collectors refused to allow either to assume this title. Their Lordships, upon the imperfect information disclosed by the Record, will therefore abstain from using this appellation, and will not attempt to define what the title as regards this pagoda indicates, or to whom it belongs; but will proceed to consider the substantial issue they have to determine, viz., whether the zemindar has established the right, under whatever name, to make or confirm the appointment of Pandarams.

It has been already stated that he has failed to show that such a right is derived either from the original foundation or any subsequent endowments of the pagoda by his predecessors.

The Counsel for the zemindar strongly relied on statements found in certain depositions as affording proof of the direct appointment and removal of Pandarams by the Rajahs of Ramnad prior to the Christian year 1793; and if these statements were admissible and trustworthy, they would afford strong support to the zemindar's

case. The depositions were taken in 1815, on the death of Pandaram Ramanada, who had held the office from 1793. On his death Venkatachellum claimed to be his successor, alleging that he had been appointed by his predecessor according to custom. Objections were made to Mr. Peter, the Collector of Madura, against his appointment, upon the ground that he had not been nominated by the dying Pandaram, but had been put forward after his death by certain persons attached to the pagoda. The Collector required the head tahsildar to make enquiries as to the fact and time of Venkatachellum's appointment; and several depositions, the authenticity of which is not questioned, were taken by him, bearing on this matter. The statements in question appear to have been made at this time, but there is no satisfactory evidence to show they were obtained by any competent or independent authority. It is suggested that they were taken by the tahsildar, but there is no proof of this, and the tahsildar's report is not forthcoming. On the other hand, the form of the documents leads to the inference that they were not so taken. They are addressed "to the Company's Circar," signed by the deponents, and attested by two native witnesses, from which it may be inferred that they were written statements obtained on behalf of the zemindar, and sent to the tahsildar to be forwarded to the Collector. Their Lordships think that such statements ought not to be received as proof of an important right, and that they were properly rejected as inadmissible by the High Court.

The first appointment of which there is trustworthy evidence occurred in 1793. In that year Muttu Ramalunga, then Setupati of Ramnad, appointed Ramanada to be Pandaram.

Mr. Nelson's "Manual of the Madura Country," compiled by order of the Madras Government, describes the disturbed state of Ramnad and the rest of Madura at this time and for some years previously. A British force had been employed against the Setupati to enforce the rights of the Nabob of the Carnatic, and the district had afterwards passed under the direct authority of the British Government. The appointment of Ramanada was near the period of the transition of the sovereign power from the Nabob to the British Government. It appears from the authority above cited that, in 1792, Muttu Ramalunga showed symptoms of rebellion against that Government, and in 1795 he was deposed, and his sister, the Ranee, installed in the possession of the Raj. It was with this Ranee the permanent settlement was made in 1803. (See Part IV., p. 154.)

The Pandaram appointed by Muttu Ramalunga in 1793 was only five years old, and he took from this child a kararnamah, which is much relied on by the appellant.

It commences thus:—"As you have been pleased to appoint me for the management of the affairs of the pagoda at Rameswarem, I will cause puja to be duly performed in the pagoda," etc.

The instrument also contains the following passages:—

"In case of my dealing friendly with the enemies of the zemindary you may remove me, and appoint another person in my room. . . . If I act improperly in these affairs, I shall submit myself to the orders of the zemindar."

This appointment, and the kararnamah which followed it, would, under ordinary conditions, be entitled to great weight, but when the disturbed state of the district and the age of the Pandaram are regarded, the transaction loses much, if not all, of its force as evidence of the right claimed.

Ramanada filled the office of Pandaram until his death in 1815. After this date much valuable evidence is afforded by the proceedings of the Collectors.

The permanent settlement, as already stated, was made with the Ranee in 1803: but this settlement did not include the villages belonging to the pagoda, which had long been held free from tribute. Some years before 1815, both the zemindary and the pagoda had been under attachment. It was contended that the pagoda had been attached as part of the zemindary; but, although the orders of attachment are

not set out, enough appears on the Record to negative this suggestion. It was not until after the zemindary had been attached in consequence of a disputed succession, that the pagoda was placed under attachment on account of the alleged mismanagement of the Pandaram. (See *Plaint*, paragraph 3; *Petition of Appeal*, p. 66, and the *Collector's Letter*, 20th September, 1832, p. 348.)

Such was the state of things in 1815, when Venkatachellum claimed to be Pandaram on the nomination of his predecessor. Two documents appear on the Record, both dated 19th July 1815, and addressed to the Collector; one from the dying Pandaram Ramanada, stating that he had appointed Setu Ramanada (Venkatachellum), whom he describes as "a relation of mine by blood, and a descendant of our family," to be his successor (p. 392); and another from Venkatachellum announcing his appointment, praying for instructions for his guidance, and that the attachment of the pagoda might be removed.

The Raneesetupati disputed this appointment. In a letter of the 3rd August 1815 she prays the Collector to prevent his being invested with the parivattom cloth, and the other emblems of office. An enquiry was thereupon directed to ascertain whether Venkatachellum had been appointed by the dying Pandaram; and before receiving any report from the tahsildar, the Collector, on the 9th August, directed that officer to inhibit the installation of Venkatachellum as Pandaram "until further orders" (p. 90).

This temporary injunction was, however, removed by the same Collector by an order of the 27th July 1816 (p. 347) directing the tahsildar that Venkatachellum should be installed as Pandaram with all usual ceremonies according to custom, and he was installed accordingly.

It was contended for the appellant that the order suspending the installation was made by the Collector as the representative of the zemindar, whilst the zemindary was under attachment, and that the order authorizing it was a new appointment of Venkatachellum in the same right.

Their Lordships are unable to concur in this view of the acts of the Collector. They think the proper construction to be placed on his action in the matter is, that the orders first suspending and then directing the installation, were made by him as a public officer on the part of the Government, and not in virtue of any right derived from the zemindar. It also appears to them that the last order did not profess to be, and was not, an original appointment, but was an act of the Collector to give effect to the title derived from the nomination of the former Pandaram. They are consequently of opinion that Venkatachellum's title to the office must be considered to rest upon the nomination of his predecessor, and not upon any appointment or confirmatory act proceeding from the zemindar.

It will be convenient to consider what powers the Board of Revenue and the Collectors possessed, or *de facto* exercised in relation to religious houses.

The proceedings upon the accession of Venkatachellum, above described, took place before Reg. VII of 1817 was passed. But it is evident that before that Regulation the British Government, by virtue of its sovereign power, asserted, as the former rulers of the country had done, the right to visit endowments of this kind, and to prevent and redress abuses in their management.

There can be little doubt that this superintending authority was exercised by the old rulers. Mr. Nelson in the *Madura Manual* says: "The principal pagodas, with their enormous establishments, their officiating priests, etc., were managed by a Dhamarkarta, or trustee and manager for life, who, as stated above, was usually a monk and guru." He had said just before, "The manager of the great Pagoda at Madura seems to have been always a Pandaram or saiva monk." Mr. Nelson evidently designates the manager, and not the person appointing him, as Dhamarkarta, who might be a monk or Pandaram, in which case he would probably be known by the latter title. He then describes the duties of the manager:—"He collected and disbursed the revenues derived from the lands granted to the pagoda

by the king and others, and from fees and offerings; appointed the officiating Brahmans and servants," etc.

He then says:—"The dhamarkartas held but little communication one with another, and recognised no earthly superiors except the King himself. Each was independent of all control, and acted altogether as he pleased. This freedom led naturally to gross abuses, and the King was compelled occasionally to interfere in the management of some of the churches." (Part III. chap. 7, p. 162.)

The King here spoken of was the ruler of Madura; but there is little doubt that the Setupatis of Ramnad, although the vassals of the Pandya of Madura, exercised sovereign power within their own territories. Mr. Nelson says:—"There is, therefore, a considerable amount of evidence which goes to support the claim to high antiquity put forward by the Ramnad Royal family. And, seeing that Rameswaram has been resorted to annually by large bodies of pilgrims, and that this would have been simply impossible unless some strong-handed prince or princes were ruling over the country in the neighbourhood, I think it may be pretty safely concluded that the principality of Ramnad had been in existence for many centuries before Sadeika Sevan (who seems to have lived in the sixteenth century) was made Setupati." (Manual, p. 111.)

It appears, therefore, to be highly probable that the Setupatis in the days of their power exercised control over the pagoda, not, however, in virtue of any proprietary right of patronage, but as the rightful or *de facto* rulers of the district. The powers they enjoyed as sovereigns, whatever they may have been, have now passed to the British Government, and the present zemindars can have no rights with respect to the pagoda other than those of a private and proprietary nature, which they can establish by evidence to belong to them.

That the new rulers, at an early date, exercised a controlling supervision and authority over the temples very clearly appears from a letter written in 1803, by the Board of Revenue to Mr. Hurdis, the Collector of Madura, of which the following extracts are printed in the Manual (Part IV., chap. 5, p. 180):—

"The subject of devastanum lands is of great importance to the happiness of the people, and the attention paid to the interests of the pagodas by the immediate officers of the Government has been attended with the most beneficial consequences to the people in different parts of the peninsula."

After saying that the Governor-General had directed that the Collector should proclaim the restoration of the lands resumed from the pagodas by the late Government, the letter proceeds thus:—

"The administration of these lands forms a distinct question. The extensive abuses found to prevail with respect to these lands, with which the pagodas of Dindigal were endowed, render it expedient that the lands and affairs of the pagodas of Madura be conducted in the same manner as those of Dindigal, *under the immediate care of the Collector.*"

It is abundantly clear from this letter that long before Reg. VII. of 1817, the British Government not only assumed the power to superintend the management of the property and affairs of the pagodas throughout the peninsula, but exercised its authority through the agency of the Collectors.

The preamble of the Regulation of 1817, after stating that large endowments had been granted by former Governments as well as by the British Government and individuals for the support of temples, and that the produce of such endowments were, in many instances, misappropriated, declares it to be "the duty of the Government to provide that all such endowments be applied according to the real intent and will of the grantor." It then enacts that the general superintendence of all endowments should be vested in the Board of Revenue, and prescribes the duties to be performed by them to prevent misappropriation of the funds. It also authorizes the Board to appoint local agents, and declares that the Collector of the district shall be *ex officio* one of such agents. (Ss. 7 and 8.)

The Counsel for the appellant, whilst admitting that the proceedings of the Collectors subsequent to this Regulation might be equivocal with regard to the character in which they acted, strongly insisted that the acts of those officers prior to it could only have proceeded from, and must therefore be referred to, the rights of the zemindar vested in them under the attachment. This contention is, however, entirely disposed of, when it is established that at an early date the power of superintendence was entrusted by the Government to the Board of Revenue, and the Collectors. The Regulation, in fact, merely defined the manner in which that power was thenceforth to be exercised.

The general authority of the Collectors as agents of the Government being thus shown, the ground is cleared for considering the question which was so much discussed on the argument, whether the Collectors in the various proceedings found in the Record were acting under such general authority, or, as the appellant asserts, in virtue of the rights of the zemindar.

From 1815 until 1828, during the whole of which time both the zemindary and the pagoda were under attachment, there is no doubt that the pagoda was managed by the Pandaram under the control of the Collectors, even in minute details, but the Counsel for the appellant did not establish to their Lordships' satisfaction the inference he sought to draw from this evidence, that the Collector's interference arose from his representing the zemindar's interest. On the contrary, considering that the pagoda had been attached for the alleged misconduct of the Pandaram, and having regard to the powers of superintendence entrusted to the Collectors as agents of the Government, both before and under the Regulation of 1817, they think that their interference ought to be referred to the exercise of these powers. This view is supported by the reports of the Collectors made during a subsequent attachment to be presently adverted to.

The long litigation respecting the succession to the zemindary ended in 1828, when a judgment of His Majesty in Council established the title of Ramaswami Setupati to the zemindary of Ramnad.

The attachment which had so long existed was thereupon removed. It appears from an order of the Collector, dated 21st April 1829, addressed to Ramaswami Setupati, that on this removal the pagoda was ordered to be delivered over with the zemindary to the Setupati, and for some time he appears to have assumed to control the management of it, as the Collectors had done. The appellant's Counsel urged that this delivery of possession to the zemindar, besides being in itself strong evidence in his favour, threw light on the proceedings of the Collectors throughout the time of the attachment. If the orders relied on had not been corrected, they might have been rightly so regarded, but they were, after full enquiry, superseded by subsequent orders hereafter referred to.

On 21st April 1830, Ramaswami Setupati died, having devised the zemindary to his two daughters. Both being minors, the management of the estate became vested in the Board of Revenue, acting as the Court of Wards, and so remained until 1846, when, on the deaths of the minors, the zemindary was restored to their mother Rani Setupati, who was the original plaintiff in the present suit.

Whilst the estate was under the care of the Court of Wards, a manager was appointed on behalf of the minor zemindars. Disputes appear to have arisen between this manager and the Pandaram, in consequence of the latter being kept out of possession of the pagoda, and the manager assuming the control of it.

The then Collector, Mr. Vivash, being appealed to by both, investigated their complaints, and on the 20th September 1832 made a report to the Board of Revenue, which is well worthy of attention.

In that report, paragraph 2, Mr. Vivash says :—

"2. The devastanum and Chuttrums, of Rameswarem, were assumed by Mr. Peter with the sanction of your Board, in consequence of mismanagement by the Pandaram, and entrusted to the superintendence of the head tahsildar of Ramnad,

and subsequently to the control of the sub-collector, who continued to manage the devastanum affairs until the Ramnad zemindary was made over to Ramasami Saithupathi the zemindar, in the year 1829 ; the Rameswarem devastanum was entrusted to the zemindar's management at the same time as a temporary measure in consequence of the sub-collector having been appointed to another part of the district, and the zemindar was the only responsible person to whom I could with propriety and safety entrust the management pending the determination of your Board as to provisions for the future devastanum management."

This statement confirms the view their Lordships derived from the evidence, that, under the attachment, the Collectors acted as the agents of the Government in superintending the pagoda. It also shows that when, on the discharge of the attachment in 1839, the pagoda was entrusted by Mr. Vivash to the zemindar's care, it was not so done because of any right belonging to him as zemindar, as the appellants alleges, but as "a temporary measure" in the absence of the sub-collector : the zemindar being a responsible person selected by the Collector to have the care of it, until the Board had decided upon the future management.

This view is confirmed by the statements of fact contained in other parts of the report. Paragraph 3 states that the Pandaram appointed in 1815 was not allowed, as his predecessor, exclusive control, but "was ordered jointly with the Cirkar servants to conduct the devastanum affairs."

Again, paragraph 4 says : "The Ramnad zemindar, or rather the manager on the (minor) zemindar's behalf, urges his right to the management. . . . It appears to me unnecessary to dwell upon this claim as the Rameswarem devastanum has never been managed by the zemindar since the date of the permanent sunnud ; and before that period it is universally admitted that the Pandarams in succession conducted exclusively the devastanum affairs."

It may be allowed that this latter statement ought not to be relied on as proof of the fact said to be admitted, but what the Collector says of the practice since the permanent sunnud would be derived from official records and experience.

Mr. Vivash further reports that, in his opinion, the supervision of the zemindars would be useful to check abuses, and his recommendations are contained in paragraphs Nos. 5 and 6.

"5. I think, therefore, that the Pandaram might, without objection, be placed in immediate management of the devastanum of Rameswarem and its revenues, that the expenditure and the sibbundy be arranged agreeably to a list fixed with reference to the usual disbursements, and that the zemindar be appointed supervisor with authority to interfere in controlling expenditure and checking abuses, and that periodical accounts of receipts and disbursements may be rendered to the huzur, for the purpose of preparing which a Huzur Goomastah may be employed at Rameswarem.

"6. Concurring with my predecessor that control over the devastanum expenditure and the devastanum affairs is necessary to preserve its revenues from spoliation, and to enforce a due performance of the necessary and usual ceremonies, as the country of Ramnad is under the management of the zemindar's family, I would recommend that the zemindar be nominated to this duty, because they are people of integrity and responsibility, and would, I have no doubt, discharge the duty of supervision with advantage, to the interest of the devastanum and their own credit."

It appears that this report was laid before the Governor in Council, and a letter was thereupon written, and transmitted through the Board of Revenue to the Collector, approving of his proposed measures and directing them to be carried into effect.

The Collector afterwards sent an order to the manager of the zemindary, under the Court of Wards, directing him to put the Pandaram in possession of the pagoda. The manager having hesitated to obey it, the Collector issued the following peremptory order :—

"To the Guardian of Ramnad.

"I have received and perused the urzi No. 14, addressed by you on the 23rd instant, to the effect that the pagoda of Rameswaram and the villages attached to it should not be put in the possession of the Pandaram, and that your man and the Pandaram's man should jointly hold the management. Having examined the documents, etc., connected with the above matter for several days, I wrote to the Board the circumstances under which the said Pandaram held the said pagoda and the villages attached thereto for a long time prior to the attachment by the sarkar. In accordance with the orders issued in this matter by the Government and the Board, you were ordered to allow the Pandaram to hold the said pagoda, etc. You should do so immediately. The delay is unfair. You wrote that your servants also should be employed together. This will create a great disturbance. Therefore the custom must be followed up. Nothing can be done contrary to the custom. However, if the said Pandaram misbehave for the future, it will be then taken into consideration. If you do not give him possession immediately the sarkar officers shall be sent to put him in possession."

Nothing can be more decisive than this action of the Collector on the question of the character in which he was acting. So far from relying on the right of the zemindar, he acted in direct opposition to the claims of his guardian.

The Pandaram (Venkatachellum) having been thus restored to full possession of the pagoda, the manager for the zemindar again put forward his claim to the management, and on this occasion he impeached the validity of the title under which the Pandaram had held the office since 1815, asserting the zemindar's right to appoint the Pandarams as well as to manage the pagoda.

This new dispute was referred to the then Collector, Mr. Wroughton. His report upon it is dated the 7th January 1834. It appears that he examined the depositions sent to the Collectorate in 1815, and other documents, and he records the facts which, in his opinion, are adverse to the claims made on the part of the zemindar. He also reported in favour of the title of the Pandaram Venkatachellum to the office.

The Board of Revenue upon this report made a minute on the 30th July 1835, that there existed no ground for questioning the validity of the appointment of the Pandaram.

One of the objections urged by Mr. Mackeson to the judgment of the High Court was that the Judges had given too much weight to the reports of the Collectors, which they described as "quasi judicial proceedings." It is to be observed, however, that it is the duty of the Collectors, under s. 10 of the Regulation of 1817, to ascertain and report to the Board the names of the present trustees, managers, and superintendents of the temples, and by whom and under what authority they have been appointed or elected, and whether in conformity to the special provisions of the original endowment by the founder, or under any general rules. They are also under s. 11 to report all vacancies, with full information to enable the Board to judge of the pretensions of claimants, and whether the succession has been by descent, or by election, and if so, by whom. The report, therefore, of Mr. Wroughton was entirely within his province, and the line of his duty.

Their Lordships think it must be conceded that when these reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public officers made in the course of duty, and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them, and the proceedings of the Government founded upon them.

Whilst protesting against the weight given by the High Court to

Mr. Wroughton's Report, Mr. Mackeson invoked the authority of the Collector's opinion contained in the last paragraph of it, in aid of his contention that the appointment was invalid without the zemindar's confirmation.

The paragraph is as follows :—

"Para. 13. It appears generally from the documents and witnesses produced on both sides, that it has been the established custom that the dying Pandaram nominates one of his disciples, and that the election is reported for the zemindar's sanction and approbation, who therefore issues orders to the stalathars of the pagoda to show him the usual respect and to obey his orders. At the time the present Pandaram was nominated the zemindary was in dispute, and held under attachment by the Collector, so that the orders which would have, under other circumstances, emanated from the zemindar, were passed by the Collector. The orders were dated 28rd July 1816, to the late head tahsildar."

The opinion of Mr. Wroughton is clearly against the claim of the zemindars to nominate to the office, and it may be doubtful whether he intends to support their pretension to a right of confirmation in the sense of a power entitling the zemindar to reject the person elected, and to treat the Pandaram who enters upon the office without his confirmation as an usurper.

But however that may be, their Lordships have already said that the opinions of the Collectors are not to be treated as having judicial authority. They also think that if the opinion of Mr. Wroughton really is to the effect contended for, it is not well founded. They have already commented on the effect of the orders passed by the Collector in 1816.

It is very probable that the Pandarams, on their election, were presented to the Setupati, not for the confirmation of their title, but to obtain from him, as the great chieftain of the district, a recognition of it, and to secure his protection and support.

In consequence of the recommendations contained in the reports of the Collectors (1832 and 1834) rules were drawn up for the superintendence of the pagoda. They were to the effect that the Pandaram was to be the manager, but an officer of the zemindar was to superintend the management, reporting to the zemindar, who was to send in the reports to the Collector. It was expressly declared that this officer should treat the Pandaram with great respect.

This state of things again led to frequent disputes. Mr. Blackburne, the Collector, writes to the Board that he had received no less than forty-two recriminatory complaints in eleven months from the manager of the zemindary and the Pandaram. In consequence the pagoda was again placed under attachment; and the Collector, on the 17th September 1836, addressed orders to the Pandaram and the manager stating that, as they gave vain trouble, and did not act up to the Board's orders, the management would be kept under attachment on behalf of the circar until they came to an amicable settlement.

In April 1837 the disputants came to a formal compromise, and the Pandaram promised to submit to the superintendence of the manager, and do certain things in conjunction with him. The Razeenamah drawn up on this occasion was strongly relied upon by the appellant's Counsel. Taken by itself, this agreement would certainly appear to recognise the manager as superintendent in right of the zemindar; but, having regard to the recommendations in Mr. Vivash's report, paragraph 5, that the zemindar should be appointed supervisor, with authority to interfere in controlling expenditure and checking abuses, their Lordships think that the acknowledgment must be referred to the power entrusted to the zemindar as the nominee of the Government. Even if it had been shown that some power of superintendence resided in the owners of the zemindary, it would not at all follow that the right to interfere in the appointment of Pandarams belonged to them.

Pandaram Venkatachellum continued in office until his death in November 1854, having filled it since 1815.

Before his death he appointed as his successor Chockalingam Pillai, who continued in office until his death in February 1857. He appointed Chidambara Pillai to succeed him, who died shortly afterwards, having first nominated Anabalavana Pillai, the original defendant in this suit, to be his successor.

It results from a review of the whole mass of evidence in this case that there is no instance of the appointment of a Pandaram by the zemindars satisfactorily proved, except that of the child by Muttu Ramalinga in 1793, nor of any Pandaram having been kept out of his office or ejected from it, because the zemindar had not confirmed his appointment.

In the absence of proof of the actual exercise of either of the rights claimed, the rest of the evidence, for the reasons already given, is in their Lordships' opinion wholly insufficient to maintain them. They are therefore of opinion that the appellant has failed to establish his pretension to oust the Pandaram from his office, because he was not appointed, or confirmed in it by him or his predecessors.

In the result they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

The 21st May 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Limitation—Fraudulent or Forcible Acquisition—Reg. II of 1805 s. 8.

*On Appeal from the High Court at Calcutta.**

Maharajah Rajender Kishore Singh

versus

Rajah Sahab Perhlad Sein.

Reg. II of 1805 s. 3, which provides that the limitation of 12 years shall not be considered applicable to any private claims of right to immovable property, if the party in possession shall have acquired possession by violence, fraud, or other unjust dishonest means, must be considered with some strictness (otherwise the door would be opened widely to a large class of claims which ought properly to be barred), and the alleged fraudulent or forcible dispossession must be clearly established.

Mr. Cowie, Q.C., and Mr. Doyne, for Appellant.
Mr. Leith, Q.C., and Mr. J. D. Bell for Respondent.

Sir R. Collier delivered judgment as follows :—

In this case the plaintiff and the defendant are two neighbouring Rajahs, each possessing a large tract of land, and the question is to which of their contterminous estates the villages in dispute belong. It would appear that disputes arose between the predecessors of these Rajahs in the early part of this century, and two cross-suits were instituted between them in the beginning of the century. The then Rajah of Ramnugger claimed 12½ tuppehs, and on the other hand the then Rajah of Bettiah claimed some 85 villages, which are said to have formed a mehal called Hamrah. The result was that each failed. The Rajah of Ramnugger failed in establishing his title to those tuppehs, the tuppehs being accorded to the Rajah of Bettiah, and on the other hand the Rajah of Bettiah failed to obtain the 85 villages, the villages being declared to belong to the Rajah of Ramnugger. In 1861 the present Rajah of Ramnugger instituted a suit against the present Rajah of Bettiah

* From the judgment of Bayley and Pundit, JJ., in Regular Appeal No. 136 of 1863, decided on the 29th September 1866.

for the recovery of nine villages, alleging them to be part of the 85 villages decreed to his predecessor, and that the Rajah of Bettiah had dispossessed him of them, and he put his case in this way. In 1840, on the death of the then Ranee of Ramnugger, the Government laid claim to the estate as having escheated to them for want of heirs and took possession of it ; and the plaintiff now alleges that shortly before or upon the Government taking such possession, the Rajah of Bettiah contrived to possess himself of the nine villages in question. The Principal Sudder Ameen, before whom the case came in the first instance, decided against the plaintiff *in toto*. The High Court, being dissatisfied with that decision, remanded the case, and ordered a local investigation. The Ameen who conducted the local investigation reported in favor of the plaintiff as to one of the nine villages only ; but the Principal Sudder Ameen adhered to his opinion that the plaintiff was entitled to none.

On the case coming again before the High Court, they came to the conclusion that the evidence of the plaintiff on the whole preponderated as to three of the villages, and accordingly they decreed to him those three, dismissing his suit as to the other six. There was, however, on the Record an issue whether the suit was not barred by the Statute of Limitations, which was disposed of by the High Court in this way :—"As to limitation, it is clear that, if we believe the evidence of the plaintiff regarding the villages we have decreed to him, plaintiff is in time as regards the villages decreed to him, because the cause of action arose to the plaintiff at a time when it was impossible for him to bring the present suit, until he had first obtained a decree in proof of his own rights of inheritance, and so shown his having a *locus standi* in Court." Their Lordships propose now to deal with this question of limitation, to which the argument before them was chiefly, if not wholly, confined.

The facts bearing upon this question may be shortly stated thus : The Government took possession of the estate in 1840 or 1841. That is the time at which the plaintiff alleges dispossession on the part of the defendant, and therefore the time when his cause of action arose. It appears that the plaintiff brought a suit against the Government and another defendant for the purpose of establishing his title as heir to this estate. A decision was pronounced in his favor in the year 1845 by the Principal Sudder Ameen, which decision was confirmed by the Court of Sudder Dewanny Adawlut in 1846. In 1848 he was actually put into possession, and he remained in possession until 1854. He was afterwards called upon to give further security to abide the event of the appeal, and on his failure to do so, the Court of Sudder Dewanny Adawlut caused the estate to be put under attachment. The appeal was decided finally in his favor in 1858 by the Judicial Committee of the Privy Council, and thereupon he was again put into possession.

The very question now to be decided arose between these same parties in a suit wherein the present plaintiff sought to recover from the present defendants certain other lands which he alleged were within the limits of the zemindary of Ramnugger, and not within those of Bettiah. This suit, though commenced on the same day as the present, came on appeal before this Board in February 1869. In that case, as in the present, it was contended on the part of the plaintiff that the operation of the statute had been suspended by the litigation in which he had been engaged in order to establish his title to his estate and by his dispossession in 1848.

In order to show that the case is precisely in point, it is enough to read a few sentences of the judgment. It is reported in the 12th Moore's Indian Appeals, and at page 341 * this is stated :—"If, however, it were granted that a right of action accrued to the appellant at the date of the thakbust proceeding (that would be the year 1845, three or four years later than the cause of action would arise in the present case), and their Lordships think it impossible on the evidence to fix the

* 12 W. R. P. C. 6.—See p. 20 ; 2 Suth. P. C. R. 225.—See p. 242.

dispossession at a later date, the suit would nevertheless fall within the twelve years' limitation, unless the appellant could show that he is entitled to deduct the whole or some part of the period between February 1848 and the beginning of 1858, and to support this claim to deduction he must show that during the period to be deducted, he was, in the words of the Regulation, 'from good and sufficient cause precluded from obtaining redress.' Their Lordships would have great difficulty in affirming the proposition that such good and sufficient cause had here been shown to exist. The appellant's title to the Raj of Ramnugger was established in the Courts of India in September 1846. He was put in possession of the property in June 1848, though between May 1854 and some day in the beginning of 1858 it was again under attachment. How can it be said in these circumstances he was between 1848 and 1858 precluded from maintaining a suit for protecting his zemindary and recovering lands taken from it by encroachment? It would be very dangerous in their Lordships' opinion to lay down as a rule that the pendency of an appeal to England puts the party who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties." Their Lordships therefore affirmed the decision of the Indian Court, which in that case had held that the Statute of Limitations was a bar to the plaintiff's claim.

Their Lordships consider themselves precluded from considering whether the present case is taken out of the statute by the exception in s. 14 of Reg. III of 1793,—viz., "or shall prove that from minority or other good and sufficient cause he is precluded from obtaining redress," because this question is actually *res iudicata* by this very tribunal between the same parties. It has, however, been argued on the part of the plaintiff that in this case he brings himself within an exception to be found in the subsequent Reg. II of 1805 s. 3 :—"The limitation of twelve years fixed by s. 14 Reg. III 1793, s. 8 Reg. VII 1795, and s. 18 Reg. II 1803, shall also not be considered applicable to any private claims of right to lands, houses, or other permanent immoveable property, if the person or persons in possession of such property when the claim of right thereto may be preferred in a competent Court of judicature shall have acquired possession thereof by violence, fraud, or by any other unjust dishonest means whatever;" and the Regulation goes on to say that if the plaintiff seeks to exempt himself from the ordinary rule, he must state the fraud or violence in his declaration or replication. It has been argued that the plaintiff does sufficiently state a case of dispossession by fraud and violence in his plaint and subsequent statement by his pleader, and that the evidence is sufficient to satisfy their Lordships that he was dispossessed by fraud or violence within the meaning of the words of this statute. Although it may be perhaps fairly contended that there is a sufficient statement in the declaration to bring the plaintiff within this exception, no issue appears to have been directed to this question, and the attention of the High Court does not appear to have been directed to it at all, inasmuch as they confined their attention entirely to the question whether the plaintiff could bring himself within the exception of s. 14 of Reg. III of 1793. But their Lordships nevertheless are asked to consider the evidence and to say that the plaintiff has brought himself within this exception. They think it right to observe that this is an exception which they think must be construed with some strictness, for the door would be opened widely to a large class of claims which ought properly to be barred by limitation, if at any period less than sixty years a plaintiff were enabled to evade the operation of the Statute of Limitations merely by alleging and giving some evidence of fraudulent or forcible dispossession. Their Lordships think that such fraudulent or forcible dispossession must be clearly established.

Applying their minds to the evidence which has been relied upon on the part of the plaintiff, they have to observe in the first place that in the suit as originally brought and heard before the Principal Sudder Ameen there was no allegation of

violent or fraudulent dispossession. There was simply a statement of dispossession. Upon the case being remanded, evidence of dispossession was brought forward for the first time, and it was to this effect :—With respect to each of the three villages —(and their Lordships believe with respect to each of the nine also),—one or two witnesses depose to the agents of the Rajah of Bettiah having come upon the land while the putwaree was in the act of collecting the rents ; that they happened to have found upon him the rent-rolls and official documents connected with the land ; that they took them forcibly from him, and expelled him and took possession. The same story is told in each of the cases, and what appears more singular, it is also said that although the attention of the Government authorities was called to the matter they refused to take any notice of it. It should be recollected that the putwaree then dispossessed was the putwaree acting on behalf of the Government, and it is further to be observed that the plaintiff himself states more than once that he received all these eighty-five villages from the Government, who were in possession of them, without making any statement at all as to this alleged forcible dispossession. It is further to be observed that the Principal Sudder Ameen would appear to have wholly disbelieved this evidence, and that the attention of the High Court was never called to it.

Under these circumstances their Lordships have no difficulty in coming to the conclusion that no such fraudulent or forcible dispossession has been proved as would bring the plaintiff within the exception of s. 3 of the Regulation of 1805, and they feel bound to decide that the plaintiff's claim is barred by the Statute of Limitations. The plaintiff's suit must be dismissed upon that ground ; and it is therefore unnecessary for their Lordships to express any opinion upon the merits of the case.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that the suit of the respondent be dismissed, and that the appellant have his costs in both the Courts below and of this appeal.

The 5th June 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Limitation—Cause of Action.

On Appeal from the High Court at Madras.

Rajah Sri Chaitanya Chundra Harischandana Jagadevu Bahadoor
versus

The Collector of Ganjam and another.

In a suit to recover possession of certain villages belonging to a talook which had been sold by Government for arrears of revenue, where plaintiff alleged that they ought not to have been sold as they were not subject to revenue, the second defendant, who was the purchaser and in actual possession, pleaded limitation as a bar. Plaintiff urged that a fresh cause of action arose in consequence of some proceedings of the Government by which they made a new grant of the villages to the second defendant, at an increased revenue.

HELD that such grant would not give a new cause of action, and cannot affect the time when the only cause of action arose to plaintiff.

Mr. Comie, Q.C., and Mr. S. G. Grady, for Appellant.

Mr. Forsyth, Q.C., for the Collector, and

Mr. Leith, Q.C., and Mr. J. B. Norton, for the other Respondent.

Two Courts in India had held the claim of the appellant to considerable villages

to be barred by limitation under Act XIV of 1859, the suit not having been brought within twelve years after the second respondent claimed possession of the property purchased by his father. The present suit was commenced in 1858 to recover fifty villages paying a quit-rent, and fourteen other villages, besides Rs. 455,000 as the past produce. In 1869 the Civil Court gave judgment, holding the claim to be barred by the Indian Law of Limitation, which decision was confirmed by the High Court of Madras, from whose decision the present appeal was lodged.

Sir Montague Smith gave judgment as follows :—

This is a very clear case. Both the Courts in India have decided that the claim of the plaintiff is barred by the limitation of twelve years. He brought his suit, as the adopted son of the late zemindar of Hautghur, to recover fifty villages which had belonged to the talook of Hautghur. That talook was sold by the Government for arrears of revenue. It is alleged by the second defendant, who was the purchaser, that the fifty villages were sold with the rest of the talook. It is alleged on the part of the appellant that those villages, although in some sense belonging to the talook, ought not to have been sold by the Government, inasmuch as they were not subject to revenue, but were Mocassa villages, which had been alienated from the zemindaree, and paid a quit-rent only to the zemindar. That is the question upon the merits, if the merits could be tried. The sale was in 1854. The second defendant was put into actual possession of the villages in 1855, and has remained in possession ever since. This suit was not brought until the 28th September 1868, which is more than twelve years after he was so put in possession. *Prima facie*, therefore, the Statute of Limitation is a bar. Mr. Cowie has endeavoured to show that a fresh cause of action arose in consequence of some proceedings of the Government, by which it is said they made a new grant of these villages to the second defendant, the present zemindar, at an increased revenue of Rs. 5,000. But such a grant, supposing it to have been made, would not give a new cause of action, and cannot affect the time when the only cause of action arose to the present appellant. The appellant is suing under the title he had in 1854 and 1855, and he has no other title, and he does not allege that he has had any possession or that the Government has given him possession since his first dispossession. It is quite unnecessary, therefore, to go into those proceedings, into which Mr. Cowie went in some detail, for the purpose of raising the point. It is sufficient to say that all that passed between the Government and the second defendant, the present zemindar, does not at all affect the question of limitation. The bar applies if the cause of action has not arisen within twelve years. It is quite clear here that it did not arise within that period, and therefore the judgments of the Courts in India are right.

Their Lordships will humbly recommend Her Majesty to affirm the judgment of the High Court of Madras, and to dismiss this appeal, with costs.

The 9th June 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Act I of 1845 s. 21—Joint Hindoo Family—Purchase by Managing Member.

*On Appeal from the High Court at Calcutta.**

* From the judgment of Bayley and Norman, JJ., in Regular Appeal No. 38 of 1869, decided on the 20th April 1870.—18 W. R. 347.

Toondun Singh
versus
Baboo Pokhnarain Singh and others.

Notwithstanding anything contained in Act I of 1845 s. 21, the members of a joint Hindoo family may sue to enforce rights acquired by them under a purchase, at a sale for arrears of revenue, made by the managing member in his own name, but on behalf of the family, though he is the sole certified purchaser.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Appellant.
Mr. Doyne for Respondents.

Sir Barnes Peacock gave the judgment of their Lordships as follows :—

The point in this case has been reduced now to the question as to what is the proper construction to be put upon the 21st Section of Act I of 1845. The High Court expressed their opinion "that a purchase at a sale for arrears of revenue under Act I of 1845 made by the managing member of a joint Hindoo family in his own name, but on behalf of the joint family, is not affected by the 21st Section of that Act, and that, notwithstanding anything contained therein; the members of such joint family may sue to enforce rights acquired by them under such a purchase as against the managing member, though he is the sole certified purchaser." Their Lordships entirely concur in that view of the construction of Act I of 1845. It appears upon the Record that this judgment was pronounced on the 20th April 1870, and that the appeal was preferred and allowed to Her Majesty in Council on the 14th May 1870. The judgment in review which has been sent up and notified to Her Majesty in Council, and put upon the Record in this case, was passed on the 29th August 1871, after the appeal was preferred. It does not appear that any appeal has been preferred against the judgment which was pronounced in review, and under those circumstances their Lordships, being aware that such a judgment has been passed, will humbly recommend Her Majesty to affirm, with the costs of this appeal, the original decree passed by the High Court so far as it finds the properties in question to be part of the joint family estate, but without prejudice to the subsequent judgment which was passed by the High Court in review, or to any proceeding which may be taken thereunder. That will leave all the questions open as to carrying it out.

The 24th June 1874.

Present ;

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Enhancement of Rent—Azeemabadee Rupees and Sicca Rupees—Conversion into
Company's Rupees—Jurisdiction of High Court.*

*On Appeal from the High Court at Calcutta.**

Meer Mahomed Hossein

versus

Alexander John Forbes.

Defendant, representing the grantees of a talook under a sunnud made in 1775, when the rent reserved was Sanwat Azeemabadee Rs. 2,599, was sued, by the auction-purchaser, for enhancement of rent to Co.'s Rs. 8,465-2. The High Court held that, under Act X of 1859, he was not entitled to en-

* From the judgment of Kemp and E. Jackson, JJ., in Special Appeal No. 811 of 1868, decided on the 3rd August 1868.

hance, as from the time of the permanent settlement (1802), down to 1835, when sicca rupees were converted into Company's rupees, defendant and his predecessor had paid sicca Rs. 2,107 in lieu of Azeemabadee Rs. 2,599; but they allowed the Azeemabadee rupees to be converted into Company's rupees according to a fresh calculation, *i.e.*, at a higher rate than Rs. 2,248 at which the conversion had been made when sicca rupees ceased to be a legal tender :

Held, that as the case was before the High Court in special appeal, they had nothing to do with the evidence. There was no evidence upon which it could be found that Azeemabadee Rs. 2,599 was of a higher value than Co.'s Rs. 2,248; but even if the High Court had the power of finding, and had found such fact, yet as the parties had agreed from a period antecedent to the permanent settlement that the Azeemabadee Rs. 2,599 should be converted into siccas at the rate which had been paid down to 1836, and which had then been converted into Company's rupees, the High Court was wrong in overruling the decision of the Judge who had tried the issues and had dismissed the plaintiff's suit.

Mr. Doyne and Mr. Cowell were for Appellant.
Mr. Field, Q.C., and Mr. J. D. Bell for Respondent.

The facts of the case are fully set out in the judgment of their Lordships, which was delivered as follows by *Sir Barnes Peacock* :—

The appellant, the defendant in the suit, represents the grantees of a talook under a sunnud, which was made in 1775, of certain lands, the rent reserved at that time being Sanwat Azeemabadee Rs. 2,599. The plaintiff represents a person who purchased the zemindaree in which the talook was situate at an auction-sale; and he, as representative of the zemindar, claimed in the first instance to enhance the rent to the present value of the lands. He sought to raise the rent of Azeemabadee Rs. 2,599 to Co.'s Rs. 8,465-2. The High Court held that, under Act X of 1859, he was not entitled to enhance. Act X of 1859 s. 15 says :—"No dependent talookdar, or other person possessing a permanent transferable interest in land intermediate between the proprietor of an estate and the ryots, who in the provinces of Bengal, Behar, Orissa, and Benares holds his talook or tenure (otherwise than under a terminable lease) at a fixed rent which has not been changed from the time of the permanent settlement, shall be liable to any enhancement of such rent, anything in s. 51 Reg. VIII of 1793, or in any other law to the contrary notwithstanding." They found that from the time of the permanent settlement down to the time when sicca rupees were converted into Company's rupees in 1835, the defendant and his predecessor had paid sicca Rs. 2,107 in lieu of Azeemabadee Rs. 2,599. That rent could not be changed now, even if it could be shown that the calculation under which the Azeemabadee Rs. 2,599 were converted into sicca Rs. 2,107 was erroneous. It would be impossible now to go back to the grant of 1775 and to say that the sicca Rs. 2,107, which has been the rent paid from the time of the permanent settlement, is now to be changed, because it originated out of a grant by which Sanwat Azeemabadee Rs. 2,599 were reserved. The High Court held that this was not an enhancement of the rent, but merely a valuation of the old rent of Azeemabadee Rs. 2,599, and therefore they allowed the Azeemabadee rupees to be converted into Company's rupees according to a fresh calculation.

The Judge found there had been no change except the conversion. He says :—"Both parties having been called upon to adduce evidence on these points," those were the two issues which the High Court had sent down to be tried, "the appellants have filed dakhillahs or receipts from 1241 M.S. to 1264 M.S., with the exception of 1262 M.S., and which have been attested by Moonshee Jowahir Ali on their behalf. Those documents show how much they paid in each year, and to a certain extent prove that the jumma has not been changed during those years." The receipts show that the jumma was paid in Company's rupees, and therefore to alter the amount of Company's rupees now you must go back beyond the permanent settlement to show that these Company's rupees, which have been paid for more than the last twenty years, were too small an amount as compared with the Azeemabadee Rs. 2,599 reserved in 1775. He says :—"Attested copy of an urzee of Baijnath Sing has also been filed in reply to a perwannah issued by the Collector. He was surburakar of the property from 1243 to 1252 M.S. This paper shows

that in May 1828, or 1236 M.S., the rent of the istemrar was sicca Rs. 2,107." He says that this document shows that at that time, viz., May 1828, the rent was sicca Rs. 2,107. From the copy of the sunnud filed in former suits the rent was fixed at Sanwat Rs. 2,599; $8=2\frac{1}{2}$ Sanwat Azeemabadee rupees. The document above mentioned shows that the rent has been changed into sicca Rs. 2,107, $9=10\frac{1}{2}$ sicca rupees; and again, according to the batta allowed in sicca rupees at the rate of 6-10-8 per cent., changed to the equivalent in Company's Rs. 2,248-1-8. Beyond this equivalent in the rupees current at different eras, no change can be discovered of the rent of the istemrar having ever been really changed since the grant of the sunnud in 1795 A.D. The respondent, Mr. A. J. Forbes, has submitted no evidence of any kind to show the contrary, or to rebut the presumption that the land has been held at that rent from the time of the permanent settlement." He then goes on, and in a note at the foot of his judgment he says:—"With reference to the second issue, namely, the difference, if any, between the Sanwat Azeemabadee rupees and the Company's rupees, the claim for the excess having been dismissed, there is no necessity to go into the matter. Reg. XXXV of 1793 s. 14, which gives the different rupees current at the time, clearly lays down that 96 old Patna Sanwats are equivalent to sicca Rs. 100 of the 19th Sun, and to reduce sicca rupees into Company's, the sum of 6-10-8 per cent. is allowed, i.e., Company's Rs. 106-10-8 equal to sicca Rs. 100." Then he says:—"See Muller's Tables." Now the Regulation to which the learned Judge refers is Reg. XXXV of 1793. It recites that it was necessary that there should be no other coin in circulation or in use except the sicca rupee of the 19th Sun, and they state the mode in which that was to be brought about. Having stated that sicca rupees only should be received at the Treasury in payment of revenue, that they should be received in payment for salt, they prohibited parties from making contracts after a certain date in any other coin than the sicca rupee, stating that if they entered into any such contract for any sum of money excepting sicca rupees, the contract should not be enforceable in a Court of Law. Then they say:—"By the operation of these rules the various sorts of old and light rupees must in a course of time fall to their intrinsic worth compared with the sicca of the 19th Sun; as they will produce no more in the mint, and to which they will necessarily be brought to be converted into siccas, as they will be nowhere passable or in demand as coin from being nowhere a measure of value." Then after this Regulation it appears that the Rs. 2,599 were, by arrangement between the parties, the one who was bound to pay the rent, and the other who was entitled to receive it, converted into sicca Rs. 2,107. That was before the permanent settlement. The permanent settlement in this district was made in 1802. That is stated in the respondent's case. The rent having been converted into sicca rupees before the permanent settlement in 1802, the permanent settlement was made with the plaintiff's predecessor, and the Government, in fixing the amount of revenue which was to be paid under the permanent settlement, looked to the assets of the estates, and they must have taken the assets of this estate as sicca Rs. 2,107, and estimated the revenue which the zemindar would have to pay accordingly. The permanent settlement was fixed upon the basis that the rent which was payable under the pottah was sicca Rs. 2,107, and from the time of the permanent settlement that is proved to have been the only amount paid in discharge of rent up to the time when the sicca rupee was abolished. That rupee was abolished by Act XIII of 1836. By s. 1 it was enacted that "from the 1st January 1838 the Calcutta sicca rupee shall cease to be a legal tender in discharge of any debt, but shall be received by the Collector of Land Revenue and at all other public treasuries by weight and subject to a charge of 1 per cent. for recoinage." Then it states that the new coin, which is called the Company's rupee, should be taken at the rate of 16 new or Company's rupees for every 15 Calcutta sicca rupees of due weight, that is to say, the Company's rupee was equal to $\frac{15}{16}$ ths of a sicca rupee.

From that time, then, the defendant could not continue to pay his rent in

sicca rupees, because the sicca rupees had been abolished, and it had been enacted that no tender should be made in sicca rupees. It was therefore necessary to convert the sicca Rs. 2,107 into Company's rupees, and that was done by adding the difference between the Company's rupees and the sicca rupees, and from that time the sicca Rs. 2,107, which had been paid from the time of the permanent settlement, were converted into Co.'s Rs. 2,248, which were paid from that time down to the time of the commencement of this suit.

It appears to their Lordships that if any question as to the value of the Azeemabadee rupees could have been entered into at all in the present suit, the conduct of the parties in dealing with the Azeemabadee Rs. 2,599 for upwards of 50 years as being the equivalent of sicca Rs. 2,107 would have been much stronger evidence than any evidence which is given in this case by Mr. Palmer from the old almanac, or by Mr. Judah from Prinsep's Tables, in which he stated that there was no actual valuation of the Sanwat Azeemabadee rupee. He states :—" The information will be found in Prinsep's Tables, in which he also admits some errors are to be found ; at the same time he states that those tables do not give the equivalent of Sanwat Azeemabadee in Company's rupees," they only give it in siccas.

Now the Judge upon that evidence, finding that from the time of the permanent settlement down to 1836 sicca Rs. 2,107 were the only rent which had been paid; and that from 1836 these sicca rupees had been converted into Co.'s Rs. 2,248, held that the plaintiff was not entitled to recover from the defendant at a higher rate than that which had been paid from 1835 to the time of the commencement of the suit as the equivalent of sicca Rs. 2,107, and dismissed the plaintiff's suit. The High Court, however, thought that the plaintiff was entitled, at this distance of time,—notwithstanding the mode in which the parties had dealt with it, notwithstanding the fact that no Azeemabadee rupees had ever been paid as rent from the time of the permanent settlement down to the time of the commencement of the suit,—to recover at the rate of Sanwat Azeemabadee Rs. 2,599 to be converted into Company's rupees ; and according to the evidence which has been given in the cause, they converted the Sanwat Azeemabadee Rs. 2,599 into Company's rupees at a higher rate than Rs. 2,248. The case was before the High Court upon special appeal, and therefore in strictness, they had nothing to do with the evidence in the cause. There was no evidence upon which (even if they could have been allowed to do so by law) they could find that Sanwat Azeemabadee Rs. 2,599 was of a higher value than the Co.'s Rs. 2,248 into which they have been converted ; but even if they had the power of doing that, and had done so, the parties had agreed, from a period antecedent to the permanent settlement, that the Sanwat Azeemabadee Rs. 2,599 should be converted into a different coinage, namely, the sicca rupee at the rate which had been paid down to 1836, and which in 1836 had been converted into the statutable equivalent in Company's rupees.

Under these circumstances their Lordships think that the High Court was wrong in overruling the decision of the Judge who tried the issues, and they will therefore humbly recommend Her Majesty that the decision of the High Court should be reversed, that the decision of the Judge of the Lower Court should be affirmed, with the costs of this appeal and the costs in the High Court.

The 3rd July 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Robert P. Collier, and
Sir Lawrence Peel.

Statutable Rights—Liability without Negligence.

On Appeal from the High Court at Madras.

The Madras Railway Company
versus
The Zemindar of Carvetinagarum.

In a suit in which damages were claimed for injuries occasioned to plaintiffs' railway and works by the bursting of two tanks upon defendant's land, defendant pleaded that the injuries were the result of influences beyond his control. The first Court held that defendant was not liable in the absence of negligence, and that he had not been negligent. This judgment was upheld by the High Court on appeal. Before the Privy Council it was contended that, by storing up water on his land, defendant rendered himself liable in damages in the event of its escaping to the injury of others, even though he might not have been guilty of negligence.

As the principle that a man, in exercising a right, may be liable, without negligence, for injury done to another, is inapplicable to rights conferred by statute, the Privy Council held that it was inapplicable to the case of defendant, which was analogous to that of persons on whom statutory rights had been conferred and statutory duties imposed, for the tanks were ancient and a part of a national system of irrigation recognised by law, and their maintenance was a duty in many instances devolving on zemindars (of whom defendant is one), who have no power to do away with the tanks in which large numbers of people are interested.

Sir John Karslake, Q.C., Mr. Watkins Williams, Q.C., and Mr. Mansel Jones
for Appellant.

Mr. Leith, Q.C., and Mr. S. G. Grady for Respondent.

This was a case in which damages were claimed by the appellant for injuries occasioned to their railway and works by the bursting of two tanks upon the respondent's land. The tanks, which had burst by a tremendous fall of rain in 1865, and flooded the bridges and works, were ancient reservoirs for the sustenance of the inhabitants of the district, and were necessary for the cultivation of the land and the religious services of the Hindoos. The damage done to the railway was estimated at Rs. 45,000. The Civil Court held that there was no cause of action, and the High Court affirmed that decision, on which the present appeal was raised. The point was whether the injuries complained of were the result of influences under the defendant's control, or the consequence of *vis major*, or the act of God. The High Court, in their decision, declared that a rule of English law was not a rule for them unless it was a correct rule; and that it was quite possible that a rule, excellent in England, would be wholly inapplicable in India. When the House of Lords and the Exchequer Chamber, in the case of *Fletcher v. Rylands*, L. R. 3 H. L. 330, decided that there was a liability to compensate, they, in fact, decided that a man had a right to store water only when he had taken complete precaution against its escape; that the escape was un rebuttable evidence of the guilty hurting of the right of another—of the commission of an injury; and that he was bound to compensate for the injury caused. The storing of water in the present case was absolutely essential to the simple agriculture of the people, and the High Court agreed with the Civil Judge when he said that laws older than the Mahomedan domination, as old as authentic history, had organised a primary necessity of such tanks, and declared the destruction of them the greatest of crimes, and for the obvious reason that they were the well-spring of a people's life. Acting Chief Justice Holloway said:—"My conclusions are that, on the true understanding of the case of *Fletcher v. Rylands*, the Civil Judge's decree is right; that, if otherwise, the imposing of such a duty upon a landowner is forbidden by precisely the same

principles as have forbidden the imposition upon wharfingers, railway companies, and shipowners ; that this attempt would never have been made if the final decision had rested with Judges conversant with the necessities of the country ; and that it has only been made in the hope that such a rule may be imposed elsewhere by Judges not so conversant. It is my hope and belief that such an attempt will not be successful. If it is, I can imagine nothing more calamitous to the Hindoo than what is called the opening up the resources of the country. Either he must throw his land out of cultivation, or, without proof of any negligence on his part, be compelled to compensate for damages resulting from natural cultivation to works centuries in advance of his immediate social necessities, and expensive beyond anything which these actual necessities would have generated. I entertain neither doubt nor hesitation in dismissing this appeal with costs."

Sir John Karlake, for appellant, contended that there was such a degree of legal negligence that the defendant was liable, and that the principles in England, as laid down in *Fletcher v. Rylands (ubi supra)*, and as to keeping vicious animals, would apply ; and that had the tanks been properly constructed, they would not have burst.

Mr. Mansel Jones followed on the same side.

Mr. Leith, in opening the case on the part of the zemindar, dwelt on the great importance of storing water in India to prevent famine, and referred to the speech of Lord Salisbury on the Indian Council Bill on the necessity of appointing a Member for Public Works, and on the proposal to spend thirty millions of money for improvements, including the irrigation of tanks for the public benefit. He showed, by the Bengal regulations and the speech of Mr. Burke, the necessity of storing water ; indeed, for the Hindoo population it was essential for their religious observances. There was no analogy between the cases cited on the other side as to the keeping of vicious animals and the absolute necessity of having large stores of water for districts in India. He urged that all necessary precautions had been taken by the zemindar ; that as the Company had run their railway through part of the district, they should have provided against any such occurrence ; that the principles on which the case of *Fletcher v. Rylands (ubi supra)* was decided could not apply to a peculiar country like India, where the construction of tanks and the storing of water were absolutely necessary to the existence of the population ; and that the case ought not to be decided according to English law, but according to the law of the defendant, a Hindoo inhabitant, and according to the Regulation law of equity and good conscience.

Mr. S. G. Grady followed on the same side.

The following are the authorities that were referred to by the Counsel on both sides :—

Fletcher v. Rylands *

Filliter v. Phippard †

Tubervil v. Stamp ‡

Jones v. Festiniog Railway Company §

Vaughan v. Taff Vale Railway Company ||

Ruck v. Williams ¶

Tipping v. St. Helen's Smelting Company **

Mayor of Lyons v. E. I. Company ††

Their Lordships reserved their judgment, which was subsequently given by *Sir R. Collier* on the above date as follows :—

The Madras Railway Company claimed in this suit damages against the

* L. R. 3 H. L. 330.

† 11 Q. B. 347.

‡ 1 Salk. 13.

§ L. R. 3 Q. B. 733.

|| 29 L. J. Ex. 247 ; 5 H. and N. 679.

¶ 27 L. J. Ex. 357 ; 3 H. and N. 308.

** L. R. 1 ch. 66 ; 11 H. L. C. 642.

†† 1 Moo. P. C. 175

defendant, the zemindar of Carvetinagarum, for injuries occasioned to their railway and works by the bursting of two tanks upon his land.

The defendant denied that the injuries complained of resulted from the bursting of the tanks ; he asserted that if they did so arise, the bursting was caused by no act or negligence of his, but by *vis major*, or the act of God. He further pleaded in these terms :—

“ 4. The tanks referred to in the plaint have existed from time immemorial, and are requisite and absolutely necessary for the cultivation and enjoyment of the land, which cannot be otherwise irrigated ; and the practice of storing water in such tanks in India, and particularly in this district and in the zemindaree of Carvetinagarum and the adjacent districts, is lawful, and is sanctioned by usage and custom. The said zemindaree is a hilly district, and the ryots will be unable to carry on their cultivation without such tanks, they being the chief source of irrigation, and the omission to store quantities of water in such tanks will be attended with consequences dreadful to the inhabitants of the country.

“ 7. The defendant could not have avoided collecting a quantity of water in the tanks during the monsoon, and he has not failed to use any reasonable care that may be expected from him. There were also several tanks and channels above his tank belonging to Government and other people, which also burst at the same time.”

He also contended that the damage arose through want of proper care on the part of the plaintiffs in the construction of their works, but this contention was abandoned. It was found by both Courts, and is not now disputed, that the works of the plaintiffs did suffer serious damage from the bursting of the tanks ; these last two questions, therefore, need not be further referred to.

The issues, as far as they are material to this appeal, agreed to by the parties, were—

1. Whether the injuries complained of were the result of *vis major*, or the act of God, or other influences beyond the defendant's control.

2. Whether defendant is liable for any, and if so what, damages sustained by the plaintiffs.

The evidence given in the cause may be summarized as follows :—It was shown that the tanks of the defendant, which were ancient tanks, the date of their origin not appearing, were constructed in the usual manner ; that the tanks were properly attended to and kept in repair ; that sluices and outlets for the water were provided of the kind usually employed both in private and Government tanks, and usually found sufficient, and which had proved sufficient to prevent any overflow or bursting of the tanks in question for twenty years ; but that an improved description of sluice, of recent introduction, would be still more efficacious ; that at or some days before the accident there had been an unusual and almost unprecedented fall of rain, described by the Deputy-Inspector of the Railway as the heaviest he had ever seen during his residence of thirteen years in the locality, and by witnesses for the defendant as exceeding any fall of rain for twenty years ; that this extraordinary flood, which caused the neighbouring river to overflow, and possibly brought down to the tanks, whose overflowing is complained of, the contents of other tanks at higher levels, proved more than the sluices could carry off, that the banks of the tanks were overflowed and finally carried away.

Upon these facts the Acting Civil Judge of the Civil Court of Chittoor found for the defendant, holding that he was not liable in the absence of negligence, and that he had not been negligent.

This judgment was affirmed by the High Court on appeal.

The appellants now contends that the judgment of the High Court should be reversed on two grounds.

1st.—That the defendant, by storing up water on his land, rendered himself

liable in damages, should it escape and do injury to other persons, even though he might not have been guilty of negligence.

2nd.—That both the Indian Courts have applied an erroneous rule of law to the consideration of the question of negligence.

The case mainly relied upon in support of the first contention is *Fletcher v. Rylands*, Law Reports, 3 House of Lords, 330, which it becomes necessary to examine. In that case the plaintiffs, the owners of a mine, sued for damages, the defendants, owners of some adjacent land, who had constructed a reservoir on their land for the purpose of working a mill, from which reservoir water flowed through some disused mining works into the plaintiffs' mine, and flooded it. It was held by the Exchequer Chamber and by the House of Lords that the plaintiffs were entitled to damages against the defendants.

The grounds of this judgment are stated very clearly and shortly by the then Lord Chancellor (Lord Cairns) and Lord Cranworth.

The Lord Chancellor says :—

“The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners and occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of the land, be used ; and if, in what I may term the natural use of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants, in order to have prevented that operation of the laws of nature. . . . On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it, for the purpose of introducing water either above or below ground in quantities, and in a manner not the result of any work or operation on or under the land ; and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing, they were doing at their own peril ; and if, in the course of their doing it, the evil arose . . . of the escape of the water and its passing away to the close of the plaintiff, and injuring the plaintiff, then, for the consequence of that, in my opinion, the defendants would be liable.”

Lord Cranworth thus states the principle of the decision :—

“If a person brings and accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage . . . and the doctrine is founded in good sense. For when one person in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum*.”

But the principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury done to another person, has been held inapplicable to rights conferred by Statute.

This distinction was acted upon in *Vaughan v. The Taff Vale Railway Company*, 5 Hurlston and Norman, 679, where it was held by the Exchequer Chamber that a Railway Company were not responsible for damage from fire kindled by sparks from their locomotive engine, in the absence of negligence, because they were authorised to use locomotive engines by Statute. Cockburn, *C.J.*, observes :—

"Where the Legislature has sanctioned and authorised the use of a particular thing, and it is used for the purpose for which it was authorised, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damages result from the use of such a thing independently of negligence, the person using it is not responsible." This view is fortified by the consideration that the Legislature may be presumed not to have conferred special powers on persons or companies, without being satisfied that the exercise of them would be for the benefit of the public, as well as of the grantees. On the same principle it was decided that a waterworks company laying down pipes by a statutory power, were not liable for damages occasioned by water escaping in consequence of a fire-plug being forced out of its place by a frost of unusual severity. (*Blyth v. The Birmingham Waterworks Company*, 25 L. J., Ex. 212.)

On the other hand, in *Jones v. The Festiniog Railway Company* (3 Law Rep., Q. B., 733), it was held that a railway company which had not express statutory power to use locomotive engines, was liable for damage done by fire proceeding from them, though negligence on the part of the company was negatived.

It has been argued on the part of the respondent that the case of *Rylands v. Fletcher*, decided on the relations subsisting between adjoining landowners in this country, has no application whatever to India. Though that case would not be binding as an authority upon a Court in India not administering English law, their Lordships are far from holding that, decided as it was, on the application of the maxim, *sic utere tuo ut alienum non lœdas*, expressing a principle recognized by the laws of all civilized countries, it does not afford a rule applicable to circumstances of the same character in India,—they are of opinion, however, that the circumstances of the present case are essentially distinguishable.

The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognised by Hindoo and Mahomedan law, by regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on zemindars, of whom the defendant is one. The zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts referred to in the judgment of the High Court, and vouched by history and common knowledge, it becomes apparent that the defendant in this case is in a very different position from the defendants in *Rylands v. Fletcher*.

In that case the defendants, for their own purposes, brought upon their land and there accumulated a large quantity of water by what is termed by Lord Cairns "a non-natural use" of their land. They were under no obligation, public or private, to make or to maintain the reservoir; no rights in it had been acquired by other persons, and they could have removed it if they had thought fit. The rights and liabilities of the defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. The duty of the defendant to maintain the tanks appears to their Lordships a duty of very much the same description as that of the railway company to maintain their railway; and they are of opinion that, if the banks of his tank are washed away by an extraordinary flood without negligence on his part, he is no more liable for damage occasioned thereby than they would be for damage to a passenger on their line, or to the lands of an adjoining proprietor occasioned by the banks of the railway being washed away under similar circumstances. (See *Withers v. The North Kent Railway Company*, 27 L. J., Ex., 417.)

The second ground on which the appellant relied was not so clearly stated;

their Lordships understood it to be, in substance, that the Court below and the High Court estimated by a wrong standard the amount of care which the law requires of the defendant.

It should be observed that the question of negligence was little, if at all, argued in the High Court.

The Judge of the Court below quotes and applies to the case the following definition of negligence by Baron Alderson :—"Negligence consists in the omitting to do something that a reasonable man would do, or in the doing something which a reasonable man would not do, in either case unintentionally causing mischief to a third party;" and the High Court confirm this view of the law. Without adopting every expression of the Judge of the inferior Court, their Lordships are unable to say that the case has been decided on an erroneous view of the law. On the question of fact whether or not negligence was proved by the evidence, they see no sufficient reason for departing from their ordinary rule of not disturbing the concurrent finding of two Courts.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Court below should be affirmed, and the appeal dismissed with costs.

The 3rd July 1874.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Suit against Guardian—Compromise prejudicial to Minor—Insufficient Representation.

*On Appeal from the High Court at Calcutta.**

Unnoda Dabee

versus

Maria Louisa Stevenson.

F having purchased an estate on behalf of his minor daughter M, paid a part of the price, and gave a mortgage-bond for the rest. Upon this bond the vendor sued F personally, and as the guardian of his daughter, for the amount due, and obtained a decree declaring him alone liable. F then appealed to the Sudder Court, on the ground that his daughter ought to have been joined in the decree, and then proposed a compromise, which was acquiesced in, and on which judgment was given to the effect that the decree should be allowed to declare the liability of the half share of the putnee which had been specially pledged as security, and the decree-holder be permitted to proceed against F only for such balance as might not be satisfied by the sale of the said property. Upon the daughter attaining her majority, she and her husband applied for a review of this decision. The High Court held, that the appeal to the Sudder Court had been by F alone, who had obtained an alteration of the decree in his own favor to the prejudice of his daughter, and that they had not materials to determine what were the rights between F and his daughter. The High Court accordingly reversed the decree of the Sudder Court.

Held, that they were not wrong, and that the vice of the compromise on which the Sudder Court's judgment had been based was that it was made without the party who was principally affected by it (*viz.*, the daughter) being sufficiently represented.

Their Lordships think that they ought not to disturb the decree of the High Court, which was made upon a review of the judgment of the Sudder Adawlut. The suit was brought by the present appellant, who was the representative of a vendor of a putnee talook, which had been purchased by Mr. Henry Gloucester French, as he represented, on behalf of his minor daughter, Miss Maria Louisa French. The suit was brought against Mr. French personally and as the guardian of his daughter. It appears that, upon the purchase of the estate, which was sold for

* From the judgment of Peacock, C.J., and Markby, J., in Regular Appeal No. 308 of 1855, decided on the 8th June 1866.—8 W.R., 29.

the sum of Rs. 26,625, a sum of Rs. 8,000, part of it, remained unpaid ; and Mr. French gave a mortgage-bond, or what is called a tummasook, to secure this money, and the suit was brought upon that bond. The conclusion of the suit is this—after stating the circumstances of the purchase of the bond :—“ It therefore becomes necessary to sue him in the above sum in his own name and as guardian of his daughter. This suit is instituted against Mr. French himself and as guardian of Miss Maria Louisa French, a minor ; and I pray that summons be directed to the defendants aforesaid as usual ; and that on hearing my evidence in proof of my claim, it may be ordered that the defendants be directed to pay me the amount of my claim, with interest and Court costs.” There is nothing in that prayer which seeks to affect the estate. It is a prayer that the defendants may be ordered to pay the amount of the claim. The case was heard before the Principal Sudder Ameen, who found these to be the facts :—“ It does not appear from the tenor, or the part signed, of the ikrar, on which the present suit has been brought by the plaintiff, that Mr. French has given and signed the ikrar as guardian or executor of the minor, Miss Maria Louisa French. He has not signed the ikrar as guardian and executor of the said Miss Maria Louisa French ; he has signed for himself. It has been clearly mentioned in the ikrar that the defendant Mr. French had obtained the putnee tenure for the said minor. The name of the said minor was used in this affair only by the defendant Mr. French. In every respect the defendant, Mr. French, appears to be responsible.” He goes on :—“ Such being the case, the said minor can by no means be responsible.” Then the order is “ that the case be decreed ; that the defendant Mr. French pay to the plaintiff the amount claimed, viz., Rs. 12,276, together with interest on the principal,” and so on. There is therefore a finding, the question apparently having been raised, that Mr. French alone is liable upon that instrument, and an order upon him alone for the payment of the money. The plaintiff, whom the present appellant represents, seems to have been perfectly contented with that decree. He did not appeal, but Mr. French appealed upon the ground that he ought not to have been made solely responsible for this amount, and that his daughter ought to have been joined in the decree. That ground of appeal was in the teeth of his own assertion in the pleadings in the Court below that he was alone liable for this debt ; and an effort was made by him to get rid of that pleading, but the Court apparently did not grant his request, and at all events that pleading stood ; and so the case came before the Sudder Court. On the pleadings as they stood, and which were not amended, it would have been impossible for that Court to have altered the decree as Mr. French desired ; and they did not do it ; but it seems that Mr. French proposed to the plaintiff a compromise of the appeal, which the appellant acquiesced in. That compromise is stated in the judgment, founded on the compromise, of the Sudder Court. They state :—“ Mr. French has appealed ; and his pleader, after submitting some pleas and objections which were not found to be included in his written grounds of appeal, confined his appeal to the point, that as the debt was obviously contracted by Mr. French for the purchase of a putnee exclusively intended for the use and benefit of his minor daughter, and for the security of which debt the half share of the putnee was specially pledged, that the decree be allowed to declare the liability of the property so pledged in the first instance, and the decree-holder be permitted to proceed against Mr. French only for such balance of the decree as may not be satisfied by the sale of the property pledged. As the pleader on the other side signifies to the Court that he should be satisfied if the Lower Court's decree be to this extent amended, it is therefore ordered that the amount decreed by the Principal Sudder Ameen be confirmed ; but with reference to the above arrangement, the decree-holder will first proceed to satisfy this decree by sale of the property pledged, so far as that property may be liable under the terms of the bond executed by Mr. French as wolee or woossee of his daughter, and any balance still remaining with them be levied from Mr. French unreservedly, until the whole amount of the decree be realized.” The compromise

may have been proper, and if all the facts could be assumed as Mr. Kay supposes them to exist, there may have been no objection to such an arrangement; but the vice of the arrangement is that it was made without the party who is principally affected by it being sufficiently represented. The appeal to the Sudder Court was really an appeal by Mr. French against his co-defendant, his own daughter; and she not being in any way represented before the Court but by himself, he comes to this compromise, and gets the assent of the plaintiff to it. It is plain that the Court exercised no controlling power over it; that they did not consider that they were looking after the interests of the infant, but they base their decree simply upon this compromise. It does not appear what was done for ten years after this decree; but upon the daughter attaining her majority and being married, she and her husband applied to the High Court for a review of this decision, which the High Court had power to rehear, as the Sudder Court, if it had existed, might itself have done. Upon the rehearing, the objections, to which allusion has just been made, were pointed out in the judgment of the High Court. The learned Chief Justice went very fully into the case, and came to the conclusion that the appeal to the Sudder Court was not made by the plaintiff, but by Mr. French himself, and that he had obtained an alteration of the decree in his own favour to the prejudice of his daughter. The High Court thought, that in a suit commenced as this had been, and with the pleadings of Mr. French standing as they did upon this record, they had not materials for going into the merits of the case to see what were really the rights between Mr. French and his daughter. Their Lordships cannot say they were wrong. By reversing the former order of the Sudder Court, they left the appellant exactly where he was after the judgment of the Principal Sudder Ameen, a judgment from which he did not appeal, and to which he must be again remitted. Whatever rights (if any) the plaintiff may have against the estate or against the daughter, he will not be precluded from asserting in a suit properly framed, because one of the grounds of this judgment is that this suit was framed merely on a money claim for the amount of the mortgage-debt.

Their Lordships will therefore humbly advise Her Majesty that the order of the High Court be affirmed.

The 15th July 1874.

Present:

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

Sale by Hindoo Widow—Suit by Reversioner—Mortgage—Liability of Reversioner.

*On Appeal from the High Court at Calcutta.**

Moulvie Mohamed Shumsool Hooda and others

versus

Shewukram, *alias* Roy Doorga Pershad.

A Hindoo widow (a Rance) having conveyed to a *bona fide* purchaser for full value an ancestral estate beyond her own life, a reversioner brought a suit for a declaration that she had only the power to grant a life estate, and that, after her death, he was entitled to an estate in remainder. The Courts below in India were of opinion that he should only be entitled to recover the property after the Rance's death on payment of the full purchase-money. The High Court varied the decree so far as to declare that he

* From the judgment of Couch, C.J., and Mitter J. (Bayley, J., having dissented), in Regular Appeal No. 53 of 1870, decided on the 13th September 1870;—see 14 W. R. 315.

should be entitled to it upon the payment of a mortgage upon the property which was existing at the time of the conveyance.

HELD, that a Hindoo widow might sell such an estate absolutely if it could be shown that the conveyance was necessary in order to pay the debts of the testator and was for the benefit of his estate generally. There was no proof of such being the state of things in this case.

HELD, that the judgment of the High Court was right, and that the mortgage having been paid by the purchaser, it was equitable that when the plaintiff reclaimed the estate credit should be given to the purchaser for such payment which otherwise the plaintiff himself would have to meet.

Mr. Doyne for Appellants.

Mr. Field, Q.C., and Mr. J. D. Bell for Respondent.

The following authorities were cited :—

*Sreemutty Soorjeemony Dossee v. Denabundoo Mullick.**

Tagore v. Tagore.†

Chutter Lall Singh v. Shewukram.‡

Crockett v. Crockett.§

Sabin v. Heape.||

Humbertson v. Humbertson.¶

*Spalding v. Shalmer.***

Sreemutty Rabutty Dossee v. Sibchunder Mullik.††

Sir Barnes Peacock gave judgment as follows :—

In this case a Hindoo widow lady, of the name of Ranee Dhun Kowur, in the year 1854, sold an estate to the defendant by a conveyance, in which she purported to give him an absolute title, what we should call in this country an estate in fee simple. Her grandson, on coming of age a great many years after, brings a suit for the purpose of having it declared in his favour that this lady had only the power to grant a life estate, and that, after her death, he was entitled to an estate in remainder.

The question depends upon the construction of a petition presented by Roy Hurnarain to the Collector in the year 1830, which has been treated by both sides in this litigation, and by both Courts, as in the nature of a testamentary instrument. The state of the family of Roy Hurnarain at the time of his presenting this petition was this. There were living only the before-mentioned Ranee Dhun Kowur, the widow of his son Roy Kalika Pershad, and her two daughters by that son, Bebee Shitaboo and Bebee Dularee, who at that time (1830) appear to have been unmarried. That being the state of the family, Hurnarain makes this, which must be now considered as a testamentary instrument. He first recites that the property of which he is about to dispose was ancestral property ; he recites the death of his son Roy Kalika Pershad, and the death of his own wife, and he recites that the widow of his son, Ranee Dhun Kowur, was alive ; that she has no heirs except her two daughters, Mussumat Bebee Shitaboo and Bebee Dularee, her daughters by his son, who would be her heirs. He then uses expressions which, if they stood alone, would, in their Lordships' opinion, show that he intended to make an absolute gift to Ranee Dhun Kowur. The expressions are these :—"And my wife too died before, only Mussumat Ranee Dhun Kowur, widow of Roy Kalika Pershad, my deceased son above-mentioned, who too, excepting her two daughters born of her womb, Mussumat Bebee Shitaboo and Bebee Dularee, has no other heirs, is my heir." And then he further goes on to say, "except Mussumat Ranee Dhun Kowur aforesaid, none other is, nor shall be, my heir and malik." He proceeds, however, to again refer to the daughters of Ranee Dhun Kowur, whom he had before mentioned, it can scarcely be assumed without some purpose, for he goes on to say :—"Furthermore, to the said Mussumat Ranee, too, these very two daughters

* 6 Moo. I. A. 526 ; 4 W. R. P. C. 114 ; 1 Suth. P. C. R. 291.

† 4 B. L. R. O. C. J. 103.

‡ 13 W. R. 285 ; 5 B. L. R. 125.

§ 2 Ph. 553.

|| 27 Beav. 553.

¶ 1 P. Wms. 332.

** 1 Vern. 301.

†† 6 Moo. I. A. 1.

named above, together with their children, who, after their marriage, may be given in blessing to them by God Almighty, are and shall be heir and malik." There is, indeed, another translation of this document which has been referred to in another case, but inasmuch as this translation appears to have been agreed to by the parties, their Lordships think they must adopt it.

It has been contended that these latter expressions qualify the 'generality of the former expressions, and that the will, taken as a whole, must be construed as intimating the intention of the testator that Mussumat Ranee Dhun Kowur should not take an absolute estate, but that she should be succeeded in her estate by her two daughters. In other words, that she should take an estate very much like the ordinary estate of a Hindoo widow. In construing the will of a Hindoo it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindoos with respect to the devolution of property. It may be assumed that a Hindoo generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindoo knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. Having reference to these considerations, together with the whole of the will, all the expressions of which must be taken together without any one being insisted upon to the exclusion of others, their Lordships are of opinion that the two Courts in India, who both substantially agree upon this point, are right in construing the intention of the testator to have been that the widow of his son should not take an absolute estate which she should have power to dispose of absolutely, but that she took an estate subject to her daughters succeeding her in that estate; whether succeeding her as heirs of herself or succeeding her as heirs of the original testator is immaterial. It would appear that the testator uses the word "heir" as signifying the person who is to take immediately in succession to another; that he applies it to the Ranee as the person who is to take in immediate succession to him, and to the two daughters as the persons who are immediately to succeed to the Ranee; and their Lordships think that, viewing the will, as a whole, when he uses the expression "except Mussumat Ranee Dhun Kowur aforesaid, none other is nor shall be my heir and malik," it may be fairly construed as meaning that she shall take a life-interest immediately succeeding him, without that interest being shared by her daughters or by any other person.

On the whole, therefore, although undoubtedly there is some difficulty in construing this testamentary document, their Lordships are of opinion that the Indian Courts have been right in construing it as not giving an estate of inheritance to the Ranee which she was able absolutely to alienate. If that be so, her daughters under this will take after her, and the question has been raised whether they take as joint tenants or tenants in common. The High Court appear to suppose that they would take as joint tenants, but inasmuch as one of these daughters died before the testator, this question becomes immaterial, because in either case the plaintiff would be the heir and would be entitled to institute this action.

It follows that the Ranee could not convey to the defendant, who must be taken to have been a *bona fide* purchaser, having paid the full value (although he does not appear to have made any inquiries as to whether or not the Ranee did possess a power, unusual in Hindoo ladies, of making a conveyance of an estate in fee simple), an estate beyond her own life, and that the plaintiff is entitled to a decree to the effect that after her death the property belongs to him.

But then comes the question as to what terms this decree in his favour shall be subject to. The Courts below in India were of opinion that he should only be entitled to recover the property after the Ranee's death on payment of the full purchase-money. The High Court varied the decree so far as to declare that he should be entitled to it upon the payment of a mortgage upon the property of Rs. 14,000, which appears to have been an existing mortgage at the time of the conveyance in 1854. A further question, however, has been raised on the part of the

appellants. The appellants say, that assuming this mortgage to have existed, and that there were some debts due at the time of the conveyance on the part of the testator, that then the widow would be enabled to convey an absolute estate. Their Lordships cannot subscribe to the proposition as so stated. They apprehend the law to be this : that Ranee Dhun Kowur, who may be considered as very much in the position of a Hindoo widow, might have sold the estate absolutely if it could have been shown (and the burden of showing this is upon the purchaser) that to convey such an absolute estate was necessary in order to pay the debts of the testator, and was for the benefit of his estate generally. In their Lordships' opinion there is no such proof whatever in this case. It appears that the testator possessed an income of somewhere about a lac of rupees, minus the Government revenue of Rs. 20,000, leaving him an income in round numbers of about 8,000*l.* per annum. He is shown at the time of his death to have owed a certain debt of Rs. 9,000, which was subsequently increased to 22,000, and was paid off in another way; therefore we have nothing to do with that. He is also shown to have owed a debt of Rs. 10,000 at the time of his death, that is 1,000*l.* A man with an income of 8,000*l.* a year is shown on his death to have owed a sum of 1,000*l.*, and it is pretended that sixteen years afterwards a necessity arises for selling a considerable portion of his real estate, to pay this debt of 1,000*l.*, plus some 400*l.* which had been subsequently contracted by the Ranee. The mere statement of these facts appears altogether to dispose of the contention that this estate could have been sold for the necessary purpose of paying the testator's debts, and when we add that both Courts have found that the fact was not so, their Lordships think it unnecessary further to dwell upon this point.

The only question that remains, then, is whether the plaintiff is entitled to the decree of the High Court as it stands, or whether he is entitled to it without the burden of paying off the Rs. 14,000. On the whole their Lordships are of opinion that the judgment of the High Court was right; that this mortgage of Rs. 14,000 subsisting upon the estate at the time of the sale, and having been paid by the purchaser, it is equitable that, when the plaintiff reclaims the estate, credit should be given to the purchaser for the payment of the mortgage, which otherwise the plaintiff himself would have to meet.

For these reasons their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty that both appeals should be dismissed, and that there should be no costs. But in order to render the intention of the Court more clear, their Lordships will recommend that the following words be added to the declaration :—"And to be put in possession of the said property after the decease of Mussumat Ranee Dhun Kowur on payment to the said defendant of the sum of Rs. 14,000."

The appellant will have his costs of the application for leave to enter his cross-appeal paid out of the deposit; the remainder will be repaid to the appellant's agent.

The 24th July 1874.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Construction of a Will—Residence in a Boitakanah.

*On Appeal from the High Court at Calcutta.**

* From the judgment of Macpherson and Pontifex, JJ., sitting in the ordinary original civil jurisdiction of the High Court.

Ganendro Mohun Tagore
versus
Rajah Juttendro Mohun Tagore and others.

A testator having declared that his son should take nothing under his will, devised his property to four trustees, who were directed, as soon as certain legacies and annuities were paid and had fallen in, to convey the real estate to the persons entitled to the beneficial interest therein. The will was contested, and the final decision was that, upon the expiration of the first life-interest, which was vested in J, the testator's son was entitled as heir to the estate. The son subsequently brought this suit to have it declared that the interest of J had ceased by reason of his non-compliance with a clause relating to residence in the testator's boitakanah, and that the son, as heir, was entitled to the estate. J pleaded that there had been no breach of the condition :

HELD, that J's delay in commencing residence was justified by his inability to get possession of the entire house from the trustees, whom he had to sue; and by the unfit state of the house for residence owing to want of repairs.

HELD that, having regard to the nature of a boitakanah house, and to Hindoo usages, the following acts amounted to the use of the house as a residence,—*viz.*, J's going frequently, if not daily, to the house, and usually spending several hours there; transacting all affairs of business there, and, on some occasions, receiving visitors in rooms properly furnished; besides keeping the house constantly open, adding new furniture, taking care of the library, and causing durwans and menial servants to live there.

This case arose out of a judgment by the Privy Council, pronounced by the late Mr. Justice Willis in July 1872,* by which the appellant, a barrister, who, for having embraced Christianity, was disinherited by his father, the Honorable Prosono Coomarr Tagore, a Hindoo and member of the Bengal Legislative Council, was declared heir-at-law to his father's estate, subject to the respondent's life interest under the father's will. In November 1872 the appellant instituted the present suit to oust the respondent from his life interest, on the ground of forfeiture by reason of non-residence in the boitakanah house.

Mr. Joshua Williams, Q.C., Mr. Leith, Q.C., Mr. J. D. Bell, Mr. J. Forbes,
and *Mr. Lawrence Biale* for Appellant.

Mr. Forsyth, Q.C., Mr. Cowie, Q.C., and Mr. Doyne for Respondent.

The authorities cited for the appellant were :—

Dunne v. Dunne.†
Walcot v. Botfield.‡
Rex v. Sargent.§
Wynne v. Fletcher.||
Shepherd's Touchstone, p. 157.

The following authorities were cited for the Respondent :—

Ridway v. Woodhouse.¶
*Clavering v. Ellison.***
Fillingham v. Bromley.††

Sir Montague Smith delivered judgment as follows :—

The questions in this appeal arise upon a clause in the will of the late Honorable Prosono Coomarr Tagore, making provision for the cesser of the estate of the persons entitled under the limitations of the will in the event of non-residence in his boitakanah house.

The will, by which the testator devised his estates, after the determination of the life-estate given to Juttendro Mohun Tagore (the first respondent), to Juttendro's sons successively in tail male, with subsequent limitations over, according to English forms of limitations, underwent much consideration in the Courts in India, and in this tribunal.

The final decision, speaking generally, was that the limitations in tail and

* 18 W. R. 359; 2 Suth. P. C. R. 692.

† 7 De G. M. and G. 207.

‡ Kay 534.

§ 5 Durn. and East 466.

|| 24 Beav. 430.

¶ 7 Beav. 437.

** 7 H. L. C. 707.

†† 1 T. and R. 530.

subsequent limitations were contrary to Hindoo law, and void, and that, upon the expiration of the first life-interest, the appellant, the testator's only son, was entitled, as heir, to the estate.

It will be necessary, before considering the questions arising upon the clause of residence, to refer shortly to the scheme of the will and to some of its provisions.

The testator expressly declared that his son, the appellant, should take nothing under his will.

He devised all his real and personal property to four trustees (of whom Juttendro was one) in trust to get in *the personally*, with an exception thus expressed :—" Save and except the jewels, household furniture, and other articles in the personal use of the members of my family, and save and except such jewels, household furniture, books and libraries, carriages, horses, farm-yard, and other articles as the person or persons for the time being beneficially interested in my real estate, or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made, shall wish to retain for his and their own use." Upon trust, after paying debts and legacies, to invest the residue and pay out of the income divers annuities and the unexpended surplus of such income to the person who for the time being should be entitled to the beneficial enjoyment of his real property, or the profits of it. And as to the *realty* upon trust until his debts, legacies, and annuities had been paid and fallen in, to collect the rents and profits, and apply them to pay his legacies and annuities, if the *personalty* should be inadequate, and, subject thereto, to pay the residue to the person for the time being to whom he had devised his real estate under the limitations thereinafter contained " for the absolute use of such person ; " and he further directed that the trustees should hold the estate generally for the use and benefit of such person, so far as was consistent with the trusts and provisions of the will.

The testator directed that out of the income, after paying the necessary costs of managing his estate, " including the expense of the establishments in the mofussil and Calcutta," the person for the time being entitled to the beneficial enjoyment or surplus income of his real property should receive Rs. 2,500 a month, or Rs. 30,000 a year.

As soon as the legacies and annuities were paid, and had fallen in, the trustees were directed to convey the real estate unto and to the use of the persons who should be entitled to the beneficial interest therein.

The will, after mentioning numerous legacies and annuities, contains the specific limitations of the *realty* which are introduced by a preamble, stating, amongst other things, that the testator was possessed of a talook in Zillah Rungpore, subject to a jumma of Rs. 40,555, and of the boitakanah house, land, and premises where he usually resided. He then devises (subject to the devise to the trustees) his " real property," and " also library, horses, carriages, farm-yard, furniture of the boitakanah, jewels, gold and silver plate," etc., unto and to the use of Juttendro (the respondent) for his natural life, with the limitations over which have been already referred to.

The clause in question as to residence is as follows :—

" Provided always, and I hereby declare that if any devisee or tenant for life or entail or otherwise, or any person entitled to take as heir by descent or adoption or otherwise, or in any manner under the limitations hereinbefore contained, shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall, after attaining his majority, cease to keep up, in a due state of repair, and to use as his residence in Calcutta, the said boitakanah houses and premises where I now reside, and make use of and enjoy my library, horses, carriages, farm-yard, furniture in the said house, and jewels, gold and silver plates, etc., in my use and possession, then and immediately thereupon, the devise and limitations in this my will contained and declared,

shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed as if the said person so permitting or suffering the said property, or any portion thereof, to be sold for arrears of Government revenue, or so ceasing to keep up in a state of repairs, and to use as his residence, my said boitakanah house, had then died."

It was contended in the former suit by the appellant that Juttendro's life-estate was void, owing to the uncertainty of the period at which it was to commence. But it was held by this tribunal that there was no uncertainty, for his interest was to begin at once. It is said in the judgment :—

"Their Lordships read this will, alike according to its words and substance, as giving a life-interest, subject to a charge for payment of legacies and annuities, whereby the rents over and above Rs. 2,500 per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid."

The testator died on the 30th August 1868. This suit was brought by the appellant on the 18th November 1872 to have it declared that the interest of Juttendro had ceased by reason of his non-compliance with the clause relating to residence, and that the appellant, as heir, was entitled to the estate, subject to the legacies and annuities.

Three distinct grounds of answer were argued at the bar. (1) That the limitations to take effect on the determination of Juttendro's interest having been declared to be void, the condition was not binding, and the heir could take no advantage of a breach of it. (2) That the condition would not attach until Juttendro became entitled to a conveyance from the trustees on the death of the last annuitant; and (3) That if this were not so, there had been, in fact, no breach of the condition.

On the first point their Lordships, as they intimated during the argument, find no difficulty in holding that, as the clause provides for the cesser and determination of the life-interest of the respondent in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over have been declared void, would cease when that event happened, and the appellant would be entitled to succeed as heir.

On the second point, it was contended for the respondent that, having regard to the other causes of forfeiture, and especially that for non-payment of the Government jumma, which far exceeded in amount the annual payment of the Rs. 30,000, to which alone he was entitled before there was a surplus income, the testator could not have intended that the clause should come into operation until the trusts were at an end and the donee's estate was perfected by a conveyance.

It was urged, on the other hand, by the appellant's Counsel, that the clause should be read distributively. They contended also that Juttendro, according to the language and substance of the decision of this tribunal, had a present life-interest, subject only to the charge for payment of legacies and annuities. It was pointed out that the testator, in requiring the library and furniture to be used with the house, contemplated an immediate residence in it. And it was observed that Juttendro had actually recovered the possession of the boitakanah house in a suit against the trustees, so that if the respondent's contention were correct, he might, it was said, hold the house, and be in the enjoyment of all the rents and profits of the estate, except what might be required to pay the last annuitant, without being subject to the condition of residence until that annuitant died. Their Lordships would be reluctant to put a construction on the clause which would have the effect of virtually defeating it; nor is it necessary for them to do so, since they agree with the judgment of the High Court in favor of the respondent on the third point, viz., that there has been no breach, in fact, of the condition.

Boitakanah appears to mean a house, or the part of a house, used for sitting or reception rooms, where entertainments are usually given and business transacted. The ladies of the family do not commonly enter these rooms, which, when in the same house with the zenana, are usually the outer rooms.

The manner in which the testator himself used the boitakanah house, is thus found by the High Court :—

“It appears from the evidence that the testator possessed a family dwelling-house as well as the boitakanah, the two houses being completely distinct, and, indeed, situated on different sides of the same street ; that some time before his wife’s death, he ceased to sleep in the family dwelling-house after having complained of defective ventilation in his sleeping chamber there ; that, thenceforth, he slept at the boitakanah ; that subsequently, during his wife’s life, he took his mid-day or principal meal in the family dwelling-house and his evening meal in the boitakanah ; that, after his wife’s death, he took both meals in the boitakanah, but the mid-day meal was taken in native fashion and was cooked at the family dwelling-house, and the evening meal was taken in European fashion and was cooked at the boitakanah ; that he gave his native, or strictly Hindoo, entertainments in his family dwelling-house, and his European entertainments at the boitakanah ; that the testator’s family idols were always lodged and worshipped at his family dwelling-house and never at the boitakanah ; and that, at the boitakanah, all the affairs of his estate were conducted and the necessary establishment kept up and lodged.”

The opinion of the High Court on the nature of the residence imposed by the condition, is thus expressed :—

“We think it is to be gathered from the will that the testator never intended the boitakanah to be occupied as a dwelling-house in the ordinary sense of a Hindoo dwelling-house.” And again : “We are of opinion that the residence intended by him was an occupation for the purposes of transacting business and of receiving male friends and visitors, and if the occupant of the house for the time being so desired (but not otherwise) for entertaining male friends with hospitality ; and we are further of opinion that such an occupation does not require that either the occupant or the ladies of his family should sleep in the house.”

Their Lordships think that, in the main, the High Court have properly construed the clause ; and they understood the appellant’s Counsel not to dispute this construction, but to contend that the evidence showed that the clause, so construed, had not been complied with.

Several English decisions were cited during the argument as to the meaning of the word “residence.” The principle, if any can be said to result from them, seems to be that where in a condition or residence no manner of period of residence is prescribed, but residence simply and without definition, exclusive residence is not supposed to be meant ; and that in such cases the occasional use of the house, and keeping an establishment in it, with the intention of again using it as a residence, is a sufficient compliance with the condition.

In one case Lord Eldon seemed to think a condition imposing residence generally, was so vague, that it was doubtful whether it could be enforced ; and he held that, at all events, slight and rare instances of actual residence by the donee were, when the house was kept open by servants living in it, sufficient to satisfy so general a direction (*Fellingham v. Bromley*, 1 T. & R., 530).

In a case (*Rex v. Sargent*, 5 T. R., 466) where a residence was a necessary qualification for the office of bailiff of a borough, Lord Kenyon said :—

“It never can be contended that in order to constitute a residence in any place, it is necessary to reside any given number of days, or even any great part of the year. It happens perpetually that persons have different places of abode, in some of which they reside more or less, as suits their convenience.”

The words of the present clause are “*cease to use* as his residence in Calcutta.” It was not disputed that a reasonable time must be allowed to the donee after the testator’s death for the commencement of the residence, before it could be imputed to him that he had ceased to reside. The testator died on the 28th August 1868, and the respondent did not, it would appear, use the boitakanah in any sense as a residence, until some large repairs were completed in October 1872. During this

interval of time, he visited the house, and transacted the business of the estate there as one of the trustees, and durwans paid by the trustees were kept in it.

The first question is whether, in the interval referred to, the respondent could reasonably be required to commence using the house as a residence. The circumstances relied on by his Counsel to justify the delay are: (1) The pendency of the great suit brought by the appellant to defeat his title altogether, which was begun in August 1868, and finally disposed of on appeal to Her Majesty in July 1872. (2) His inability to get possession of the entire house from the trustees, which he only succeeded in obtaining by a suit commenced in May 1870, and ended in March 1872; and (3) The unfit state of the house for residence, owing to the want of repairs.

With regard to the first ground, it is certainly little in accordance with reason that the appellant, who disputed in the suit referred to the respondent's right to possession, and would, if his suit had been successful, have ejected the respondent from the house with the loss of any money he might have expended on it, and with the liability to account for mesne profits, should now be heard to claim the estate on the ground that the respondent did not take possession during the time covered by this litigation. But, without saying that the appellant is estopped by his own conduct from taking advantage of the condition, their Lordships think that the delay is justified by the other two grounds referred to.

It seems that in the testator's lifetime the lower part of the house was used for the transaction of the business of the estate, and a small room on the upper and principal floor of the house was also used as an office. The respondent, whilst willing to allow the lower part of the house to be used as before, objected to the retention of the upper room by the trustees. The result of the suit he brought against the trustees was that he was declared to be entitled to the possession of the whole house. Their Lordships cannot but think he might reasonably object to use it as a residence until this question was settled. The testator might have found no inconvenience in having the room occupied as an office when the manager was his own servant, but the inconvenience to the respondent might be great when a clerk appointed by the trustees was installed within the precincts of the residential part of the house.

But a stronger ground to justify the delay existed in the state of the house and its want of repair.

Mr. Allan, the surveyor, who saw the house two or three months before the testator died, says it was much in want of repairs at that time. Soon after his death, it was necessary to take down and rebuild a portion of the east wall at a cost of Rs. 6,200. But further extensive repairs were required. The trustees having hesitated to do them, the respondent requested Mackintosh and Co. to survey the house, who made a report to him that "the building throughout is urgently in need of repair." This report he sent to the trustees, with a request that the repairs should be executed. The trustees declined to do them on the ground that the obligation lay upon the respondent, who, upon this refusal, commenced in December 1871 a suit against them, and in March 1872 obtained a decree ordering the trustees to repair. The repairs so ordered were commenced in July, and completed in November 1872, at a cost of Rs. 14,000. Mr. Allan, the surveyor, says:—"The Rs. 14,000 was necessary to make the house safe. The house was entirely out of repair, and some portion of it very dangerous."

The respondent entered into possession in October 1872, before the repairs were entirely completed, and their Lordships agree with the High Court in finding that up to this time there had been no unreasonable delay on the part of the respondent in commencing to reside, and that no breach of the condition had then occurred.

The conclusion at which, on this point, their Lordships have arrived, is sufficient to dispose of this suit, which was brought on the 18th November 1872, immediately

after the completion of the repairs, in favor of the respondent; but as evidence was given of the subsequent use of the house, and the High Court expressed an opinion upon it, their Lordships, to prevent future litigation, desire to state that on this point also they think the view of the High Court is correct.

The respondent, who appears to adhere more strictly than the testator to Hindoo usages, has no doubt continued to take his meals and sleep in the family house, where the other members of his family live; but this mode of living is not of itself inconsistent with such a residence in the boitakanah house as the testator, in imposing the condition on his Hindoo descendants, must be supposed to have contemplated. It appears upon the evidence that, since the respondent entered upon possession, the house has been constantly kept open, new furniture had been added to the old, the library taken care of, and not only durwans, but menial servants, have lived in the house. The respondent himself frequently, if not daily, went to the house and usually spent several hours there. It appears also that he transacted all affairs of business there, and on some occasions received visitors in rooms properly furnished for their reception.

These acts appear to their Lordships, having regard to the nature of a boitakanah house and to Hindoo usages, to amount to a use of it as a residence.

It was strongly urged by the appellant's Counsel that any entertainments the respondent might give ought to take place in the boitakanah, and it was said he had always given them at his family dwelling-house.

The omission, however, to use the boitakanah for this purpose may be accounted for and excused by the condition of the house up to the bringing of this suit. With regard to future entertainments, their Lordships cannot hold that the respondent is in any way obliged to give them, although, in case he thinks fit to do so, he would best comply with the testator's will by using the boitakanah house on some, at least, of these occasions.

Some stress was laid on the fact that a part of the furniture and jewels had been removed from the boitakanah to the family dwelling-house. But it seems this was done during the repair of the house, and the furniture was brought back or replaced, and afterwards used in it. The jewels were always kept at the family house, and were so kept there for greater safety; but the language of the condition in no way confined the use of the jewels to the residence in the boitakanah.

Their Lordships observe with satisfaction that this suit has been brought to a conclusion with commendable expedition. It was commenced in November 1872, and within twenty months from that date their Lordships are able to report upon this appeal to Her Majesty. This instance shows that appeals from India, if prosecuted with vigor, may now be speedily determined.

In the result, their Lordships will advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal, with costs.

The 5th November 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Trust Property—Fiduciary Relationship—Purchase by Trustee,

*On Appeal from the High Court at Calcutta.**

* From the judgment of Norman and Levinge, JJ.,—when sitting in appeal from ordinary civil jurisdiction,—dated 7th September 1864.

Dhonendro Chunder Mookerjee

versus

Mutty Lall Mookerjee.

J, as the executor of his deceased father S, obtained a decree which he held in trust for S's heirs, namely, himself and brothers. One of the brothers (H) died, leaving J and M his executors. M then sold to J the interest of H's sons for an inadequate consideration.

HELD that, according to the rules of equity, the sale could not stand; but that J was bound to return to H's sons their share in that estate, upon receiving back the purchase-money.

HELD that the sale was equally invalid against any other person for whose benefit the trustee (J) may have purchased secretly in his own name, as it would be against the trustee himself.

Mr. Cowie, Q.C., Mr. Cochrane, and Mr. J. E. Woodroffe for Appellant.

No one appeared for Respondent.

The following authorities were cited by Mr. Cochrane :—

Harvey v. Bradley *

Green v. Badley †

Hodson v. Ball †

Partington v. Reynolds §

Sheffield v. Duchess of Buckinghamshire ||

Blake v. Foster ¶

Bingham v. Dawson **

Co. Litt. lib. 3, c. 8.

Bank of Australia v. Nias ††

2 Taylor on Eved. § 1503

King v. Hoare ††

Henderson v. Henderson §§

Tommey v. White ||||

Garland v. Littlewood ¶¶

Sir Barnes Peacock gave judgment as follows :

This was a suit instituted by the sons of Hurriah Chunder against Juggut Chunder and Sreeman Chunder Mookerjee, praying, amongst other things, that a certain deed of assignment, dated the 23rd June 1854, of the plaintiffs shares and interest in a certain decree, which had been sold by Mohes Chunder Mookerjee to Juggut Chunder Mookerjee might be declared as against them invalid and void as an absolute conveyance, "and that the said assignment might be decreed to stand as a security only for the sum of Rs. 5,000, and for anything further which might be found justly due from the plaintiffs to the defendants." Mohes Chunder Mookerjee was made a party to the suit, but no relief was prayed against him. The ground upon which the bill was framed was that Juggut Chunder, who purchased the decree, stood in a fiduciary relation to the plaintiffs, and that he had purchased the decree for an inadequate consideration. It appears that Doorga Chunder Mookerjee was the father of Sib Chunder, Sumboo Chunder, and Ramnarin; that Doorga Churn Mookerjee was possessed of considerable property, and having died, his three sons divided the estate. Sumboo Chunder took a portion of the estate, and Sib Chunder covenanted with Sumboo Chunder to discharge all claims against the estate of Doorga Churn. A claim was made against Sumboo Chunder and others, as representatives of Doorga Churn, and a decree was obtained against them for about two lacs of rupees. Sumboo having died, Juggut as one of his executors compromised the suit for Rs. 80,000, and, as such executor, brought a suit against the representatives of Sib Chunder to recover that amount and other

* L. R. 4 Eq. 13.

† 7 Beav. 274.

† 1 Ph. 177, 182.

§ 4 Drew, 253.

|| 1 Atk., 628.

¶ Ball and Beatty, 451.

** Jac. 243.

†† 16 Q.B., 717.

‡‡ M. and W., 404.

§§ 3 Hare, 100.

||| 6 Cl. and Fin., F. L., 78.

¶¶ 1 Beav., 527.

moneys from his estate ; and in that suit he obtained a decree for one lac and Rs. 70,000. That suit was brought by Juggut Chunder as the executor of Sumboo Chunder. The question is whether, in that position, and in that character, he did not hold a fiduciary relation to the plaintiffs in the suit. Sumboo Chunder died, leaving six sons, Juggut Chunder, who is the defendant in this suit, Mohes Chunder, who is also made a party to this suit, Hurrish Chunder, Prawn Chunder, Cally Chunder, and Sreeman Chunder ; but Sumboo Chunder before he died made a will, by which he left his property to his five sons. Sreeman Chunder was not then born.

Hurrish Chunder died, leaving the plaintiffs in the suit his heirs, and consequently Juggut Chunder held the decree which he recovered against the representatives of Sib Chunder in trust for the benefit of himself and his brothers, and as to the share of his brother Hurrish Chunder for the benefit of the plaintiffs. Hurrish Chunder appointed Juggut Chunder and Mohes Chunder his executors ; and Mohes Chunder, as one of the executors of Hurrish Chunder, sold the interest of Hurrish Chunder's sons to Juggut Chunder for the sum of Rs. 5,000 ; in other words, he sold a fifth share of a decree for Rs. 170,000 for Rs. 5,000. The Courts found that that was under value, and that an inadequate consideration was given by Juggut Chunder to Mohes Chunder for the purchase. It is said that Juggut Chunder, as one of the representatives of Hurrish Chunder, renounced. Whether he did so renounce, or could renounce, appears to be immaterial, provided he held in a fiduciary character, as executor of Sumboo Chunder, the share which belonged to the plaintiffs as the sons of Hurrish Chunder. It is clear that he held the decree which he recovered as executor of Sumboo in trust as to a share for the benefit of the plaintiffs, who were the sons of his brother Hurrish.

Now both Courts have found that no adequate consideration was given for the purchase. It therefore appears that there was a sale of the interest of the plaintiffs for an insufficient consideration to Juggut Chunder, who held in a fiduciary character for them. According to the rules of equity, that sale cannot stand as an absolute sale, but Juggut Chunder is bound to return the share of the plaintiffs in that estate upon receiving back the purchase-money which he gave for it.

The youngest son of Sumboo, Sreeman Chunder, was also made a defendant in the suit. Sreeman Chunder is said to have been a party to the purchase by Juggut Chunder. He says that Juggut Chunder purchased the decree for the benefit of himself and Sreeman Chunder jointly. But if Juggut Chunder, holding the decree in a fiduciary position, could not purchase it for himself, could Sreeman Chunder employ Juggut Chunder, who held the decree in a fiduciary position, to purchase that decree for the benefit of himself and Sreeman Chunder jointly ? It appears to their Lordships that the same objection would apply to Juggut Chunder's purchasing for himself and Sreeman jointly as there would be to his purchasing for himself alone. One of the reasons for setting aside transactions such as this, is, that the purchaser is presumed from his position to have better means than the vendor has of ascertaining the value of the property purchased. Well, then, if a person knowing that another holds a fiduciary position, and has a better knowledge of the value than the vendor, employs that person to purchase for him, and the trustee purchases secretly in his own name for the benefit of that other, it appears to their Lordships that the sale is equally invalid against the person for whose benefit it is purchased by the trustee as it would be against the trustee himself ; therefore it was not necessary in this suit to file a bill to set aside the sale merely as to half the estate as against Juggut Chunder, and to allow it to stand as to the other half for the benefit of Sreeman Chunder. If it became necessary to investigate the evidence, there does not seem to be sufficient to show that Sreeman Chunder actually advanced any part of the purchase-money, or was really interested in the purchase.

The decree having been obtained by Juggut Chunder, the property of Sib

Chunder's representatives was put up for sale by the sheriff in execution, and a portion of the property so put up was purchased under the decree, but Juggut Chunder did not actually pay money for the property which he so purchased. The price of that portion of the property which was sold in execution of the decree was credited to the decree, and only the balance remained due. Then Juggut Chunder held the balance of the decree, and also the property which he had purchased and paid for with the other portion of the decree, in trust as to one-fifth share for the benefit of the plaintiffs. It was shown that Juggut Chunder re-sold portions of the property which he purchased at the sale under the decree for very much larger sums of money than those for which he purchased them. Both the Lower Courts found, as a fact, that the Rs. 5,000 which Juggut Chunder paid as the purchase-money of the share of the plaintiffs was an inadequate consideration. Their Lordships would not disturb the finding on the question of value unless there was the clearest evidence to satisfy them that an adequate consideration was given for the property; but, so far from that appearing to be the case, their Lordships are satisfied that the Lower Courts came to a right conclusion in finding that there was an inadequate consideration.

Then it is contended that this suit cannot be maintained, inasmuch as a suit had been brought against Mohes Chunder, as one of the executors of Hurriah Chunder, for administration of the assets of his estate; and it is said that this suit is in the nature of a bill of review of the decree which was given in that suit, or that it is in the nature of a supplemental bill, or of a bill in aid of that decree. But it appears to their Lordships most clearly that that is not so, when they come to look at the nature of the two suits. The administration summons, which may be treated as a suit, was to compel Mohes Chunder to account for the moneys which he had received as executor of Hurriah Chunder. It is true that in the affidavit, and also in the petition which was filed in order to obtain that summons, it was alleged that Mohes Chunder, as executor of the will of Hurriah Chunder, "had relinquished all claims to the decree for Rs. 170,000, by executing the said deed of assignment for the sum of Company's Rs. 5,000 only, and thereby had occasioned a loss to the plaintiffs of the balance of Company's Rs. 23,333." That was alleged in the petition; but it is clear that under a summons for an administration of the assets of an estate the executor could not be charged with negligence and wilful default. Accordingly the order which was made under that petition, referring the matter to the Master, did not direct the Master to enquire as to whether more could have been made by Mohes Chunder if he had not been guilty of wilful default, but merely to take an account of the assets which he had received; and that is all that the Master did. He found what Mohes Chunder had received, and stated that there was a small balance due from him to the estate; but he did not enter at all into the question of whether Mohes Chunder had committed waste; nor could he, under the order which was made by the Court, have entered into that question. When the matter was brought before the first Court, Mr. Justice Morgan says:—"One point made by the defendants is that the same points have been raised by an administration summons by the present plaintiffs against the executor. The Master, however, properly declined to enter on an investigation of this matter;" and the Master never did, nor did Mr. Justice Levinge, who made the order, direct the Master to enter into such an investigation. He could not, and did not, make such an order, and the matter never came before the Master at all.

Well, then, assuming that Mohes Chunder has been decreed to account for the Rs. 5,000 which he had received from Juggut as the purchase-money of the estate, that circumstance would be no reason why the heirs of Hurriah Chunder should not have the purchase made by Juggut Chunder set aside upon returning the amount to him. The two causes of action are quite different. The present suit is not in the nature of a review of the decree which has been made against

Mohes Chunder. It is a suit against Juggut Chunder as a purchaser in his own right, and not as executor of Hurriah Chunder. The other suit was against Mohes Chunder, to account for what he had received as executor of Hurriah Chunder.

It appears, therefore, to their Lordships that the Lower Court was right in declaring that the points raised by the administration summons, and the order and the reference to the Master, did not preclude the plaintiffs from bringing this suit against Juggut Chunder. It is true that Mohes Chunder was made a party to the present suit, but whether it was necessary or not is immaterial. Possibly this decree might have been obtained against Juggut Chunder without making Mohes a party; but Mohes did not object to being made a party, and he does not appeal in this case. He is made a respondent in this suit; he is not an appellant.

Their Lordships do not repudiate the authority of any of the cases which were cited by Mr. Cochrane. Admitting them to their fullest extent they are not applicable to the present case.

Mr. Justice Norman says:—"I see no reason why an account should not be taken against one executor on one principle and against another in respect of a separate wrong committed by him or separate relief sought against him." It appears to their Lordships that that remark is not applicable to the case. They have already pointed out that this is not a suit against Juggut Chunder as executor of Hurriah Chunder, nor for a wrong committed by him in that capacity. The relief to which the plaintiffs are entitled is upon the ground that the purchase which Juggut Chunder made was invalid, not because he was executor of Hurriah Chunder, but because he was executor of Sumboo Chunder, and as such executor held, for the benefit of Hurriah Chunder's heirs, the share which he purchased from Mohes Chunder as executor of Hurriah Chunder.

Under these circumstances their Lordships think that the Lower Courts came to a right decision, and they will therefore humbly recommend Her Majesty that the decree of the High Court be affirmed. As there is no party appearing on the other side, it will be without costs.

The 6th November 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Diluvion—Re-formation.

*On Appeal from the High Court at Calcutta.**

Hursuhai Singh and others

versus

Syud Lootf Ali Khan and others.

Where land which has submerged re-forms, and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it.

Mr. Doyne and Mr. C. W. Arathoon for Appellants.

Mr. Leith, Q.C., and Mr. J. D. Bell for Respondents.

The following authorities were cited:—

Lopez v. Muddun Mohun Thakoor.†

* From the judgment of Bayley and Pundit, JJ., in Regular Appeal No. 401 of 1865, dated 4th June 1866.

† 13 Moo. I. A. 467, 478; 5 B. L. R. 521; 14 W. R. P. C. 11; 2 Suth. P. C. R. 336.

*Katteemonee Dossee v. Ranee Dabee Monomohinee.**

Romanath Thakoor v. Chundernarrain Choudry.†

Musst. Imam Bandi v. Hurgovind Ghose.‡

Nogender Chunder Ghose v. Mahomed Esóf.§

Sir Montague Smith gave judgment as follows:—

Their Lordships, considering the turn that the argument has taken, do not think it necessary to go at any length into this case. The suit was brought by the appellants, the proprietors of Mouzah Muteor, in Tirhoot, against the respondents, the proprietors of Mouzah Ramnuggur, to recover the possession of a large quantity of land which had been submerged by the river Ganges. It appears that the river flowed between the estates of the plaintiffs and the defendants, and in its course between the two estates there were from time to time various changes. There were two or three defined channels, which at times the river overflowed, and formed a pool or lake. The land which is the subject of the present suit was submerged, and when it first became free from water and reappeared, it adhered to and adjoined the estate of Ramnuggur, and, *primâ facie*, the accretion was to that estate; but upon an enquiry made by the Judge of Patna, who went to the spot, heard evidence, and took great pains to survey the district, he came to the conclusion that the submerged land, although it had re-formed close to Mouzah Ramnuggur, was, in point of fact, land which belonged to Mouzah Muteor, and that there were means by which he could identify, and did identify, the land as having been, before its diluviation, part of that mouzah. He found those facts, and applying the law as he understood it to the facts, namely, that when submerged land can be identified upon its reappearance as belonging to a particular estate, the proprietor of that estate is entitled to it because in truth he had never lost the land, the land was always his, and the difficulty of identification being removed by evidence—the land being in fact identified—there was no reason why the property should not be regained by him. He acted upon this principle of law, which had been at that time affirmed by the High Court of Calcutta in a case in which Sir Barnes Peacock, with two other Judges, had given the judgment. That, however, was the judgment of a Division Bench; and the High Court, upon appeal in the present suit, decided that they were bound by a subsequent decision of a Full Bench of the High Court, which had come to a contrary conclusion, and had held that land which reappeared under circumstances like the present, must be held to belong to the proprietor of the estate to which it had apparently accreted; and they remanded the cause to the Judge of Patna, who, without altering his finding of the facts, decided according to this view of the law, and his judgment was, as might be expected, upheld by the High Court in the judgment now under appeal, on the case again coming before it upon the appeal of the present appellants.

The question of law involved in these decisions, which is a very important one, was brought before this Committee, in a case of *Lopez v. Muddun Mohun Thakoor*, 13 Moore I. A. 467,|| in which the principles which should govern cases of this description were very fully discussed and elucidated, with the result that it was laid down by the authority of this Committee that where land which has been submerged reforms, and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it. It is admitted by Mr. Leith, the Counsel for the respondents, that the authority of this case and others which have followed it before this Committee, cannot be disputed. Their Lordships think the principles laid down in those cases are perfectly correct, and are distinctly applicable to the present; and that, if the facts are to be taken as they were found by Mr. Justice

* 3 W. R. 51.

† Marshall 136; 5uth. F. B. R. 45.

‡ 4 Moo. I. A. 408; 7 W. R. P. C. 67; 1 5uth. P. C. R. 208.

§ 10 B. L. R. 406; 18 W. R. 113; 2 5uth. P. C. R. 113.

|| 14 W. R. P. C. 11; and 2 5uth. P. C. R. 336.

Ainslie, the judgment below must be reversed. Their Lordships, for the reasons they gave during the argument, think it is impossible those facts could be disputed with any effect at their bar, and therefore both law and fact are in favor of the appellants.

Mr. Leith endeavoured to distinguish between the lands which were the permanently settled lands of Muteor and some lands which had been in themselves an accretion, and which were temporarily settled only with the proprietor of Muteor. Their Lordships think, however, that this distinction cannot prevail. There is evidence from which it may be presumed that those lands accreted to the estate of Muteor, and it may be inferred from the mode of accretion that the Government settled with the proprietor upon the ground that they had so accreted, and therefore that he was entitled to the settlement.

On these grounds their Lordships think that the judgment of the High Court must be reversed, and they also think that the decree originally made by the Judge of Patna before the remand is the correct decree. They find there is no formal petition of appeal against the decree of the High Court which remanded the suit, but this judgment ought not to be allowed to stand in the way of the proper decree to be made in the cause, and will be nullified by the course their Lordships propose to take, viz., humbly to advise Her Majesty to reverse the judgment of the High Court now under appeal, and the second judgment of the Zillah Judge, and to direct a decree to be made in the suit to the effect of the original decree of the Zillah Judge. The respondents must pay the costs of the litigation in India, and of this appeal.

The 19th November 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Bond—Interest—Damages—Penalty.

On Appeal from the High Court at Madras.

Vencatavarada Iyengar

versus

Venkata Luchmamal and another.

Defendant entered into a bond agreeing to pay a specified rate of interest in instalments on a sum borrowed, and to repay the principal in twelve years; the obligee not being bound to accept payment earlier. A zemindaree was mortgaged as security, and it was provided that if any obstacles were caused by the defendant in respect of any of the conditions of the bond, the mortgagee would be competent, after two months' notice, to sell the property, or portions thereof, and pay himself the principal and the interest thereon for the unexpired portion of the twelve years.

A portion of the interest having come into arrear, plaintiff gave notice of sale; but defendant disputed his right to sell on the alleged ground as not being an "obstruction" within the bond. The parties not being able to come to a final agreement as to the conditions of sale, plaintiff brought this suit claiming the full amount of the mortgage-money with interest for twelve years. He obtained a decree, which was modified by the High Court, who gave him principal and interest at the stipulated rate :

HELD, that the clause relating to sale was in the nature of a penalty, and plaintiff was not entitled to enforce it only upon default in the payment of interest.

HELD, that the suit was not maintainable, either as an action for damages for the amount which plaintiff could have obtained by the sale, or on the bond itself.

Mr. Benjamin, Q.C., and Mr. Norton, for Appellant.

Mr. J. D. Mayne for one of the Respondents.

The facts of this case material to its decision may be shortly stated. The defendant entered into a bond with the plaintiff on the 28th December 1867, which is to this effect :—The defendant acknowledges that he had borrowed a sum of Rs. 60,000, which he agreed to pay. He says :—“As you have this day paid, and I have received in cash, this sum of Rs. 60,000, I agree to pay interest thereon at three-fourths per cent. per mensem, and to repay the said principal sum in twelve years from this date,” but you, the plaintiff, are not bound to accept payment even though I tender it, nor can you demand it before that time. Then there is a provision for the payment of the interest which amounts to 9 per cent. in three instalments annually, and then there is a mortgage of a certain zemindaree of Tiruvur for the purpose of securing the payment of the principal and interest of the bond. There are some further provisions to the effect that the mortgagor is to remain in possession, but that the mortgagee is entitled to retain some man on the premises to look after his interest, to be paid by the mortgagor. Then at the end there comes this clause :—“If any obstruction be caused either by me or my men in respect of any of the conditions aforesaid, you are competent to give me two months’ notice, and if I do not within that term fulfil the conditions entered into with you, to sell by auction by yourself the said Muttah zemindaree and all other mortgaged property or portions thereof, according to your pleasure, to pay yourself at once the principal due to you, and the interest payable on the full amount of principal for the unexpired portion of the twelve years, and to deliver to me the remainder, if any.” It appears that a portion of the interest became in arrear, and that the plaintiff gave notice in October 1869 of his intention to sell under this power, the plaintiff supposing that he had the power to sell for the purpose of realizing the principal and the interest up to the end of the twelve years. The defendant disputed this right of the plaintiff to sell for that amount on the mere ground of non-payment of interest, which he alleged not to be an obstruction within the meaning of the bond, and it appears that he took measures which stopped the sale, whereupon a further agreement was come to between the parties on the 26th October 1869, the material parts of which are to this effect :—At that time there was due the Rs. 60,000 and Rs. 5,426 for interest, and it was agreed that further interest was to be payable on the principal up to the date of payment. Then there is a further stipulation that the plaintiff is to deliver to the defendant all the mortgage documents and a certain note of hand given for Rs. 2,500 on account of interest, “that, together with interest thereon, having been included in the aforesaid amount of interest.” Then it goes on to say :—“When as you,” that is the mortgagee, “proceed to sell lot by lot, the said amounts become fully covered up, you shall not proceed with the sale of the subsequent lots.” It appears that conditions of sale were nearly agreed on between the parties when the plaintiff insisted upon a condition to the effect that if the sale of all the lots did not realize the full amount, then the sale of all those that had been sold before should be void, and there was also a dispute between them on the question of the defendant giving security to the plaintiff in the event of the sale not realizing the full amount of the principal and interest due. The sale did not take place ; whereupon the plaintiff brings this action. This plaint is drawn in a very obscure and ambiguous manner, and it is not very easy to arrive at the effect of it. One construction of it is that the plaintiff complains of an obstruction of his power of sale by the defendant, and claims as damages that which it would have realized by the sale if it had taken place, which he contends to be the whole amount of the mortgage-money, together with interest, up to the expiration of the twelve years. But it may also be taken as a suit brought under the bond, irrespective of the power of sale, for the purpose of recovering the full amount of the principal and interest for the whole time. The plaintiff obtained a decree in the Court below for all that he sued for. That decision was modified by the High Court, who thus expressed themselves :—“The present suit can hardly be regarded as a suit for damages occasioned by the obstruction

offered by the defendant to a sale under the power. It appears rather to be founded on the assumption that the plaintiff may recover by suit and by process of execution whatever he might have deducted from the proceeds of a sale made under the power. But the deed itself does not contain any such stipulation, and we do not think it should be in such a case implied." Then they proceed to say that they modify the decree, and give to the plaintiff the principal sum and interest at the stipulated rate. From that decision the plaintiff appeals.

In their Lordships' opinion the decision of the first Court was clearly wrong. They are of opinion that this clause relating to sale was in the nature of a penalty, and that the defendant was not entitled to put up the property for sale, and to realize the full amount which he claims, namely, interest due up to the expiration of the 12 years, upon such default only as has been made, namely, default in the payment of interest on the mortgage-money. What might or might not be an obstruction that would authorise such a proceeding it is not necessary to determine.

Assuming, then, the suit to be in the form of an action for damages, whereby the plaintiff seeks to recover the amount which he could have obtained by the sale, their Lordships are of opinion that it is not maintainable, and they also agree with the High Court that it is not maintainable on the bond itself, inasmuch as no such right of action, if not expressly given by the words of the bond, is to be implied from it. Their Lordships are therefore clearly of opinion that the decision of the first Court was wrong. Whether or not the plaintiff's suit ought to have been dismissed is a question not before them now, because the High Court have undertaken, and their Lordships are far from saying wrongly, on the matter coming before them, to do what they deemed just between the parties; and there is no appeal on the other side against the decision of the High Court. Their Lordships are therefore in the position of the High Court, and have to determine what is just between the parties; and they are of opinion that the decree of the High Court does determine this. In fact, towards the end of the case the contention very much narrowed itself. It was contended finally on the part of the appellant that he was entitled to somewhat more than the High Court had given him, on the ground that by the agreement of the 26th October there was a settlement of account under which he would have obtained some Rs. 426 more than the High Court gave him; and it would appear that the High Court have not given to the plaintiff two sums of Rs. 172 and 254 which he claims respectively as the wages of the man who was to be kept on the property to look after his interest and the interest due on the promissory note before mentioned for interest which was not paid. It would appear that the High Court have not given the plaintiff those sums, and he contends that he would be entitled to them if he could insist as he does upon this agreement of the 26th October 1869 being an account stated between the parties and an admission of the balance due at that time. But their Lordships have to observe, in the first place, that the plaint is not in any respect framed upon that agreement of the 26th October 1869, but is a plaint praying for principal and interest upon the bond; and it is only upon the hypothesis that it be treated as such a plaint that it is maintainable at all. And, further, it occurs to them to observe that if the High Court have inadvertently omitted to take notice of those items (and their Lordships are far from saying that is so), the proper course on the part of the plaintiff would have been to have called their attention to it by petition of review, or at all events in some other manner which has not been done. Their Lordships do not think the appeal maintainable on this latter ground.

Under these circumstances, their Lordships will humbly advise Her Majesty that the judgment of the High Court should be affirmed, and this appeal dismissed with costs.

The 20th November 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Redemption Suit—Limitation—Act XIV of 1859 s. 5—Mesne Profits—Laches.

*On Appeal from the High Court at Calcutta.**

Juggernath Sahoo and others

versus

Syud Shah Mahomed Hossein and others.

The period of sixty years within which the law allows mortgagors to bring their suit cannot be diminished by any Court of Justice, on the ground of the laches of a party in the prosecution of his rights.

Following a previous ruling of the Privy Council (in the case of *Radhanath Doss v. Gisborne & Co.*), it was held that in a suit founded upon a right to redeem, the defendant, in order to claim the benefit of Act XIV of 1859 s. 5, must show three things : first, that he is the purchaser according to the proper meaning of that term ; second, that he is a *bonâ fide* purchaser ; and third, that he is a purchaser for valuable consideration.

Plaintiffs, having been guilty of laches, were held not entitled to recover, as against purchasers for valuable consideration, without notice of their title, mesne profits from any date earlier than that of the institution of the suit.

Mr. Doyne and Mr. C. W. Arathoon for Appellants.

The Respondents did not appear.

Sir James Colville gave judgment as follows :—

This is a suit by the heirs and representatives of a Mahomedan lady named Bibee Mujo, to recover possession of property comprised in a *zur-i-peshgee* lease from the defendants, who claim to be purchasers for value of the property in dispute. The title of the plaintiffs is, in fact, founded upon a right to redeem, although the suit is not exactly in the form of an ordinary redemption suit.

The title of the plaintiffs is thus derived. Some time in the year 1814 one Khadim Hossein mortgaged the whole of the mouzahs, of which a share is claimed in this suit, by a *zur-i-peshgee* lease to one Sheik Emam Buksh. The *zur-i-peshgee* was for seven years, and stipulated that out of the gross proceeds of the village five annas should be paid as *huk-ajiree* to the mortgagors, and the remainder be retained by the mortgagees ; the amount thus coming to the mortgagees to be received by them in lieu of interest. Khadim Hossein died, and a dispute afterwards arose among his heirs, or persons claiming to be his heirs, which was finally settled by a compromise, in the year 1817. Under that arrangement, his wife, Bibee Emamun, became entitled to seven and a half annas of his interest in the mortgaged property, Bibee Mujo became entitled to four and a half annas, and Amjed Hossein, the nearest male relation, to four annas. After that, though it does not appear very distinctly at what time, an arrangement is admitted to have been made, by which, as between the mortgagors and the mortgagees, the original mortgage was treated as three distinct mortgages, in the proportions in which the estate of Khadim Hossein had been divided under the compromise above-mentioned. The result was that Bibee Mujo became solely entitled to the equity of redemption in four and a half annas of the mortgaged property, upon the payment of a similar proportion of the original mortgage debt.

It is admitted that Amjed Hossein unquestionably sold the equity of redemption in his four annas to the persons through whom the appellants derive their title. The share of Bibee Emamun seems to have been redeemed by her, or by her

* From the judgment of J. P. Norman, *Offg. C.J.*, and L. S. Jackson and W. Ainslie, *JJ.*, in Regular Appeal No. 32 of 1870, decided on the 18th March 1871.

representatives, as early as the year 1844, upon a suggestion that the whole of the mortgage debt for which she was liable had been satisfied by the retention of the huk-ajiree coming to her, or in some other manner. But the contention on the part of the plaintiffs in this suit, the respondents on the present appeal, is, that the equity of redemption as to her share remained in Bibee Mujo, and that, by reason of the retention of the huk-ajiree due and owing to her, the whole of her share of the mortgage debt has been satisfied, and that, therefore, her representatives are entitled to recover possession of her share of the mouzahs in question with six years' mesne profits.

The title set up by the defendants is as follows :—The original mortgagees sold their interest to Sheikh Taleb Ali and his two sons, Sheikh Fuzul Ali and Sheikh Ashghur Ali. They thus became the mortgagees. Sheikh Taleb Ali died, and his interest descended to his two sons. It is alleged on the part of the defendants that Bibee Mujo, in the year 1841, sold her interest in the four and a half annas upon terms similar to those upon which Amjed Hossein had sold his interest in his four annas to Sheikh Fuzul Ali and Sheikh Ashghur Ali ; and that by subsequent purchases and conveyances, the absolute interest which had thus been acquired by Sheikh Fuzul Ali and Sheikh Ashghur Ali in the four and a half annas share of the mouzahs, which is the subject of this suit, had become vested in some one or more of the appellants as purchasers for value, and without notice.

A point which has been taken as to a moiety of the property in dispute makes it necessary to state with some precision what was the devolution of title as to that moiety. The whole interest, whether absolute or merely by way of mortgage, which was vested in Fuzul Ali and Ashghur Ali, was divided between them in equal moieties. And it is alleged that on the 29th July 1844 Fuzul Ali transferred his interest to his wife by a baimokasa, or conveyance of property, in satisfaction of her rights of dower ; that this wife, whose name was Bibee Zenut, exercised rights of ownership over the property, having mortgaged it on the 8th December 1849, and that on the 10th January 1859, *i.e.*, within twelve years before the institution of the suit, she transferred her absolute interest in the property to the two first appellants on the Record. Of the other moiety of the property, being that which was vested in Sheikh Ashghur Ali, it is only necessary to say that by various conveyances the whole of it, with the exception of the small portion afterwards mentioned, had, before the year 1860, become vested in the principal appellants, being the first and second on the Record. That small portion, having been purchased at an execution sale by a Mahomedan lady, afterwards became vested in the appellant Burra Toonissa.

From this statement of the title set up by the defendants, it is obvious that the material question to be determined in the cause was the validity of the alleged conveyance of the equity of redemption by Bibee Mujo to Ashghur Ali and Fuzul Ali. Against the validity of that instrument, we have the decision of the two Indian Courts, both concurring in finding that, if not a fabrication, as it was found by the Judge of first instance to be, it cannot be treated as established against Bibee Mujo or her representatives.

The first consideration upon that point is whether sufficient grounds have been presented before their Lordships to induce them to deviate from their general rule, not to disturb such a finding of fact by two Courts in India. If they are to look merely at the evidence of the execution of that conveyance, they are bound to say that, so far from thinking that there is any ground for an exception being made to the general rule, they are of opinion that upon that evidence the conclusion of the High Court would be correct. To fix Bibee Mujo with the deed, it is necessary to establish the mookhtarnamah, and the evidence of the execution of that instrument by her is of the slightest and most unsatisfactory character. The evidence, again, of the execution of the deed, as it is stated to have been executed by the mookhtar appointed by the mookhtarnamah, and of the subsequent admission of the deed by

the lady, is also of a very suspicious character. It appears, moreover, that the deed was not registered even before the Caze for several months; and that it was not registered at all, as the conveyance by Amjed Hossein had been, in the office of the Registrar of deeds. It appears further that in 1843, upon an application made to the Collector by Fuzul Ali and Ashghur Ali for mutation of names, on the suggestion of such a conveyance having been executed by Bibee Mujo, a petition of objections disputing such execution, was filed by that lady's agent, and that the applicants Fuzul Ali and Ashghur Ali thereupon allowed their proceeding to drop.

The only doubt which their Lordships have felt on this part of the case has been founded on the laches of Bibee Mujo and her representatives in taking steps to enforce their rights as mortgagors for so many years; and if there had been a substantial conflict of evidence touching the execution of the deed, their Lordships might have thought that the Courts in India, in weighing that conflicting evidence, had hardly given sufficient weight to the inferences which arise from such laches. But their laches cannot estop the parties from asserting their right, if it exists. The question is one of title, and the right to assert that title is to be determined by the law of limitation as it stands. The law, wisely or unwisely, has given to mortgagors the long period of 60 years within which to bring their suit; and no Court of justice would be justified in diminishing that period on the ground of the laches of a party in the prosecution of his rights. Their Lordships, after weighing the whole of the evidence, and giving full effect to the laches of the parties, cannot say that the execution of this deed by Bibee Mujo has been proved. They must, therefore, deal with the case on the assumption that the two Courts below were right in finding that material link in the title of the defendants to be wanting.

If that be so, it remains to be considered whether Mr. Doyne's argument as to the Statute of Limitations can prevail. He has not attempted to show that the Courts below were wrong, in fact it could not be shown that the Courts below were wrong, in finding that the suit as a whole was not barred by the Statute of Limitations. It follows that the plaintiffs (the respondents) can assert a title to redeem the portion of the property which fell to Ashghur Ali, since, if the conveyance of the equity of redemption to him is not established, he had nothing but a mortgage title to convey; and there was no conveyance even of that to the appellants, except within the period of twelve years. The questions raised by Mr. Doyne are, whether a different rule ought not to be applied to that portion of the property which was vested in Fuzul Ali, and which passed by the baimokasa to his wife, and from her to the appellants, the transfer to the wife having occurred more than twelve years before the suit; and whether the suit as to this portion is not barred by the 5th Section of Act XIV of 1859. Upon that point their Lordships, during the argument, entertained some doubt; but they are of opinion that they can make no distinction between the two classes of property, for the following reasons:—In the first place, the case which has been made here does not really appear to have been made in either of the Courts below. It certainly was not made in the Court of first instance; and though it was said that it was raised by the grounds of appeal, it appears to their Lordships that the first ground of appeal points to a general bar of the whole suit; and the observations of the learned Judges of the High Court in giving their judgment show that the argument before them must have proceeded upon that ground. Moreover, upon the merits of the question, their Lordships are of opinion that the supposed bar to the suit is not established. In the case of *Radhanath Doss v. Gisborne & Co.*,* in which the judgment was given by the present Lord Chancellor, the principles upon which the 5th Section of Act XIV of 1859 is to be applied to such cases as the present are very clearly stated. His Lordship said:—"But their Lordships cannot fail to observe that the provisions of this Section are of an extremely stringent kind. They take away and cut down the title which *ex hypothesi* is a good title, of the *cestui que* trust or of a person who

* 15 W. R. P. C. 24; and 2 Suth. P. C. R. 397.

has deposited, pawned, or mortgaged, property. They cut down that title in regard to the number of years that the person would have had a right to assert it; from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this Section should clearly and distinctly show that he fills the position of the person contemplated by this Section as the person who ought to be protected. Their Lordships think that, in order to claim the benefit of this Section, the defendant must show three things: first, that he is the purchaser according to the proper meaning of that term; second, that he is a *bonâ fide* purchaser; and third, that he is a purchaser for valuable consideration." Now if the twelve years to be computed under s. 5 are to run from the transfer by the baimokasa to Bibee Zenut, it is necessary to show that Bibee Zenut was a *bonâ fide* purchaser, and of that there is no proof; on the contrary, the transaction is open to all the suspicions which attach to transactions between a Mahomedan and his wife, and the necessity of proving that the purchaser is a *bonâ fide* purchaser makes the absence of a particular plea raising the particular defence now set up extremely material, because if that point had been distinctly raised in the Courts below, it would have been open for the plaintiffs to dispute the *bona fides* of that transaction, and to have it investigated.

It seems, therefore, to their Lordships, that they cannot give any greater effect to the transfer of the share of Fuzil Ali than they do to that of the share of Ashghur Ali.

There is, however, one point upon which their Lordships are not satisfied with the present decree. They cannot but remark that the laches of the plaintiffs in the case have been very great, and that the case is far from being a clear one. They have also to remark that there are no grounds for imputing to the appellants, the actual holders of the property, a knowledge of any fraud that there may have been in the supposed transfer to their vendors. They have also to remark, that, in strictness, some exception might have been taken to the form of the suit considered as a redemption suit, although it is admitted at the bar that there are no grounds for a further investigation of the question whether the mortgage money had been paid off at the date of the suit; and that it may be considered to have been paid off. Their Lordships, however, cannot see that there were sufficient grounds for allowing the plaintiffs, who have been guilty of such laches, to recover, as against purchasers for valuable consideration, without notice of their title, mesne profits from any date earlier than that of the institution of the suit. They think that, on the institution of the suit, the laches of the plaintiffs in enforcing their rights ceased, and that the mesne profits from that date should follow the result.

Their Lordships will, therefore, humbly advise Her Majesty to confirm the decree under appeal, with the exception that the amount of mesne profits should be reduced to the mesne profits which have been received since the institution of the suit. The appellants having, to the extent of a reduction in the mesne profits, succeeded on the appeal, and the respondents not having put in a case or appeared at the bar, their Lordships will make no order as to the costs of this appeal.

The 10th December 1874.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Suit by Mortgagee—Mokurruree Lease—Onus Probandi.

*On Appeal from the High Court at Calcutta.**

* From the judgment of L. S. Jackson and Macpherson, JJ., in Regular Appeal No. 276 of 1866, decided on the 21st June 1871.

Shamnarain and others
versus
The Administrator-General of Bengal.

In a suit by mortgagees under a zur-i-peshgee mortgage, not only for possession, but also for setting aside a mokurruree lease, which was alleged to have been granted by the mortgagor prior to the mortgage, and under which defendants had been in possession for some time in accordance with a Magistrate's order :

Held, that the *onus* was on the plaintiffs to give some evidence to impeach the validity of the mokurruree ; but this having been done, and a strong *prima facie* case made out, the *onus* was shifted, and it became incumbent on the defendants to show that the mokurruree was executed before the zur-i-peshgee, and that it was granted *bona fide* for a real consideration, and intended to be operative as between the mortgagor and the lessee.

This suit was brought by the plaintiffs, whom the present respondents represent, claiming under a zur-i-peshgee granted by the Rajah of Ramnuggur, to secure the sum of Rs. 49,000. The zur-i-peshgee included 14 mouzahs, and among them a mouzah called Koorkoorcha.

It seems that the Rajah instituted a suit against the mortgagees to set aside the zur-i-peshgee, on the ground that it had been collusively obtained from him, charging Binda Lall, whom the appellants in this suit represent, with colluding with the mortgagees in obtaining the mortgage. Then a cross-suit was brought by the mortgagees under the zur-i-peshgee, being the suit in which the present appeal arises, against Binda Lall, for possession of the mouzah of Koorkoorcha, and to set aside a mokurruree lease alleged to be granted by the Rajah to him prior to the mortgage, under which he claimed the possession of the mouzah upon payment of the rent reserved by the mokurruree of Rs. 41.

The value of the mouzah was Rs. 850 per annum.

Both suits were heard by the Principal Sudder Ameen, who found that the zur-i-peshgee was a genuine instrument, and that it had not been obtained by fraud ; and he affirmed the validity of it. He also found in the present suit that the mokurruree set up by Binda Lall was a fraudulent document, intended to prevent the mortgagees under the zur-i-peshgee from getting the full benefit of their mortgage as regards the mouzah Koorkoorcha.

There were appeals to the High Court from his decision. The High Court reversed the decree of the Principal Sudder Ameen, which affirmed the validity of the zur-i-peshgee, holding that although it was executed, the consideration had not been paid, and they set the zur-i-peshgee aside. The consequence of their deciding that the plaintiffs had no title under the zur-i-peshgee was that, in the present suit, it was held that they had no *locus standi* to set aside the mokurruree.

From these decisions of the High Court there were appeals to Her Majesty, and the result was that Her Majesty was recommended to reverse the decree of the High Court, which had set aside the judgment of the Principal Sudder Ameen, and disaffirmed the mortgage, and to set up his judgment which had held that the mortgage was valid.

That state of things left the question as to this mokurruree undecided, for the High Court had only decided against the mortgagees in this suit upon the ground that having no title in the mouzah they could not be heard to say that the mokurruree was invalid. It was therefore necessary, after the decision of this tribunal in the Rajah's suit, that the High Court should hear the original appeal in the present suit as regards the mokurruree upon the merits ; and accordingly this direction was given in the order of Her Majesty in this suit :—" It is hereby ordered that the decree of the High Court of Judicature at Fort William in Bengal of the 21st May 1863 be reversed, and the cause remitted to the High Court, with a declaration that the zur-i-peshgee deed alleged to have been granted by the Rajah of Ramnuggur to the appellant and his brother is a valid instrument, and the High Court is hereby directed, in case the respondent does not appear within a reasonable time to be fixed by the High Court, to dismiss his appeal from the Zillah Judge of Sarun to the

High Court, with costs; and if the respondent does so appear, then the High Court is to hear and determine the appeal on its merits, and in case the respondent shall fail to appear in the High Court,"—then here are further directions. The "respondent," being the appellant in the High Court, did appear, and the High Court heard the appeal, and gave judgment, affirming the original decision of the Principal Sudder Ameen, to the effect that the mokurruree was a fabricated and fraudulent instrument: and from that judgment comes the present appeal.

Mr. Doyne could not do otherwise than admit that the judgments of both Courts on the question of fact were against him, but the main point which he urged before their Lordships was that both Courts had improperly shifted the *onus*, and that, in consequence of the form of the present suit, it lay upon the respondents, the plaintiffs below, to show affirmatively that the mokurruree was invalid.

Their Lordships, having regard to the form of the suit, which was not only for possession, but for setting aside the mokurruree, and having regard also to the fact that for some time under a Magistrate's order, the appellant, or those whom he represents, were in possession under the mokurruree, think that, in the first instance, it did lie upon the plaintiffs to give some evidence to impeach the validity of the mokurruree, and that some *onus* was therefore upon them; but they are clearly of opinion that this *onus* was satisfied, and a strong *prima facie* case to impeach the validity of the deed made out, and then the *onus* was shifted, and it was incumbent upon the appellant to show by satisfactory evidence that the mokurruree was really executed before the date of the zur-i-peshgee, and that it was granted *bona fide* for a real consideration and intended to be operative as between the Rajah and Binda Lall.

There are strong circumstances of suspicion in the case. Binda Lall was the mookhtar of the Rajah, and notwithstanding that the Rajah had charged him with having acted collusively with the holders of the zur-i-peshgee in obtaining it from him, he kept him in his service. These facts are pointed out in the judgment of the Principal Sudder Ameen. It appears that the deed was not registered nor stamped at the time, the value of the mouzah was considerable, the rent very small, and there was no evidence that any consideration was paid. Considering the relation of the parties, and the facts which have been referred to, the Principal Sudder Ameen and the High Court seem to their Lordships to be perfectly justified in saying that unless the holder of the mokurruree gave satisfactory evidence of its execution and of its *bona fides*, they could not hold that it was a valid instrument as against the zur-i-peshgee. The High Court do not affirm the judgment of the Principal Sudder Ameen without looking at the case for themselves, and it appears that they did look at the evidence to which Mr. Doyne referred, to satisfy themselves of its weight and effect, and they thought it was not the kind of proof that should be given in a case which, upon the face of it, was so suspicious. They say in their judgment:—"The point for decision really and substantially is, whether the case made out by the plaintiffs, resting as it does upon the zur-i-peshgee deed, which, on the finding of the Privy Council in the several suits between these parties, is a good and valid instrument, has been sufficiently answered by the alleged mokurruree which the defendants set up. Now, besides that we have before us what seems a satisfactory judgment of the Principal Sudder Ameen, Moulvie Mahomed Wuheedooddeen, upon this point, which was in issue in his Court, that decision not being impugned upon what appeared to be any valid grounds; in point of fact it seems that the defendant gave neither in this case, nor in any of the other cases in which these parties were concerned, anything approaching to direct evidence of the execution of his mokurruree. It is shown that in another case between Rajah Sahab Prolad Sen and the Tewarees, some of the witnesses referred incidentally to this mokurruree, and we are asked to infer from that that those witnesses might, if further examined, have given positive testimony on the point; and it is suggested that the defendant had not fully present to his mind the necessity of setting up the mokurruree by direct

evidence, and upon that suggestion we have been asked, at this time of day, to send this case back to the Court of the Subordinate Judge, of Sarun in order that a fresh issue may be framed, and the parties allowed an opportunity of adducing evidence upon it."

The High Court, having referred to the only evidence given by the appellant in support of the mokurruee, held it to be entirely insufficient for that purpose; their Lordships think that their judgment is correct, and that the High Court were also right in not putting a case of this description into a train for further enquiry. They will, therefore, humbly recommend Her Majesty to affirm the judgments appealed from.

The 11th December 1874.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Joint Hindoo Family—Evidence—Possession, and Participation in Profits, of Specific Share—Review of Judgment (after 90 days).

On Appeal from the Court of the Financial Commissioner of Oudh.

Luchmun Singh, Ajeet Singh, and Ramdeen Singh

versus

Shumshere Singh.

It is not necessary for a member of an undivided family to prove possession of a specific share of the joint fund, nor participation in the profits to the full extent of his share. It is very common among joint families that the expenses of the family are paid out of the common fund, and that each member draws a certain sum as he requires it; but there is no account taken between the members of the family to see whether each member receives his full share.

The Privy Council approved of and adopted the decision in 8 W. R. 184, that the order of a Lower Appellate Court admitting a review of judgment after the expiration of ninety days from the date of the decree, without showing whether there was sufficient cause proved to its satisfaction for the delay, was illegal together with all subsequent proceedings under it.

Mr. Leith, Q.C., and Mr. R. Campbell for Appellants.

Mr. Cowie, Q.C., and Mr. Herman C. Merivale for Respondent.

In this case Luchmun Singh brought a suit against Shumshere Singh in the Court of the Settlement Officer of Seetapore. His suit was to recover one-fourth of an estate situate in that district. Luchmun Singh was the representative of one of five brothers, who were the sons of Ojeeb Singh. He was the son, actually, of Bhugwunt Singh, but he had been adopted and taken out of Bhugwunt Singh's family by Rae Singh, who was one of the other five brothers. Bhugwunt Singh subsequently died without leaving any other issue, his other son, the brother of the plaintiff, having been killed in the mutiny, and in consequence the shares, which were originally held by five brothers, belonged to four. Luchmun Singh, therefore, as the adopted son of Rae Singh, claimed one-fourth of the estate. It appears that Shumshere Singh was the person who had signed the kubooleut and had contracted for the Government revenue, but the brothers were a joint undivided Hindoo family up to a certain period; and the question was whether the plaintiff had proved that they were joint, both in food and the period of limitation. The period of limitation in Oudh, with regard to cases of this nature, depends upon Act XIII of 1866 of the Government of India, which enacts that no suit relating to any tenure which, under the provisions of Act XVI of 1865, shall be solely cognizable

in the Courts of Revenue in the said province (and this is one of those cases) shall be barred under the rules of limitation in force in such Courts if the cause of suit shall have arisen on or after the 13th day of February 1844.

The question was whether Luchmun Singh's cause of action to have a share of this estate did accrue subsequently to the commencement of the year 1844. The case was tried before the Settlement Officer, who found certain facts. He says, "The defendants deny possession as proprietor or sharer, and claim to have held the full proprietary right for some years prior to the term of limitation. The question before the Court then is,—1. Has the plaintiff been in possession of any rights within the term of limitation? and if so, 2. Are they the rights of a proprietor? The onus of proof rests on the plaintiff. A review of the proceedings in the District Court and of the evidence produced by the plaintiff now, seems to me to establish that—First, For many years immediately preceding annexation the plaintiff was on perfectly amicable terms with the defendant, and received his support in common with the defendant himself and some other relations from the estate. Disputes arose at the close of 1263 Fuslee, ending in an affray, in which the defendant's brother was killed. These disputes arose either because—(1) Plaintiff then, for the first time, set up a claim to a share, or (2) Defendant, for the first time, sought to deprive the plaintiff of a share. The plaintiff was completely ejected till 1266 Fuslee, when, by order of Court, he was put into possession of what was thought to be his seer land, nominally 100 beegahs, but really 150, the order being to put him in possession of what he had before. The plaintiff is still in possession of this seer. Up to this point there seems no doubt about the facts. Beyond this there may be doubt. In my opinion the plaintiff has wholly failed to prove, and there is no reasonable hope that he can establish his allegation, that he participated annually in the profits to the extent of one-fourth, and was therefore a sharer or part proprietor." But it would not be necessary for a member of an undivided family to prove that he participated in the profits to the full extent of his share. It is very common among joint families that the expenses of the family are paid out of the common fund, and that each member draws a certain sum as he requires it, but there is no account taken between the members of the family to see whether each member receives his full share.

Then the Settlement Officer goes into the question of seer land, and discusses the question whether the occupation of the seer land would take the case out of limitation, provided he had nothing else. He says, "But the question will sooner or later arise, and not alone in this, but in other similar cases,—does seer land, held as it is held by this plaintiff, represent an ancestral share in the estate, or is it merely maintenance given to younger branches, at the pleasure of the head of the house? It is quite certain that if circumstances compelled the division of the estate, the plaintiff would share by ancestral right." He then decided against the plaintiff's claim, upon which the case was brought before the Settlement Commissioner of Oudh, Mr. Currie, and he says,—“It is shown that the descendants of Ojeeb Singh lived together till about 1264 Fuslee, and that the appellant held possession of a village named Akberpore, which forms a portion of this estate, paying the proceeds into the common fund. It is also shown that appellant held some seer, but there is no actual proof of appellant's having enjoyed a share of the general profits.” Then he goes on to discuss the question whether the holding of seer land is a participation in profits, and he comes to this conclusion :—“In the present case then, the Court being of opinion that the appellant was, up to 1264 Fuslee, a member of an undivided Hindoo family, living in common and sharing in common, holds that the cause of action in the case arose in 1264 Fuslee, or such other date about that year when appellant and respondent quarrelled, and appellant was deprived of the rights which he had up to that time enjoyed. Being of this opinion, the Court does not consider it necessary that appellant should prove possession of a specific share, the possession of respondent being presumed to be the possession of the entire family.”

It appears to their Lordships that the Settlement Commissioner was right in this opinion. If these brothers did live in commensality, and the funds of the estate which they respectively held, independently of the seer land, were brought into the common fund, and they participated in this fund by reason of their living in commensality, it was not necessary that the plaintiff should prove the possession of a specific share of the joint fund. "For these reasons," the Commissioner says, "the Court reverses the order of the Settlement Officer, and decrees the appellant a one-fourth share in Mouzah Nawagaon, being the share to which he is entitled by ancestral right, and to which he lays claim."

An appeal was brought from that decision to the Financial Commissioner, the defendant upon that appeal being the appellant. Colonel Barrow, as the Financial Commissioner, states the grounds of appeal, and he says:—"If the parties were an undivided family in the Nawabee within limitation, no doubt the Commissioner's order, reversing that of the Settlement Officer, is correct. It appears that in the Nawabee (1263 Fuslee), within limitation, a separation took place, and respondent got only 150 beegahs seer, but this does not invalidate his claim, for he was in possession as a member of an undivided Hindoo family up to 1263 Fuslee. He is, therefore, now entitled to his share. The proof of specific possession is not requisite. I uphold, therefore, the Commissioner's finding, decreeing four annas share to special respondent, subordinate to the zemindar, Shumshere Singh."

Colonel Barrow's judgment was given on the 24th September 1867. It appears that at that time Colonel Barrow was only officiating as Financial Commissioner when he gave judgment affirming the decision of Mr. Currie; after that Mr. Davies appears to have come back and resumed his duties as Financial Commissioner. An application was made to Mr. Davies, who was then the Official Commissioner, to review the judgment which Colonel Barrow had given when he was acting as Financial Commissioner. Mr. Davies refused to grant a review, and on the 27th November 1867 rejected the application. Nothing was done after this until the 24th April 1868, which was more than ninety days from the time of the original decision of Colonel Barrow, and more than ninety days even from the time when Mr. Davies rejected the application for review. Colonel Barrow at that time was again acting as or had been appointed substantially to the office of Financial Commissioner. At all events he was performing the duties of that office, and on that day an application was made to him for a review of his own judgment; Mr. Davies having rejected a review, an application was made to Colonel Barrow himself to grant a review. Upon that he says:—"Review is asked for in this case on the grounds of a certain statement said to have been made by the special respondent in 1859 to the effect that they (the sharers) had been turned out of possession, sixteen or seventeen years before, by Shumshere Singh, meaning that the family had then separated. The statement is produced and read, showing that Shumshere Singh had turned them out before February 1844, and that they (the special respondents) merely held their seer, etc. The translation of the deposition referred to is dated January 1859, and the plaintiffs (special respondents) loosely stated they had been sixteen years separated, which places them a year only out of limitation. I do not think that this statement would suffice to eject Luchmun, etc., from a share if they could otherwise prove that they had held the status of shareholders." The statement referred to was, however, before the Settlement Officer when he came to the first decision, and it was also before Mr. Currie as well as the evidence which had been given in the plaintiff's favor; the statement which the plaintiff had made, and which tended to show that the evidence was not correct, was before both those officers, the Settlement Officer who decided the case in the first instance, and the Settlement Commissioner, Mr. Currie, and it was also before Colonel Barrow himself when he gave his judgment affirming the decision of Mr. Currie. But the plaintiffs

had given evidence to show that they were shareholders, and Mr. Currie had acted upon that evidence and found that they were shareholders, and had given them a decree in consequence. Mr. Currie says that "up to 1264 Fuslee appellant (Luchmun) was a member of an undivided family, living in common and sharing in common, and that they only separated in 1264 when they quarrelled." The Financial Commissioner goes on, "There is no evidence on record to this effect; the trying officer indeed says that Luchmun has produced none to show that he had any status as a proprietor. There are eleven or twelve villages concerned in this decision. The Government demand on the same is Rs. 4,150" (that is to show that the value of the estate was considerable). "Such important interest deserves full enquiry before shares can be decreed, and the quotation from Mr. Currie's judgment will form the subject of an issue for further trial. After the lapse of so long a time I regret to give the Courts the trouble of further enquiry, but in this instance it appears only just to special appellant to do so, for Luchmun, as far as the evidence yet goes, has not proved a good title to a share."

The case, then, was sent down for the purpose of trying whether the quotation from Mr. Currie's judgment that the plaintiff was a member of an undivided family up to 1264 was correct or not. In reality the case was sent back to the Settlement Officer to try whether the decision of Mr. Currie upon appeal from the Settlement Officer upon a question of fact was correct or not. The case came before Colonel Barrow merely upon special appeal. He sent it back upon the ground that there was no evidence whatever given in support of that issue. There was, however, the evidence of the plaintiff himself upon oath. It appears to their Lordships that the Financial Commissioner was wrong in granting the review and remanding the case; and further, that he had no power to do so.

The right to apply for a review of judgment depends upon Act VIII of 1859 s. 376, which is as follows:—"Any person considering himself aggrieved by a decree of a Court of original jurisdiction, from which no appeal shall have been referred to a superior Court, or by the decree of a district Court," and so on, "and who, from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time such decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree."

Now what was the ground of application to Colonel Barrow for a review of his own judgment? He says that there was no evidence whatever before Mr. Currie in support of the fact that the plaintiff was a member of a joint family, but there was no allegation when the application for the review of judgment was made, that the applicant had discovered any new matter or evidence which was not within his knowledge, or could not be adduced by him at the time the decree was passed.

Then was there any other good and sufficient reason? The only other good and sufficient reason appearing in Colonel Barrow's judgment was that Mr. Currie had found that fact without any evidence to warrant it; but that is not correct.

But the application was made more than ninety days from the date of the decree, and it was made more than ninety days even from the time when Mr. Davies had refused to review Colonel Barrow's decision. S. 377 of Act VIII of 1859 enacts that the application for a review shall be made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and sufficient cause, to the satisfaction of the Court, for not having preferred such application within the limited period.

Now if the ground for the application for review was, as stated by Colonel Barrow in his judgment, that Mr. Currie had found a fact without any evidence

whatever in support of it, the defendant ought to have applied for the review of judgment within ninety days from the date of the decree. But in this case the second application for review was not made within that period. In the case of *Maharajah Moheshur Singh v. The Bengal Government*, cited from 7th Moore's Indian Appeals, page 309,* it was held that a review granted after ninety days without sufficient ground was invalid. That, however, was in a resumption suit, and was not a case under Act VIII of 1859. It was under an old Regulation, and was not an express decision, although probably the same principle would apply to a case under Act VIII of 1859. There is, however, an express decision in the High Court of Bengal with regard to the application for a review under Act VIII of 1859. That is reported in 8th Weekly Reporter, page 184, *Gungansarain Roy v. Gonomoonsee*. The marginal note is, "The order of the Lower Appellate Court, admitting a review of judgment after the expiration of ninety days from the date of the decree, without showing whether there was sufficient cause proved to its satisfaction for the delay, was held to be illegal, and was set aside with the subsequent proceedings thereon."

Their Lordships approve of that decision, and consider it applicable to the present case. Colonel Barrow does not state that there was, or that it had been shown to his satisfaction that there was, sufficient cause for not having made the application for the review within the ninety days. According to the decision, to which reference has been made, it appears that the review itself and all the subsequent proceedings under it were invalid.

The case, however, went down, and was retried by the Settlement Officer. It is unnecessary to go into the further proceedings. Their Lordships are of opinion that even if the review had been properly granted, the subsequent proceedings and judgment were entirely wrong. The case is decided upon the ground that Colonel Barrow has not shown that it was proved to his satisfaction that there was a sufficient excuse for not having made this application for a review within ninety days from the date of the decree, and that the granting of the review, and all subsequent proceedings under it, were erroneous and invalid. The original decision of Colonel Barrow, upholding Mr. Currie's decision in favor of the plaintiff, and awarding him a one-fourth share of this estate, must stand.

Their Lordships, therefore, will humbly advise Her Majesty that the last decision of the Financial Commissioner, dated the 29th and 30th June 1868, be reversed, and that the first decision of the Financial Commissioner, dated the 1st September 1867, be affirmed.

There were two other cases, Ajeet Singh's case and Ramdeen Singh's case. They appear to have been decided by Mr. Reid in favor of those plaintiffs, upon the authority of the first decision of Colonel Barrow in Luchmun Singh's case. It does not appear when the application was made, but Colonel Barrow (page 13) says:—"I must admit this case to review, as Captain Thompson, in consequence of the orders in special appeal, *Shumshere Singh v. Luchmun Singh*, altered his decision in the cases of *Shumshere Singh v. Ajeet Singh* and *Shumshere Singh v. Ramdeen Singh*."

Then he goes on and determines the matter in the same way as he determined it in Luchmun Singh's case. He says, "And my orders of the 29th ultimo upheld Captain Thompson's in all three cases, which is an error, as my order was intended to dismiss the claims of Ajeet Singh and Ramdeen Singh, as well as that of Buchmun Singh."

Their Lordships will humbly advise Her Majesty that the decision of the Financial Commissioner of the 14th July 1868 be reversed, that the decisions of the Officiating Commissioner, dated the 21st October 1867, in the cases of *Shumshere Singh v. Ajeet Singh*, and of *Shumshere Singh v. Ramdeen Singh*, dismissing the appeals from the decrees of the Settlement Officer, dated respectively the 8th March

1865, be affirmed, and that those decrees be upheld, and that the respondent do pay the costs of those appeals, and all the costs in the lower Courts, subsequent to the order of remand of the 29th April 1868. One set of costs only to be allowed in the three appeals to Her Majesty in Council.

The 12th December 1874:

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Putnees—Sale under Reg. VIII of 1819 s. 8—Construction of the word "Substantial"—Petition of Appeal (to Privy Council)—Misstatement—Costs.

*On Appeal from the High Court at Calcutta.**

Ram Sabuk Bose

versus

Monmohini Dosses.

The statutory sale of an under-tenure under Reg. VIII of 1819 cannot be set aside, because one of the witnesses to the notice (which was in fact served) turns out not to be substantial.

The High Court's construction of the word "substantial" in s. 8 of the above Regulation, as meaning a wealthy man from whom damages could be recovered by the putneedar in the event of the attestation being false, was held by the Privy Council to be too limited a view; wealth being only one element in the position and status of the witness. If he lived in the neighbourhood and was a respectable man and of good character, their Lordships saw no reason why the Judge might not properly come to the conclusion that he was a substantial person.

There must be *uberrima fides* on the part of those who come for leave to appeal, on special grounds, to Her Majesty; where the petition contained a material misstatement, the appellant was not allowed the costs of the appeal.

Mr. Doyne for Appellant.

Mr. Graham for Respondent.

Sir Montague Smith gave judgment as follows:—

In this case their Lordships, having heard the argument on the appeal, propose to give judgment upon its merits, and some observations will subsequently be made on the objection which was taken to the statements in the petition of appeal.

The suit was brought by a putneedar to set aside the sale of his putneedar talook, called Juggutbullubpore, which had been sold for arrears of rent through the Collector, under the provisions of Reg. VIII of 1819, and the defendants to the suit were the zemindar Muddun Mohun Haldar, and the purchaser at the sale, Ram Sabuk Bose. The plaint charged fraud on the part of the zemindar and the purchaser in the proceedings previous to the sale, and charged that the receipt of the notice which was served under the provisions of the Act had been forged. Various objections taken to the sale have been disposed of in favor of the defendants, and one only remains for consideration in the present appeal; that is, whether the witnesses who have signed the receipt are substantial persons within the meaning of the Regulation.

The Regulation provides, in the second clause of the eighth section, for the manner in which the notice of sale shall be served and published. It directs that it shall be stuck up in some conspicuous part of the cutcherry of the zemindar,

* From the judgment of Kemp and Glover, *JJ.*, in Special Appeal No. 280 of 1864, decided 18th February 1865;—2 W. R., *Civil*, 188.

and it also provides for publicity and service in the cutcherry of the defaulter. It is with the latter only that it is necessary to deal in the present appeal. The Regulation says: "A similar notice shall be stuck up at the sudder cutcherry of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the cutcherry or at the principal town or village upon the land of the defaulter. The zemindar shall be exclusively answerable for the observance of the form above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter or of his manager for the same, or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot."

It appears that the receipt of the defaulter could not be obtained. His gomastah was seen, but he refused to give one; and thereupon the peon obtained the signatures of seven persons who, it is alleged, resided in the neighbourhood. At the hearing before the Principal Sudder Ameen, evidence was given as to the residence and the status of three of those seven, and the Principal Sudder Ameen, being satisfied that they were substantial persons within the meaning of the Regulation, thought it unnecessary to go into evidence with respect to the other four; and he found in very distinct terms these three persons resided in the neighbourhood, and were substantial persons. This is his finding upon the facts:—"The plaintiffs take exception to the above seven persons not residing in the neighbourhood of the defaulter's mehal. To this it would be observed that Warris Mollah, one of the seven persons above alluded to, was the mundul of Juggut-bullahpore, and Goluck Chowkeedar was the chowkeedar of the village. These two certainly are what the law calls 'substantial' men. As regards Kabel, though not a man of much consequence, he was known to carry on the trade of a tailor in the village; consequently, a receipt signed by, among others, three such men as Warris, Goluck Chowkeedar, and Kabel, must be considered a sufficient proof for the service of notice. A more respectably signed document cannot be, from the circumstances of the country (the respectable portion of every community being at all times averse to appear in a court of justice) expected." The objection at their Lordships' bar was directed only to one of these witnesses, Kabel, who carried on the trade of a tailor. It has not been contended that the other two did not satisfy the requirements of the statute, although in the judgment under appeal it appears to have been held by the High Court, contrary to its former decision on the same point, that two of them did not satisfy its words.

There was an appeal from the finding of the Principal Sudder Ameen to the Judge of the 24-Pergunnahs; and Mr. Beaufort, the Judge of the 24-Pergunnahs, affirmed the decision. He affirmed it upon two grounds: first, upon the facts, and then that supposing the witnesses did not satisfy the statute, still notice having been really served upon the plaintiff, the putnadar, as was proved in the cause, through his gomastah, the non-compliance with the direction of the statute would not, under the circumstances, vitiate what had been done. His finding is:—"I am of opinion that the appellants have failed to show any sufficient ground for rejecting the receipt. When the gomastah, who was in the cutcherry, refused to give a receipt, the peon brought the guru of the village, and made him write a receipt under a tree close by, and then he got some of the bystanders to sign the receipt. The evidence proves these facts, and proves that the three persons who were called as witnesses at the trial of the case in the Lower Court saw the notice affixed to the door; and I find no ground for holding that they are not substantial within the meaning of the law; I think that all that is required is good evidence to the fact of the publication of the notice on a certain date, and that has been supplied in this case;" therefore he affirmed the judgment of the Court below upon the fact that these witnesses were substantial men. Then he

goes on thus :—"I would go further and say that the directions of the law are intended for the guidance of the Collector only." Then he gives his reasons. "Before putting up the putnee tenure to sale he must require proof that the notice was duly served, and the law says that such proof must be of such and such a nature. The Collector is not required to take evidence; he has to examine merely the written documents produced by the zemindar, and if the proof appears to be *prima facie* good, the putnee is sold on the responsibility of the zemindar. Then, if the putneedar has recourse to the Civil Court, the issue is not whether the proof adduced to the Collector at the time of sale was strictly within the words of the law, but whether the evidence adduced before the Court to prove the service of the notice on or before a certain date, is credible and satisfactory. The reasonable object of the law is that the defaulter should have timely notice of the intention to sell; and if it be proved that such notice was given to the satisfaction of the Court, the number of witnesses present, their actual *status* in social life, and the distance of their dwelling-houses, are points which are immaterial." It is to be observed that on this point there is a decision of the High Court, when Sir Barnes Peacock presided in it, to the same effect. In the case of Sona Beebee, appellant, and Lall Chand Chowdhry and another, respondents, reported in the 9th Weekly Reporter, page 242, the Chief Justice says: "This was a suit to cancel a sale of an under-tenure under Reg. VIII of 1819. The material part of cl. 2 s. 8 Reg. VIII of 1819, so far as this case is concerned, is that the notice required to be sent into the mofussil shall be served. The zemindar is exclusively answerable for the observation of the forms prescribed by that clause. The subsequent part of the section, which prescribes that the serving peon shall bring back the receipt of the defaulter or of his manager, or in the event of his inability to procure it, that he shall obtain that which by the Regulation is substituted for it, is merely directory, and if not done does not vitiate the sale, provided the notice is duly served."

Their Lordships are disposed to agree with the judgment of the High Court as delivered by Sir Barnes Peacock, confined as it is to cases where there is proof that the notice was duly served. The consequences of holding that a statutory sale of these putnees could be set aside, because one of the witnesses to the notice turned out not to be substantial, when it was in fact served, would be to give too great effect to form at the expense of substance.

The putneedar was not satisfied with these two decisions. Although the point is certainly small and narrow, whether this tailor was a substantial man or not, he appealed to the High Court. The two Courts below having found that in point of fact Kabel was a substantial person, his appeal could only be upon matter of law, namely, that they had misconstrued the Regulation and the meaning of the word "substantial." Upon this appeal to the High Court, he at first fared no better than he had done in the Courts below, and a Division Bench of the High Court affirmed the two former judgments, and for reasons which to their Lordships' minds are perfectly satisfactory. Having noticed some of the objections which are not now relied upon, they say:—"Next, as to these witnesses' respectability. The word used in the Regulation is 'substantial,' meaning, of course, men who have some *status* in the community, men of local influence or importance, or respectability. We think that the law has been complied with on this point also. One of the witnesses is the Mundul, the head man of the village; another is the Chowkeedar, an official whose attestation is always considered as the best possible in all matters connected with service of notice." It is well to call attention pointedly to this finding as to the Chowkeedar, because it is entirely inconsistent with the decision of the same Division Bench upon review, where they considered that the Chowkeedar is not a substantial witness within the meaning of the Act. "The third appears to be a tailor, residing temporarily at the place, but who lives in the neighbourhood. This man is declared to be not a proper witness. We do

not see why the man is not to be considered ~~competent~~ to attest the serving of notice. He appears to be a respectable man, though not a rich one; and besides, the phrase 'substantial,' on which special appellant lays so much stress, must be taken comparatively. In a small village the measure of a 'substantial' witness will, of course, be much lower than in a place of importance."

The putneedar, still dissatisfied, applied for a review of that judgment, and, upon the review, the Court, consisting of the same two Judges, without much reference to, or discussion of, their former judgment, reversed it upon grounds to which I will now refer. In order to see upon what grounds the Court really acted in thus reversing their former judgment, it is necessary to say that they refer in their judgment to the contention of Mr. Paul, the counsel for the appellant, in this way: "It is contended by Mr. Paul, the learned counsel for the applicant for review, that the law requires that the attesting witnesses must be 'substantial,' that is to say, responsible, moderately wealthy men, against whom, in a case of false attestation, the party injured may have his remedy in a suit for damages." This is what they observe on the evidence: "Now, in this case, the attesting parties are sufficient in number, and they reside in the neighbourhood, but, with the exception of the Mundul, the rest are not what can be called substantial persons. One is the Chowkeedar of the village, and the other a thika tailor. The Legislature invested the zemindar with the power of bringing subordinate putnees to sale, and made him exclusively answerable for the due observance of the prescribed processes under which such tenures could be brought to sale. To protect the putneedar from fraud, it was enacted that the notice of sale must be attested by three substantial persons. Now it is clear that, unless the attesting parties answer to the common meaning to be put upon the word 'substantial,' the putneedar would be wholly without remedy in case of false attestation." Now the Court, this being a special appeal, could only decide upon some matter of law, and the matter of law which they appear to rule upon the construction of this Act is that the word "substantial" means a wealthy man from whom damages could be recovered by the putneedar, supposing the attestation to be false.

Their Lordships think that this is too limited a view. It is, no doubt, desirable that men of property should sign these receipts if they can be obtained, but wealth is only one element in the position and *status* of the witness, and if he lives in the neighbourhood, and if he be a respectable man and of good character, their Lordships see no reason why, upon evidence appearing of such facts, of which the Judge in each case must satisfy himself, the Judge, in estimating the position of the man, may not properly come to the conclusion that he is a substantial person. In the present case, the evidence appears to show that the man objected to carried on the trade of a tailor, that he had lakheraj lands, that he lived in the neighbourhood, was well known, and was (to use a description built up of many circumstances) a "respectable" person. Their Lordships think that upon such evidence the Judge of first instance and the Judge of the 24-Pergunnahs, who had a right to review his decision on questions of facts, might properly come to the conclusion that the witness was a substantial man. Their Lordships, therefore, think that the first judgment of the High Court was more correct than the last.

On these grounds, their Lordships have come to the conclusion to reverse the second judgment of the High Court upon the review; but inasmuch as the zemindar Muddun Mohun has not appealed from that judgment, they see no reason to give him relief, so far as the order affected him personally only; that is to say, so far as it ordered him to pay the costs; and therefore the reversal of the judgment will be without giving any right to him to have any costs that he may have paid under it refunded.

Their Lordships have given very serious attention to the objection raised by

Mr. Graham, on the part of the respondents, to the inaccurate statements in the petition for leave to appeal to Her Majesty. The appeal was made to Her Majesty upon special grounds, one being that the question was of considerable practical importance upon the construction of the Regulation. The petitioner was obviously out of time, and he could only obtain leave to appeal by excusing that lapse of time. Some of the statements in the petition are clearly inaccurate. It is stated, among other things, that the petitioner himself had applied for review of the judgment now appealed from on the 3rd February 1866, and that the learned Judges of the Division Bench differed in opinion as to the propriety of allowing the application, and did not allow it; and he introduced the fact of that petition to the High Court as an excuse for a part of the delay, alleging further, that, according to the then understood practice of the Court, which he says was afterwards changed, the application was in time. It turns out that the statement is inaccurate in this, that he did not petition the Court for a review of the judgment at all, but that the petitioner was the zamindar Muddun Mohun. Now when he came to excuse himself for the lapse of time, it is obvious that he should have been particularly careful to give their Lordships accurate information upon the points relating to that petition for review. If he had correctly stated the facts in his petition, although the point to be decided in the appeal was one of general importance, leave to appeal might not and probably would not have been granted. There is, therefore, a material misstatement in the petition.

Their Lordships have considered whether the misstatement was intentionally made with a view to deceive this tribunal; and if they had been clearly satisfied that this was the intention of the petitioner, or of those who advise him in India, they would, even at this late stage, dismiss the appeal; but they are not fully satisfied that such was the intention; and although the misstatement is material, and one that clearly ought not to have occurred, and shows, at least, a great deal of culpable negligence, they are not so satisfied that it was done with the intention to deceive, as to dismiss the appeal at this late period. They desire, however, to say that they think so seriously of this objection, and it is so necessary to insist that there should be *uberrima fides* on the part of those who come for leave to appeal, on special grounds, to Her Majesty, that they must mark their sense of what has occurred by refusing to give to the appellants the costs of the appeal. They desire further to say that if the objection had been made, as it ought to have been, by a preliminary motion, they have little doubt that motion would have been successful, and the order for hearing the appeal rescinded. Even if it had been made before the appeal had been entered upon at their Lordships' bar—when it was called on—they must have yielded to it; but considering that the appeal has been heard upon the merits, that Mr. Doyne's observations upon the facts and the law had been concluded, and it was only in the course of the argument for the respondents that this objection was taken, they think, under all the circumstances of the case, that they ought not now to dismiss the appeal, and that it will be enough to mark their sense of the impropriety of the petition by the refusal of costs.

In their Lordships' opinion, an objection of this kind ought to be taken by the respondents as early as the matter is brought to their notice, for the plain reason that if the leave to appeal is on that ground rescinded, no further costs are incurred, and it is wrong to leave the objection until the hearing of the appeal, when the record has been sent from India, and when all the costs attending the hearing have been incurred. In the present case not only was there no preliminary motion made to rescind the leave to appeal, but the respondent's case, although referring to the facts, did not point to them with distinctness, and there is no reason directed to the objection.

Under these circumstances, their Lordships think that they will best perform

their duty, the appeal having been heard, and their Lordships being clearly of opinion that the judgment appealed from is wrong, by reversing that decision, but doing so without costs; and that will be the recommendation they will humbly make to Her Majesty.

The 15th December 1874.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Act VIII of 1859 s. 15—Declaratory Decree—Consequential Relief.

*On Appeal from the High Court at Calcutta.**

Rajah Nilmoney Singh Deo Bahadoor

versus

Kally Churn Bhattacharjee.

The right, given by Act VIII of 1859 s. 15, of obtaining a declaration of title without consequential relief, can be claimed only in those cases where the Court could have granted relief if relief had been prayed for.

A suit instituted by a zemindar against a number of his ryots, for a declaration of a māl title by setting aside, not a deed set up, but an allegation made by the defendants of a bromuttur title, was held to be not maintainable, because relief could not be granted in the shape of merely setting aside an assertion which may have been merely by word of mouth.

Mr. Cowie, Q.C., and Mr. Doyne for Appellant.

No one for Respondents.

Sir Robert Collier gave judgment as follows:—

This was a suit instituted by the Rajah of Pachete against a great number of his ryots, about fifty, "to," in his own language, "obtain possession of ten rekhs, or a ten-annas share of Mouzah Raotara, Pergunnah Para, under a māl title, by setting aside the false mogolee bromuttur title stated by the defendants." The defendants set up different defences; some of them alleged the mogolee bromuttur tenure, which the Rajah complained of their having set up; others repudiated any such tenure, and declared that they had never set it up, and therefore that the suit was brought unjustly against them; others did not appear. The case came in the first instance before the Assistant Commissioner, who in their Lordships' opinion did not sufficiently distinguish between the different classes of defendants. He treated them substantially as all setting up this mogolee bromuttur tenure, and framed his issue with that view. He found in the result in favor of the Rajah, that the Rajah was entitled to possession of the lands in suit, and that the defendants' allegation of mogolee bromuttur holding be set aside.

An appeal was then presented to the High Court, and in their Lordships' judgment the High Court scarcely sufficiently adverted to the distinct defences on the part of the various defendants; the case of some being that they had a bromuttur tenure, that of others being that they had not and never had set it up; as against those last it was necessary for the Rajah to prove that they had set up a bromuttur tenure. The High Court reversed the decision of the Lower Court, and the ground of their decision is expressed in the last paragraph of their judgment:—"On the whole case we think that the onus being shifted on

* From the judgment of Kemp and Ainslie, JJ., in Regular Appeal No. 79 of 1871, decided on the 29th August 1871.

the plaintiff to prove that these defendants had, since the year 1197, paid at a variable rate, and that they have not paid at the rate of Rs. 121, 9 annas, as per settlement of 1197, he has altogether failed to do so. We therefore dismiss the plaintiff's case, and decree the appeal with costs." In other words, the High Court appears to have found that the defendants had proved a *primæ facie* case of a mogolee bromuttur tenure, throwing upon the plaintiff the onus of rebutting that case, and that he had failed to sustain the onus thrown upon him. The decree of the High Court is in these terms:—"It is ordered and decreed by the said Court that this appeal be decreed, and the decree of the Lower Court be reversed, and that the suit of the plaintiff respondent as against all the defendants be and the same is hereby dismissed." Their Lordships do not think it necessary to determine whether or not the High Court were right in the conclusion they came to, as to the proof or the rebuttal of proof of the bromuttur tenure, because in their Lordships' opinion the judgment dismissing the suit is maintainable on totally different grounds. This is in substance a suit for a declaration of title, and it is a suit to set aside, not any deed nor any act, but a mere allegation of the defendants that they had a certain tenure. In their Lordships' view such a suit is not maintainable. S. 15 of Act VIII of 1859 is in these words:—"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Court to make binding declarations of right without granting consequential relief." A similar clause in this country has been held to give a right of obtaining a declaration of title only in those cases where the Court could have granted relief if relief had been prayed for; and that doctrine has been applied to this clause in the Indian Act.

Now, applying that test, in their Lordships' opinion this suit is not maintainable. The Rajah was not entitled to relief in the shape of an order giving him possession, inasmuch as he was in receipt of the rents and profits, and he sought for and could obtain no other description of possession than that which he had. He could not obtain relief by an order directing an enhancement of rent, inasmuch as the cognisance of suits for the enhancement of rent is confined to the Revenue Courts, and a certain procedure is assigned to claims of that kind in those Courts. His requisition of a declaration of a *mâl* title, by setting aside the false bromuttur title alleged by the defendants, is really no more than this, that he should have his title, whatever it was, as a zeminder, free from the allegation of the defendants that they had some other title. If he had applied to set aside a deed set up by the defendants impugning his ordinary title as a zemindar, then relief might be granted to him by cancelling that deed, but he cannot obtain relief in the shape of merely setting aside an assertion—an assertion, which for all that appears, may have been merely by word of mouth. On these grounds it appears to their Lordships that no relief could have been granted to him if he had prayed for it, and therefore that this suit was not maintainable. They think it right to add that even if no rule of law had barred the suit, still that in their opinion this was not a case in which, in the proper exercise of judicial discretion, a declaration of title should have been made.

The real object of the suit would appear to be to obtain a general declaration against a great number of persons, holding by different rights, that they had no bromuttur tenure, of which declaration the Rajah might avail himself in proceedings to be taken in the Revenue Court in suits for the enhancement of rent. It was and will continue to be open to the Rajah to institute any actions he may think fit in the Revenue Court for the purpose of enhancement of rent against all or any of these his tenants; but each of these cases must be tried upon its merits, and ought not to be prejudiced by a declaration such as he has sought to obtain.

Under these circumstances their Lordships, for the reasons given, are of

opinion that the decree of the High Court was right, and they will humbly advise Her Majesty that that decree should be affirmed. It is scarcely necessary for their Lordships to add that the decree being affirmed on these grounds, no adjudication has been given in favor of either party upon the question of mogolee bromuttur tenure.

The 14th January 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Hindoo Wife—Life Interest—Dowl.

*On Appeal from the High Court at Calcutta.**

Mohima Chunder Roy and another

versus

Durga Monee and another.

Where a Hindoo wife is entitled to an absolute estate in certain property, her husband cannot cut down her interest to a life interest by any dowl which he may make.

Mr. Leith, Q.C., and Mr. J. D. Bell for Appellants.

Mr. Cotton, Q.C., and Mr. Doyle for Respondents.

This was a suit brought by the sons of Tillock Chunder Roy by one of his wives, against the daughter of his other wife, to recover possession of certain property which the daughter alleged that her mother, who died before the suit, was entitled to as an estate of inheritance in the nature of jowtook or streedhun, but which as the sons alleged belonged to her only for her life, and after her death reverted to them.

The plaint relies chiefly upon a certain dowl, which is described in these terms:—"Agreeably to the deed of specification of shares of our father, Tillock Chunder Roy Chowdhry, on the 18th Bysack 1244 B.S., and the list dated the 27th Joisto 1244, signed by him, the six kâtas (plots) written in the under-mentioned first schedule, and the two kâtas (plots) of property written in the second schedule, were, on account of maintenance, held possession of by our stepmother, Manoka Chowdranea, under these conditions,—that she should in her lifetime enjoy the proceeds of the said property, without the power of making over the same by sale or gift, and on her death the said property would devolve on the sons of our father." In the first schedule annexed to the plaint they described the six portions of the property which they had mentioned, and in the second the other two. Durga Monee, the defendant, in her written statement, says in answer, with respect to properties Nos. 1 to 6 inclusive, they belonged to her mother. No 1, she says, was her mother's jowtook estate, and Nos. 2 to 6 property acquired by her mother from her streedhun estate. But with respect to Nos. 7 and 8, she says that they were assigned by her father to her mother under a writing of the 21st Joisto 1244, that is, a writing or list made by him on the 2nd June 1837, shortly before his death. It is very material to distinguish between the titles which she sets up to these two sets of property, respectively, the first being a title of long standing in her mother, who obtained an estate of inheritance by conveyances of an early date, the second resting entirely upon this

* From the judgment of Kemp and Glover, JJ., dated 7th July 1865.

list of June 1837, a distinction which has not been adverted to by either of the Courts in India.

The plaintiffs' and defendants' cases may be thus respectively stated. The plaintiffs gave no evidence whatever of any title or seisin on the part of their father; they put in no deeds, they gave no evidence of receipts of rent or profits, or any evidence customary in actions of this kind, but they put in this dowl, which bears date the 25th April 1837, some two months, or a little more it may be, before the death of their father, the purport of which is this,—that after making a partition of the great bulk of his property among his four sons, he proceeds to say:—"Besides this I have two wives, Sree Manoka Chowdranee,"—that is the mother of the defendant,—and Sree Raj Monee Chowdranee. The jageers and other property of mine which they hold in their possession shall be confirmed to them during their lives in lieu of maintenance. They shall have no power of making sale or hibba of the same. On their deaths the sons will receive equal shares thereof respectively. Moreover, when the maintenance is insufficient, the deficit will be made up in a reasonable manner." They also put in a list of property stated to have been made by their father on the 8th June 1837, about six weeks after, and very shortly before his death, which begins in this way:—"List of the property assigned over as maintenance. Creditor Manoka Chowdranee and debtor Tillock Chunder Roy." Then follows a description of lands which are stated to have been previously given, a description which substantially agrees with the first schedule in the plaint, relating to lands Nos. 1 to 6 inclusive. These are described as previously given. Then this list gives this heading—"Given for making up the deficit," under which heading follows a description of property substantially corresponding with Nos. 7 and 8 in the plaint.

The plaintiffs have shown that in May 1837 a petition stating the execution of the dowl and its material provisions was filed by or in the name of Tillock Chunder Roy in the Court of the Judge of Zillah Buhagunga, and that the dowl itself was filed shortly after the death of Tillock in a proceeding whereby his sons sought to substitute themselves for him as parties to a suit; they have also put in copies of two vakalutnamahs, executed, the one by the widow, the other by the sons of Tillock Chunder, in February 1839, from which it appears that the widow having set up some right of adoption, a compromise had been made. In her vakalutnamah she referred to a list made up and prepared by her husband; the other vakalutnamah referred to the dowl and also to their list. This in substance was the case of the plaintiffs.

The defendant put in several deeds, and gave the evidence of the attesting witnesses to them, for the purpose of showing that her mother had acquired several of the properties mentioned in the schedule to the plaint; that she had acquired the earliest of those properties as long ago as 1815, another in 1820, and others in 1831. With respect to three of these deeds she called the attesting witnesses. With respect to the fourth, she did not call any attesting witness; but it is to be observed that all of them were more than thirty years old. If these deeds were genuine, she showed that the interest in certain talooks was conveyed to her mother absolutely, subject to the payment of a quit-rent; and that these conveyances were confirmed by her father Tillock Chunder, who claimed a right as superior landlord to his wife, upon the payment to him of a certain quit-rent. She put in documentary evidence showing her mother's title to four out of the six properties mentioned in the schedule, and she gave some parol evidence, no doubt not of a very satisfactory character, that the others had been purchased out of her mother's jowtook.

The Principal Sudder Ameen decided in favor of the plaintiffs. He held that they had proved their dowl and the accompanying list. He held that the defendant had not proved her documents: on the contrary that they were

forgeries ; and he gave judgment for the plaintiffs. This judgment was reversed by the High Court. The High Court found that the dowl was a forgery. They do not expressly state, but perhaps it may be collected from what fell from them, that they did not agree with the view of the Principal Sudder Ameen that the documents put in by the defendants were false, but their Lordships have to regret that they have not the assistance of any distinct finding on the part of the High Court on this subject. The High Court treated the genuineness of the dowl as the sole question in the case. They reversed the judgment of the Court below, and gave judgment for the defendants. Their Lordships regret to have to observe that neither of these judgments appear to them satisfactory, and it will be necessary to state their view of the case. Their Lordships are by no means satisfied with the reasons given by the High Court for reversing the judgment of the Principal Sudder Ameen, to the effect that the dowl was genuine. On the whole their Lordships are inclined to think that the dowl and the document accompanying it—the list—were genuine documents. On the other hand, they are not prepared to dissent from what, as before observed, would appear to be the finding of the High Court that the deeds of the defendant were genuine. It would appear by the case of the plaintiffs themselves, that the defendant's mother had been in possession of these properties for a considerable time ; that she had in one of them at least what is called a *nim ousut talook*, which would probably be created by some documents or other ; and it may be assumed that some documents relating to her title were in existence. She puts in documents ; she proves them by the evidence of attesting witnesses—at all events three of them. The plaintiffs on the other side put in no title-deeds of their own, nor any *kubooleuts* or counterparts such as might be expected to be in their possession of the title-deeds under which the defendant's mother held such of the properties as she admittedly held under her husband ; and further it is to be observed that when summoned as witnesses for her by the defendant, they declined to put themselves into the box. On the whole their Lordships are of opinion that there is no sufficient ground for coming to the conclusion that these documents on the part of the defendant are forged.

That being so, it is necessary to consider what aspect the case presents. It appears to their Lordships that assuming the genuineness of these documents on the part of the defendant, it is made out she was entitled to an absolute estate in lots Nos. 1 to 6, both inclusive. They come to that conclusion, partly on the strength of her evidence, partly in the absence of any evidence whatever on the subject on the part of the plaintiffs. Then, if that were so, her husband could not cut down her interest to a life-interest by any dowl which he might make, and accordingly the dowl, assuming it to be genuine, appears to their Lordships to have been inoperative. Whether each or both of the lists are genuine, it does not appear to their Lordships absolutely necessary to decide. They are disposed to find as a fact that the list which came to the possession of the defendant is that which she now produces. It is possible that another list also may have been made, and that may have been, as the plaintiff *Mohima* states, entrusted to his possession. It is not necessary to go with great minuteness into an examination of these two documents, because it appears to their Lordships that, having come to the conclusion which they have already expressed, the materiality of the list produced by the defendant would appear to be that, with respect to Nos. 7 and 8, those properties were given to her for the purpose of supplementing her maintenance. Adopting her own view, that the reference in this list to those properties which she then held recognises her title to an estate of inheritance in them, it appears to their Lordships that the proper construction of the supplemental grant for the purpose of making her maintenance sufficient for her purpose is, that that grant should be for life and for life only. They think it highly improbable that that portion of the supplemental grant which consisted of a part of the dwelling-house of the family should have been intended to be granted to her in perpetuity.

Their Lordships therefore have come to the conclusion that as far as lots from Nos. 1 to 6 are concerned, the plaintiffs have failed to make out their case, and that the defendant is entitled to judgment; but that as far as lots 7 and 8 are concerned, they have made out their case, and that the plaintiffs are entitled to judgment.

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court, except so far as it reverses the decree of the Principal Sudder Ameen; and in lieu thereof to declare that the plaintiffs have failed to establish, as against the defendant, any title to the lots 1 to 6 in the plaint mentioned, and to decree that they do recover possession of the said lots 7 and 8 from the defendant, with the mesne profits received by her since the date of the institution of the suit, but that the said suit, so far as it seeks to recover the said other lots, do stand dismissed; and to direct that the costs in the Lower Courts be borne by the parties, respectively, according to the value of the property decreed and disallowed. Each party will bear their own costs of this appeal.

The 15th January 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Oudh Sub-Settlement Act (XXVI of 1866)—Evidence (of Sub-Settlement).

On Appeal from the Court of the Financial Commissioner of Oudh.

Syud Meer Wahid Ali

versus

Ranee Sadha Bebee.

Mr. T. H. Cowie and Mr. C. W. Arathoon for Appellant.

In order to entitle a person to a sub-settlement of lands under Act XXVI of 1866, he must prove that he, or some persons under whom he claims, has within the prescribed period held these lands as an under-proprietor under the talookdar or the predecessor of that talookdar. It is not sufficient for him to show that he has been a proprietor of those lands by a title adverse to the talookdar, so that although he might have lost his right to engage for the Government revenue under the peculiar laws that have prevailed in the province of Oudh since the re-conquest of that province, it was to be presumed that, having once had the better title to the lands, he had still a right to a sub-settlement.

Sir James Colville delivered judgment as follows:—

Whatever may have been the questions originally in dispute between the parties appellant and respondent on this appeal, they are now reduced to this,—whether the appellant is entitled to a sub-settlement of Taluka Beoramow upon the terms on which that sub-settlement was decreed to him by Mr. Nicholson, the Settlement Extra Assistant Commissioner, on the 23rd November 1867. The case must be taken to admit that the respondent, as the talookdar of this property, has those proprietary rights which are assured to talookdars of Oudh holding talookdari sunnuds by “The Oudh Estates Act 1869,” and the only question is whether the respondent, whom we may treat as alleging himself to be the zemindar of Taluka Beoramow, is entitled to a sub-settlement under the terms of “The Oudh Sub-Settlement Act 1866.”

Now, in order to entitle him to such a sub-settlement, it was necessary that he should prove that he, or some person under whom he claims, had within the prescribed period held these lands as an under proprietor under the talookdar or the predecessors of that talookdar. It was, indeed, contended by Mr. Arathoon

that it was sufficient for him to show that he had been a proprietor of those lands by a title adverse to the talookdar, and that although he might have lost his right to engage for the Government revenue under the peculiar laws that have prevailed in the province of Oudh since the reconquest of that province, it was to be presumed that, having once had the better title to the lands, he had still a right to a sub-settlement. But it does not appear to their Lordships that this broad proposition can be maintained, or that it receives any support from the decision of this Board, which has been referred to in the case of *The Widow of Shunker Sahai v. Rajah Kishen Pershad*.* The material question, therefore, to be decided was whether the relation of superior and under proprietor had ever existed between the two parties.

The case made by the appellant was shortly this:—Rajah Newaz Khan was the proprietor of Taluka Beoramow. He was the common ancestor of Ali Buksh Khan, the respondent's husband, through whom she claims, and Peer Gholam Khan, whose widow, the mother-in-law of the appellant, was one Sada Bibi. Ali Buksh Khan having dispossessed Peer Gholam Khan's branch of the family, Sada Bibi appealed to the King's Court, and in 1847 obtained a decree declaring her to be proprietor of Beoramow. She had previously transferred her rights by deed of gift to her son-in-law, the appellant, and he, by virtue of this decree, obtained possession of the taluka. Ali Buksh Khan, however, continued to disturb him in that possession, and in 1851 the two parties came to an agreement, the terms whereof were embodied in an *ikrarnamah* executed by Ali Buksh Khan, to the effect that the appellant should hold Beoramow as subordinate proprietor under Ali Buksh Khan, who was to hold the *kuboolent* for that as well as for the Taluka Mahona, to which he was entitled in his own right. This state of things subsisted until the annexation of the province in 1856.

The extra Assistant Commissioner, Mr. Nicholson, held that this case, including the execution of the *ikrarnamah*, had been established. The Commissioner, Mr. Capper, held that the *ikrarnamah* was not proved, and further that "the respondent had failed to prove that the relationship of over and under proprietor was ever established between the parties." This was the ultimate decision upon this cardinal issue of fact. There was then a special appeal to the Financial Commissioner, and the grounds of appeal were four. They were as follows: "That the Court of first instance had of necessity far better opportunity of testing the genuineness of the *ikrarnamah* under which plaintiff (appellant) claims, and that the grounds on which the Commissioner had set aside the *ikrarnamah* are insufficient. 2nd, That the village papers and accounts from 1858 to 1862, filed by appellant, together with the Coomedan's *perwanah*, are additional proofs of the genuineness of the *ikrarnamah*. 3rd, That the circumstances of the *canoongoe* having been unfavourably reported of on a previous occasion is no proof that his evidence in appellant's case is untrustworthy." Now as to these first three grounds, it is obvious that they all go to the genuineness of the *ikrarnamah*, and that they simply raise a question as to the effect of the finding of Mr. Capper upon the fact of the execution or genuineness of that instrument, and the appreciation that he should have given to the evidence in support of it. The 4th ground is, "That appellant has on no occasion either confined his claim to a *nankar* or waived his right to a sub-settlement; on the contrary, a reference to appellant's petition of 8th December 1863 will show that appellant then asserted his present rights." The order of the Financial Commissioner dismissed the special appeal, and it is against that order that the present appeal is brought.

The point to which their Lordships have, in the first instance at least, to direct their attention, is whether,—they being merely in the position of the Financial Commissioner who had to deal with a special appeal,—there are any grounds upon which they can interfere with the finding of Mr. Capper, which was in effect that

the relation which it was necessary to establish in order to entitle the appellant to a sub-settlement, never existed between the two parties. Their Lordships have to observe that, so far as the title of the appellant depends upon the proof of the ikrarnamah, there can be no ground whatever for interfering upon special appeal with the judgment of Mr. Capper on that pure question of fact; and though it is not necessary for them to do so, they may add that, as far as they can see, the reasons given by Mr. Capper are sound, and that they, if sitting as judges of the fact, would probably, on the same evidence as to the execution of that instrument, have come to the same conclusion. The fourth ground of appeal seems to refer specially to an observation which was made by Mr. Capper, to this effect: "Before Mr. Forbes, Assistant Settlement Officer, and Mr. Currie, Settlement Commissioner, it has been admitted for Wahid Ali, that he held nothing under the Rajah but his nankar; and in his petition to the Financial Commissioner of 12th March 1865 reasserting his proprietary title, he is silent as to having held under the present talookdar." Now as to the admission that the appellant held under the Rajah nothing but his nankar, it is undoubtedly stated by Mr. Currie, in the judgment delivered by him in one of the earlier proceedings at page 7, that the appellant had admitted having held nothing but nankar under the Rajah, and this seems to have been the ground of Mr. Capper's observation. But, at most, it is an observation which follows his finding, to the effect that the appellant had failed to prove the relationship, and does not appear very materially to have influenced that decision, though it may have been used to construct it. And considering the inconsistency of the cases which were put forward by the appellant at various times in the course of this long litigation, their Lordships cannot feel certain that no such admission was ever made before Mr. Currie.

The argument which Mr. Arathoon founded on the finding of Mr. Capper, that Sada Bibi did obtain a decree in the King's Court in favor of his title and against that of Ali Buksh Khan, had already been dealt with. It was more plausibly urged by him that Mr. Capper's judgment might be impeached, upon special appeal, upon the ground that he had decided the case on the failure of the appellant to establish the genuineness of the ikrarnamah, and had altogether omitted, and as it were rejected, from his consideration other and independent evidence which ought to have led him to the conclusion that the alleged relationship of over and under proprietor had existed between the appellant and the respondent. Their Lordships, however, are unable to come to this conclusion. They think that there is nothing to show that the evidence in question was altogether rejected by Mr. Capper, or that it was of such a character that it ought necessarily to have led him to a contrary conclusion to that to which he came. And assuming for the sake of argument that he may have failed to give to this or that portion of the evidence the full weight which their Lordships, sitting as a tribunal competent to determine the facts, would have assigned to it, they must observe that this would be no ground for reversing his decision upon the facts on special appeal. In the course of the argument some attempt was made to reopen generally Mr. Capper's decision. It appeared, however, that the appellant some time ago petitioned this Committee for special leave to appeal against that decision, and that the petition was dismissed. This circumstance, independently of the general practice recently adopted by their Lordships, of not allowing such applications to be made at the hearing of an appeal, necessarily precluded them from treating this otherwise than as a special appeal. They may, however, observe, that so far as they can form an opinion from what they have seen in the record or heard in argument, they are not disposed to think that the appellant would have succeeded in disturbing Mr. Capper's finding on the facts, had it been open to him to question its correctness by regular appeal.

Their Lordships will humbly advise Her Majesty to dismiss the appeal, and to affirm the judgment of the Financial Commissioner, with costs.

The 16th January 1875.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Mortgage—Interest—Punjab Code, s. 19 cl. 4.

On Appeal from the Court of the Financial Commissioner of Oudh.

Rajah Mahomed Ameer Hussun Khan

versus

Thakoor Monoo Singh and others.

Where their Lordships thought that $3\frac{1}{2}$ per cent. per mensem, or 42 per cent. per annum, which was the rate of interest agreed upon in a mortgage, to be unjustly usurious, they were of opinion that interest equal to half the amount of principal, or little more than 4 per cent. per annum, would not be sufficient, but that (looking to s. 19 cl. 4 of the Punjab Code) a fair amount of interest to be allowed would be twelve years' interest at the rate of 12 per cent. per annum.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Appellant.

No one appeared for Respondents.

Sir Barnes Peacock delivered the following judgment:—

This is a suit brought by Rajah Mahomed Ameer Hussun Khan, who was the son of Rajah Nawab Ally Khan, the Talookdar of Mahmoodabad in Seetapore, to recover possession of certain estates which he alleged had been mortgaged to him by Monoo Singh and other persons who are made defendants in this suit, and are now the respondents. The mortgage was executed in November 1850, and the mortgagor stipulated in the mortgage deed that the mortgagee was to be let into possession, to be at full liberty to enjoy the lands, to be at liberty to fell the trees or assign such produce to any person to whom he might think fit to give it, and he also promised to pay moonafah or interest at the rate of $3\frac{1}{2}$ per cent. per mensem.

The mortgage then proceeded:—"At the end of the harvest of the year we will in one lump sum make good the original amount together with interest, etc., to the mortgagee from our own pocket, and without availing ourselves of the assistance of any other party, and thus effect the mortgage at the time of redemption." They probably mean "and thus *redeem* the mortgage."

The first decree was given by the settlement officer, Mr. Gordon Young, in which he decreed to the Rajah Ameer Hussun Khan the principal sum of Rs. 7,659. 5. 9. and half as much, namely, Rs. 3,829. 10. as interest, making a total of Rs. 11,489. Then he went on, "This sum must be paid within one year or possession will be given to the Rajah, and till paid into Court it will bear interest at 6 per cent." An application was made for a review of that judgment, and in the grounds for the review the Plaintiff claimed principal and interest, at the rate stipulated, as well as the profits which had accrued during his dispossession. It appears that he had been dispossessed in 1264, when the Government made the summary settlement with Monoo Singh and the other defendants. He claimed therefore instead of the principal and half the amount of principal as interest, to have interest awarded to him at the rate of $3\frac{1}{2}$ per cent. per mensem according to the terms of the deed, and to have the profits of the lands which had accrued during his dispossession. Upon that the same Settlement Officer, Mr. Gordon Young, altered his original decree, and decreed as follows:—"The Court decrees possession of the estate of Burchutta to Rajah Ameer Hussun Khan, possession to be had from the 15th of the ensuing Jeth, unless the sum of Rs. 7,659. 5. 9. principal + 14,360. 10. interest, total 22,019. 15. 9., be paid by defendant through

the Court, such money to be raised otherwise than by sale or mortgage of the hypothecated property."

From that decision an appeal was preferred to the Commissioner. He reversed the judgment altogether, and holding that the mortgage had been executed merely by the son, and that it was not binding on the defendants, he dismissed the plaintiff's suit, with costs. From that there was an appeal preferred to the Financial Commissioner, and he upheld the first (not the second) decision of Mr. Gordon Young in which he awarded Rs. 7,659. 5. 9. with interest, calculated at half the amount of the principal, Rs. 3,829, making a total of Rs. 11,489. An application was made to the Financial Commissioner for a review of that judgment, and he, after hearing the case, thought that the original amount of interest at $3\frac{1}{2}$ per cent. was usurious, and having heard the case argued, he said, that under the circumstances he held that the decree as it stood, that is the original decree made by the Financial Commissioner himself, was equitable, and he refused to alter his order. The ultimate judgment then stood that the plaintiff was entitled to recover possession unless the defendant should within a certain time pay the amount of principal and half the amount of principal by way of interest.

From that judgment there is an appeal to Her Majesty in Council, and the only question which is raised here, is whether the amount of interest which was awarded was a fair and equitable amount, or one which could legally stand? The plaintiff before us does not claim the profits as well as the interest, but he says that half the amount of principal was an inequitable and insufficient amount to be awarded to him under the mortgage bond. It is admitted that the Punjab Code has been extended to Oudh, and in s. 19 of the Punjab Code (paragraphs 4 and 5 at page 34 of the Code), it is enacted, that "the Courts are not bound by any restrictions with regard to usury. Debtors and creditors are allowed to arrange as to the terms and conditions of interest in whatever manner they may deem most conducive to their mutual benefit. The Courts will decree whatever rate may have been agreed upon *bond fide* between the parties. If no special rate shall have been agreed upon, then the Court will fix what may appear an equitable amount with reference to the custom of the locality, the usage of trade, or the merits of the transaction. It will be remembered that the rates of interest vary for different classes of cases and in different places. If in any case the amount of interest shall be deemed unjustly usurious, the Court will decree only as much as may appear just under the circumstances." Now the Financial Commissioner determined that the amount of $3\frac{1}{2}$ per cent. per mensem, or 42 per cent. per annum, was unjustly usurious, and to that extent their Lordships agree with him. The question then comes to this, whether the amount which the Financial Commissioner has fixed, namely, half the amount of principal by way of interest, is such as appears to their Lordships to be equitable under the circumstances? It appears to their Lordships that interest equal to half the amount of principal would not be much more than about 4 per cent. per annum, and that in their Lordships' opinion would be too low a rate of interest to be allowed upon a mortgage in which $3\frac{1}{2}$ per cent. per mensem had been agreed upon. Their Lordships think that $3\frac{1}{2}$ per cent. per mensem is unjustly usurious. On the other hand they are of opinion that the amount of one half the principal is not sufficient amount. They think that a fair amount of interest would be at the rate of 12 per cent. per annum for the time during which the plaintiff was out of possession of the estate, and that he ought not to have any interest at all during the period in which he was in possession. Assessing the amount for the whole period during which the plaintiff was out of possession, from 1264, Fusli, down to the present time, would be giving him about seventeen years' interest. Now, according to the Punjab Code it is declared that the period during which interest is demanded must not exceed twelve years. Their Lordships, therefore,

are of opinion that, looking to the Punjab Code, a fair amount of interest to be allowed to the plaintiff would be twelve years' interest at the rate of 12 per cent. per annum. That amount of interest calculated in round numbers would be about Rs. 11,000, and their Lordships are of opinion that the plaintiff ought to recover the principal sum, namely, Rs. 7,659. 5. 9., together with Rs. 11,000 as interest, making a total of Rs. 18,659. 5. 9.

Their Lordships, upon the whole, will humbly recommend Her Majesty that the decree of the Financial Commissioner be varied by awarding to the plaintiff as interest Rs. 11,000 instead of one half of the principal, making the total sum for principal and interest Rs. 18,659. 5. 9.; and by directing that the defendant have one year from the date of Her Majesty's Order in Council for the purpose of paying that amount. If the above amount be not paid within that time the plaintiff to be put into possession of the estate. Their Lordships are of opinion that the appellants are entitled to their costs of this appeal.

The 30th January 1875.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Copies—Secondary Evidence—Mahomedan Law—Deed of Gift—Gift by Guardian—Mushd—Gift of Undivided Things—Issues—Special Appeal.

*On Appeal from the High Court at Calcutta.**

Mussumat Ameeroonnissa Khatoon and others

versus

Mussumat Abedoonnissa Khatoon and others.

Where a copy of a deed is tendered as evidence, and the party tendering it fails to comply with the conditions required to make the copy statutory proof of the deed, he is at liberty to give other secondary evidence of the contents of the deed, if the non-production of the original has been duly accounted for.

The general principle of the Mahomedan law that a gift is invalid where there is want of acceptance and seisin by the donee, is subject to the exception that where there is, on the part of a father or other guardian, a *bona fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.

The rule of Mahomedan law that the gift of *Mushd*, or an undivided part in property capable of partition, is invalid, does not apply to definite shares in zemindaries, which are in their nature separate estates with separate and defined rents.

Where an issue was not raised in the Court of first instance, nor taken in the ground of appeal, it is too late to set it up for the first time in special appeal, especially if the evidence has not been directed to it.

*Mr. Leith, Q.C., and Mr. J. D. Bell for Appellants,
Mr. Cowie, Q.C., and Mr. Doyne for Respondents.*

Sir Montague Smith gave judgment as follows:—

This suit was brought in the Civil Court of Dacca by Moulvie Wahid Ally against his father, Moulvie Abdool Ally, in his own right, and as the heir of his deceased wife Eftekhurunnissa, and as the husband of another wife, Ameeroonnissa, to set aside three ikrarnamahs, or agreements, on the allegation that they were forged. These ikrars, if genuine, modified the operation of three hibbana-

* From the judgment of Morgan and Pundit, JJ., decided on the 14th March 1864;—Special No. W. R. 121.

mahs, or deeds of gift, two purporting to be executed by his father, and one by his mother Noorunnissa, containing, ostensibly, absolute gifts to Wahid Ally of various properties of considerable value. The plaint also prayed that Wahid Ally might be put into possession of these properties, and that the decree of the Magistrate in a suit under Act IV of 1840, maintaining his father in possession, might be set aside. Mr. Barry and others claiming under pottahs from the father, were also made defendants. Their title must stand or fall with Abdool Ally's; and they did not appear on the hearing of this appeal.

The questions in the suit relate to the genuineness and validity of the three hibbanamahs and the three ikrars. Each of them was on some ground impeached.

The Judge of Dacca dismissed the suit (except as to an 8-anna share of some property of the plaintiff's mother Noorunnissa, which it was admitted he was entitled to), holding that the first alleged hibbanamah of the father was not proved, and that the second and third from the father and mother, respectively, were invalid by Mahomedan law, there being, as he found, no delivery and acceptance of the gifts, or change of possession. He also held that the ikrars were genuine and valid.

The High Court reversed this decree, and the grounds and nature of their own decree, which is the subject of the present appeal, are thus stated at the conclusion of their judgment:—"Our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents (the ikrars). We shall declare that Moulvie Wahid Ally was in his lifetime, and that those who are now by law his heirs and representatives, are entitled to a decree for setting aside the documents relied upon by the respondents, and for the recovery of the property sued for."

Wahid Ally died before the decree appealed from, and the father subsequently. The parties to this appeal are their respective representatives.

It appears that at the date of the alleged hibbanamahs, Abdool Ally had two wives, Noorunnissa, the mother of Wahid Ally, and Eftekhurunnissa. Wahid was his only son, and he had one, or at most, two daughters. Abdool afterwards married a third wife, Ameeroonnissa, and the third ikrar purports to be made on the occasion of this marriage.

The first hibbanamah, in order of time, is dated the 14th Magh 1254, and purports to convey, by way of gift from the father, some lakheraj lands charged with religious trusts belonging to the Kuddum Russool Durgah at Noabaree, and to appoint his son Mutwallee of the Durgah in his place. The document also contains an appointment by the father of Moonshee Kolumoodeen Mahomed to be the guardian of his son for the business of the Durgah during his minority.

The original of this deed was not produced; and their Lordships, during the argument, declared their opinion that its non-production was not sufficiently accounted for to allow of secondary evidence being given of its contents. It appeared upon the plaintiff's evidence that the original deed had been delivered to the guardian Moonshee Kolumoodeen, but this person was not called as a witness, nor was his absence explained. It is to be observed that, although the document tendered as evidence,—viz., what purported to be a copy of the deed from the Registry,—showed that the instrument, if really executed, was signed by numerous subscribing witnesses, none of them were called to prove its existence and execution. Supposing, therefore, that secondary evidence had been admissible, neither of the two conditions required to make the copy statutory evidence of the deed by virtue of Reg. XX 1812 (s. 2 cl. 5), was complied with. It was not shown that the original was "lost, destroyed, or not forthcoming,"—that is to say, its non-production was not satisfactorily accounted for, nor was there any proof by any of "the subscribing witnesses" that the original had been duly executed.

No doubt, although the statutory proof failed, other secondary evidence might have been given of the contents if the non-production had been duly accounted for. It was suggested that the deed may have remained with the father, but this suggestion is opposed to the evidence; and further, the custody of the father would not be, according to the supposed terms of the deed, the proper custody. In their Lordships' opinion, therefore, no sufficient foundation was laid for the admission of secondary evidence.

Objections made with the view of excluding evidence are not received with much favor at this Board, but it is sometimes necessary for the right decision of the merits of the controversy between the parties to give effect to them. In the present case the surrounding circumstances raised no presumption of the existence of the deed, and the question of the custody bore materially on the issue to be determined.

The execution of the two other hibbanamahs by Abdool Ally and Noorunnissa respectively is not denied. The first of them is dated 19th Assin 1256, and purports to be a gift from Abdool Ally to his son of certain jumma lands, viz., his 10-anna share of the zemindary of Noroollapore, and shares of other zemindaries. This deed, which recites that Abdool Ally had only one son Wahid, and a daughter Sremootee Fukhurunnissa, who was well provided for by her husband; that he had already bestowed some of his property on his wife, Noorunnissa, and that he wished to prevent quarrels at his death and to enable his son to live well, contains an absolute and present gift from the father to the son of the above-mentioned properties.

The deed from the mother, Noorunnissa, is dated 24th Joistee 1258, and purports to be a present and absolute gift to her son of certain shares of the zemindary of Pergunnah Boro Bajoo, and of other zemindaries. Some of these properties originally belonged to Noorunnissa in her own right, and others had been transferred to her by her husband. The deed states that the son being a minor, the father, as his guardian, had acknowledged the gift.

These two hibbanamahs were duly registered, but no mutation of names was made.

It has been found by the High Court that Wahid became of full age, viz., eighteen, in 1261; consequently, at the date of the hibbanamah from the father he was a child only ten or eleven years old.

The Courts below substantially agree in their conclusions of fact upon the evidence with regard to the possession and management of the properties. They both find that although all proceedings relating to the estate were subsequently to the hibbahs in the son's name, the father remained in actual possession and receipt of the profits of the properties and in the uncontrolled management of them.

The Principal Sudder Ameen was of opinion, on these facts, that the transfers to the son were "purely nominal," and that the father did not intend that any property should pass by them, or at least whilst he lived; and he further held that the gifts were invalid by Mahomedan law for want of acceptance and seisin by the donee.

The High Court, however, came to the conclusion that the transfers were not colorable, but intended to operate as real gifts. They also held that "when the guardian of a minor is himself the donor, and in possession of the property, no formal delivery and seisin is required," citing in support of this exception to the general law "Macnaughten's Principles of Mahomedan Law," Chapter V, ss. 9 and 10.

It was not denied by the learned Counsel for the appellants that the High Court had on this last point taken a correct view of the law, nor do their Lordships doubt that where there is, on the part of a father or other guardian, a real and *bona fide* intention to make a gift, the law will be satisfied without change

of possession, and will presume the subsequent holding of the property to be on behalf of the minor.

It was, however, strongly insisted by the appellants' Counsel that the Principal Sudder Ameen was correct in considering that the transfers were colorable, and only with the view of making the son the ostensible owner; or, if not purely *benamee*, that they were not intended to operate exclusively for the son's benefit, but were made subject to a future family settlement. It is enough for their Lordships in this place to say there are circumstances in the case which favor this contention, at least as regards the transfer from the father; but they do not think it necessary to go at large into this question, for, having come to the conclusion, for reasons to be hereafter stated, that the three *ikrars* alleged to be executed by the son are genuine documents, they think the rights of the parties must be determined on the basis of the combined operation of the *hibbas* and *ikrars*. It is clear also that the father, who set up in his defence to this suit these *ikrars* as valid instruments, cannot now be allowed to aver that the *hibbas* to which they relate were intended to have no operation and effect.

A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of *Mushâ*, or an undivided part in property capable of partition, was, by Mahomedan law, invalid. This point appears to have been taken for the first time in the High Court, and was argued at this bar. That a rule of this kind does exist in Mahomedan law with regard to some subjects of gift is plain. The *Hedaya* gives the two reasons on which it is founded: First, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor, he had not engaged for, *viz.*, to make a division. (See Book XXX c. 1 3 vol. 293). Instances are given by text-writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state, and confusion might thus be created between donor and donee which the law will not allow.

In the present case the subjects of the gift are definite shares in certain zemindaries, the nature of the right in them being defined and regulated by the public Acts of the British Government. The High Court after stating that the shares "were for revenue purposes distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue," and further, that the proprietor collected a definite share of the rents from the ryots, and had a right to this definite share and no more, held that the rule of the Mahomedan law did not apply to property of this description.

In their Lordships' opinion this view of the High Court is correct. The principle of the rule and the reasons on which it is founded do not in their judgment apply to property of the peculiar description of these definite shares in zemindaries, which are in their nature separate estates with separate and defined rents. It was insisted by Mr. Leith that the land itself being undivided and the owners of the share entitled to require partition of it, the property remained *Mushâ*. But although this right may exist, the shares in zemindaries appear to their Lordships to be, from the special legislation relating to them, in themselves and before any partition of the land, definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to *Mushâ*.

Mr. Cowie, in his argument, contended that the rule only applied to cases where the donor himself retained some share of the property, and not to those where the owner gave all his own interest in undivided shares to the donee.

The authorities on Mahomedan law do not seem to be agreed on this point; and after the opinion they have just expressed, their Lordships need not enter upon the consideration of it. Indeed, but for the great practical importance of the question they would have thought it unnecessary to express their opinion on the subject-matter of the gift, since if the hibbas are to be construed, as they think they should be, by the light reflected upon them by the ikrars, absolute and pure gifts of the property were not intended; and therefore the principles of law governing such gifts are not applicable to the transaction.

Their Lordships will now proceed to consider the ikrars. The first two are dated on the 20th Falgoun 1259. One is addressed by Wahid to his father, Abdool; the other to his mother, Noorunnissa.

That from Wahid Ally to his father recites the hibba of the 19th Assin 1256, and that his father, mother, and "half-mother" being alive, full brothers and sisters, and half brothers and sisters might be born to him. After further reciting that Abdool, by reason of his gift to Wahid, was unable to make suitable arrangements for their maintenance, it became incumbent on him to do so out of the property received by him in gift. It then contains an agreement by Wahid to maintain his sister Koreemunnissa and any other sisters or half-brothers to be afterwards born, in joint mess during their minority, and on their becoming of age, to allow them certain fixed stipends for maintenance. He also agreed, in case any full brothers should afterwards be born, that he and they, subject to such allowances, should enjoy the properties in equal shares. These words follow this disposition: "And thus I do make my brothers and sisters co-sharers in the property received by me in gift, and the profits thereof." The ikrar concludes by declaring that during the father's life-time, the whole of the property named in it will remain in the father's charge, and under his management and control.

The ikrar to the mother contains analogous dispositions by Wahid in respect to the property contained in her hibba of the 24th Joistee 1258, except that the provisions for maintenance and shares are confined to his uterine sister Koreemunnissa, and any uterine brothers and sisters to be afterwards born. It also contains a provision for the payment of Rs. 250 per mensem to his mother for her life. This ikrar concludes, like that to the father, by declaring that, as long as his father lived, he will have the entire management of the property named in it, of the collection of the rents, etc., and of all business connected therewith. "I shall not interfere with it."

The High Court do not apparently dissent from the finding of the Principal Sudder Ameen that these ikrars were executed by Wahid. They say: "We should very reluctantly interfere with the finding of the Lower Court that these ikrars are genuine. They were registered when made. It is not probable they remained unknown to the plaintiff until the year 1864, as we understand him in effect to allege in his plaint." But they declined to give effect to them on the grounds, apparently, that the son was a minor, and that they were obtained by undue influence.

It is to be observed that neither the plaint nor the issues distinctly raise these points. The plaint alleges that the ikrars were forged, and the only issue directed to these instruments is in the following terms:—"Are the three ikrars said to have been given by the plaintiff to the defendant genuine and valid deeds?" Granting that the objection that the ikrars were obtained by undue influence, might, if the previous proceedings had raised it, be held to be comprehended in the word "valid" in the issue (although their Lordships think such an issue ought always to be raised in a more pointed form), the question does not seem to have been in fact raised before the Principal Sudder Ameen, nor was it taken in the grounds of appeal against his judgment. In their Lordships' opinion, therefore, it was too late to set up this defence for the first time before the High Court, especially as the evidence does not seem to have been directed to it, which

would certainly have been the case if the parties had originally intended to make it an issue in the cause.

The disability of Wahid Ally arising from his being a minor when the first two ikrars were given depends on the question whether his minority is in this case to be determined by the Regulations of 1793. As regards the fact, it was admitted by the respondents' Counsel that Wahid, when he made these ikrars, was fifteen, the age at which, by the general Mahomedan law, he would have been competent to act for himself; but they denied that he was then eighteen, and their Lordships are satisfied that the High Court were right in their conclusion of fact from the evidence that he did not reach eighteen, the age fixed for the minority of Mahomedan proprietors of estates paying revenue to Government by Reg. XXVI of 1793 s. 2, until 1261, which was subsequent to the date of the two ikrars.

If it had been necessary for their Lordships to determine whether the period of minority was governed by this Regulation, they would be strongly disposed to hold that it was. In dealing with these ikrars, Wahid must be assumed to be the proprietor of the revenue-paying estates referred to in them; and inasmuch as they contain dispositions of such estates, the period of his minority, at least for this purpose, would seem to be within the policy and terms of the Regulation and governed by it. But this point becomes immaterial, since their Lordships are of opinion upon the evidence that the Principal Sudder Ameen was right in finding that the third ikrar, which refers to the two earlier ones, and in substance confirms them, is a genuine instrument.

It is not denied that this ikrar, if genuine, was executed after Wahid was of the full age of eighteen, and the most disputed, and obviously the most important, question of fact in the cause is, whether it is genuine, or was, as Wahid alleges, forged by his father.

This ikrar bears date the 16th Anghran 1263, and was made, as before observed, upon the occasion of Abdool's marriage with a third wife, Ameeroonnissa. After reciting the two hibbas from the father and mother, it thus refers to the two former ikrars:—"That I, being your only son, and on account of your having no other son, possessed of all your affections, you had, so as to prevent that any disputes could arise with any one in future, bestowed upon me, by your favor, and through the execution of a deed of gift, dated the 19th Assin 1256, your ancestral zemindaries specified in the schedule, and situated within the Collectorate of Zillah Dacca, viz., a 10 as. 13 gs. 1 c. 1 k. share of Pergunnah Noroolapore, and your 7-anna share of Pergunnah Idrakpore, situated within Zillah Backergunge. Besides this, having settled upon my late mother, Noorunnissa Khatoon Saheba, as her marriage dower, your zemindary of Tuppah Awalee Jahanabad, situated within the Collectorate of the aforesaid Zillah Dacca, and your talooks, etc., my mother aforesaid, as the owner thereof, bestowed them upon me through a deed of gift dated the 25th Joistee 1258, and I, being the owner and in possession of that property, worth, in accordance with the deed of gift, Rs. 80,000, I did formerly give and execute, as addressed to you and to my mother, the aforesaid Khatoon Saheba, separate ikrars (agreements) to the effect that all the properties named in the schedule of the aforesaid deeds of gift and other properties should, during your lifetime, remain under your control and in your possession. That I did not possess the right of sale and gift over that property, and that, should uterine brothers to me be born, the property received in gift from my mother should be enjoyed by all of us in equal shares, and promising, should I have sisters, or half-brothers and sisters, to make monthly allowances to them." It then recites that the father had contracted a marriage with Ameeroonnissa, who is stated to be a lady of good family; that provision had been made for the children of the former marriages by the earlier ikrars; and that it was proper to make some for her and any children to be born of the

intended marriage. It then states an agreement by Wahid to make allowance to the daughters of the marriage, his half-sisters, and that, should any sons be born, they, his half-brothers, should enjoy the property with him in equal shares, adding, "and thus I constitute my brothers and sisters sharers in the property and in the profits thereof." Wahid then grants an allowance to Ameeroonnissa of Rs. 150 per month for her table, and Rs. 500 a year for her clothes. The ikrar contains a statement that the father was in possession of the property by virtue of the former ikrars, and concludes by declaring that it will remain in his control and management during his lifetime, and that neither Wahid nor his heirs should interfere or lay any claim thereto.

This ikrar was registered soon after its date. It is sealed with Wahid's seal, but not signed. Five witnesses, two of whom were cited by both sides, deposed that the seal was affixed to the ikrar by Wahid himself in their presence, and there is no opposing evidence. Wahid was not called to negative the personal execution of the ikrar attributed to him by the witnesses; and their Lordships cannot but think, whilst making due allowance for the dislike of Mahomedans of rank to give evidence in the Courts, that it was his duty if the instrument had been forged to give the Judge the opportunity of hearing his own evidence. His not having done so naturally conduces to the belief that the witnesses who proved his execution of the ikrar have spoken the truth. The Principal Sudder Ameen gave credit to them, and the High Court, who overruled his finding, which affirmed the genuineness of this ikrar, appear to rest their decision partly on the want of Wahid's signature to the ikrar, but mainly on the improbability that, under the circumstances, he should have made the arrangement it contains.

The signature was not necessary; but no doubt its absence made it proper that the proof of the affixing of the seal should be clear and convincing. This evidence, it seems, was supplied; five witnesses, to whom the Principal Sudder Ameen gave credit, having proved that the seal was affixed to the document in their presence by Wahid Ally himself.

In considering the improbability that the son would make such an ikrar, the High Court seem to assume that there was at its date dissension between the father and the son; but it would seem from the evidence that this did not occur until after the father's marriage with Ameeroonnissa, and no proof was given that Wahid was opposed to this marriage. His own mother, Noorunnissa, was then dead. Undoubtedly domestic quarrels afterwards arose, which led to a separation of the son from the father's house, and from that time the relations of the parties were hostile.

Supposing, then, the father and the son to have been on good terms at the date of the ikrar, there would seem to be, according to Mahomedan family usage, and having regard to the disposition of the property under the previous hibbas and ikrars, nothing really unjust or improbable in the arrangement. Wahid had only one uterine sister, Fukhurunnissa, and his own mother being dead, he could have no more brothers or sisters of the full blood. His father's second wife, Eftekhurunnissa, appears to have had no children, and it was probably thought she would have none. In this state of the family, it would seem just and reasonable that the son, who held the bulk if not all of the family property under the hibbas, should join in making some provision for his father's new wife and the possible children of the marriage. It is true that in this ikrar he agrees to make his half-brothers of this marriage equal sharers with himself, whereas in the former ones only his brothers of the full blood were so to share; but his mother was living when the former ikrars were given, and it was then possible he might have had uterine brothers.

Granting, however, that the arrangement in the last ikrar may have been too disinterested to have been altogether probable, if the property had been unquestionably the son's, it does not follow that there is the same or any want of

probability in it when his title was only derived from the hibbas, and his father was still in actual possession and enjoyment of the property.

The High Court assumes that the father really intended to denude himself of his property and to make an absolute gift of it to his son, although he had two wives living, and probably contemplated marrying, as he afterwards did, a third; and on this assumption they regard the arrangements of the last ikrar to be improbable.

Their Lordships, however, in considering the probability of its execution, are disposed to adopt the opinion of the Principal Sudder Ameen that an absolute gift was not intended, and that the transaction was either purely benamee, or, more probably, to be followed by a family settlement. In this view of the case the improbabilities relied on by the High Court vanish, and the direct evidence of the execution of the instrument ought to prevail.

The result of establishing the third ikrar will be to confirm and give effect to the two former ones, which must be construed with it. The rights of the parties ought, therefore, in their Lordships' opinion, to be governed by the provisions contained in the hibbas of the 19th Assin 1256 and the 12th Joistee 1258, and in the three ikrars, read and construed as a whole; and may be declared and enforced, if necessary, in a suit properly framed for that purpose.

The form of the present suit does not allow of these rights being so declared in it. The only prayer in the plaint is to have the ikrars set aside as fabricated, and the plaintiff put into possession of the properties claimed with mesne profits. Their Lordships being of opinion that the ikrars are genuine, the prayer to set them aside cannot, of course, be granted, nor can the father's possession be treated as wrongful, so as to justify the claim of the son to remove him from it. The ikrars clearly provided that the father should have the possession and control of the property during his life; and any rights, therefore, which others may have under them to any share of the profits accruing in his lifetime could only be enforced in a suit charging him in the character of manager. The present suit which treats him as a trespasser liable to mesne profits cannot be sustained.

For these reasons their Lordships will humbly advise Her Majesty that the decree of the High Court ought to be reversed, and that of the Principal Sudder Ameen, which dismissed the suit except as to 8 annas share of the mother Noorunnissa's property, affirmed.

The respondents must pay the costs of this appeal.

The 30th January 1875.

Present:

Sir James W. Colville, Sir Barnes Peacock, and Sir Robert P. Collier.

*Hindoo Law—Widow—Reversioners—Limitation—Daughters—Heirship—
Disqualification—Admission.*

*On Appeal from the High Court at Calcutta.**

Amirtolall Bose and others

versus

Rajoneekant Mitter and another.

The Privy Council affirmed the principle of a decision of a Full Bench of the High Court (9 Weekly Reporter, p. 505), which held that, in the case of succession by a reversionary heir after the death of a

* From the judgment of Trevor and L. S. Jackson, JJ., decided on the 31st December 1862.

widow, who takes by inheritance from her husband, and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud, is not to be reckoned from the time when he succeeds to the estate; but from the time at which it would have been reckoned against the widow if she had lived and brought the suit.

According to Hindoo law, the right once vested in a daughter by inheritance does not cease until her death, notwithstanding she become barren, or a widow who has not borne a son. Circumstances of that nature do not destroy a heritable right which has once vested. If two sisters, upon the death of their mother, together constitute their father's heir, then upon the death of one of them, the property which descended to both jointly, survives to the other whose right of survivorship previously acquired by inheritance is not destroyed by her disqualification to inherit at that time by reason of her being a childless widow.

An admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact.

Mr. Doyne for Appellants.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Respondents.

Sir Barnes Peacock gave judgment as follows:—

The respondents were plaintiffs, and the appellants defendants in the Court below. The plaintiff Rajoneekant Mitter, as the only son of a daughter of Ram Nursing Bose, deceased, sued to recover a four-anna share of certain ancestral estates, and of certain other properties purchased with the income of the said estates. The plaintiff Womeschunder Roy claimed as a purchaser of a portion of the said share from the plaintiff Rajoneekant. His title depends upon that of Rajoneekant.

The ancestral estates originally descended to Ram Nursing and his three brothers from their father Gokool Chunder Bose, and was held by them as an undivided Hindoo family. Ram Nursing Bose died in November 1824, without a son, leaving a widow, Soorjomoneye, and three daughters, Bindubaseenee, Sarodamoye, and Nitokally. Soorjomoneye, the widow, died in March 1835, and upon her death the heirs of Ram Nursing were Sarodamoye and Nitokally, two of the daughters, who were then married and likely to have sons. It may be taken against the plaintiff, upon his own statement, that Bindubaseenee could not take any interest in her father's estate, as she was a childless widow at the time of her mother's death. In his plaint, page 2 of the record, he says:—

"My elder aunt, Bindubaseenee, having become a childless widow, my grandmother supported her and the other two daughters, who were both under age, and effected the marriages of the two unmarried daughters in due and proper time. On the 30th Bysack 1242, my maternal great-grandmother breathed her last, leaving behind her my mother and my two maternal younger aunts" (meaning his mother, and his maternal younger aunt, Nitokally), "who were under age, and my maternal aunt, Bindubaseenee, under the maintenance and control of my maternal great-uncles."

He then states his own title and eviction as follows:—

"My mother attained her majority in the month of Choitro 1243, and as my youngest maternal aunt unfortunately became a childless widow in the year 1244, so the right of succession to all the aforesaid properties accrued to my mother, according to shasters. I was born in the year 1246; but, owing to my evil fortune, I was at my tender age bereaved of my mother, who breathed her last on the 25th Kartick 1252. Since then I, together with my maternal aunts, remained under the guidance of Joy Doorga Dass, mother of Prem Chand Bose and Amirtolall Bose, heirs of my maternal grand-uncle; and on their attaining majority, in the same house and in the same mess, and under the superintendence of the said persons, on the 16th Srabun 1262 I attained my majority. When I came to know what property I was entitled to as my grandfather's heir, I proposed separately to realize the collections of the one-fourth share of all the real and personal properties left by my maternal grandfather and grandmother, and mother, and of the real and personal properties, *i.e., talooks, etc.*, acquired in own name or *benamee* from the joint funds. Prem Chand Bose, Amirtolall Bose, and Joy

Doorga Dassy, the principal defendants, having been instigated by the ill advice of wicked persons, and supported by the defendant Gooroodoss Roy, with the motive of divesting me of my rights, forcibly expelled me from the joint dwelling-house on the 16th Kartick 1264, and having ousted me by artifice, forcibly and fraudulently held possession of all the properties, and are enjoying the profits arising from the estate."

The principal defendants, in answer to the plaintiff's claim, stated (Record, page 6) that Ram Nursingho Bose having no male issue, and having no probability of male issue, executed, in the year 1231, a hibanamah, or deed of gift, to his three brothers, and breathed his last. They then proceed:—

"The aforesaid three donees, by virtue of the said deed of gift, applied to the Courts to be made representatives in the cases that were then pending in the Court in the name of the said Ram Nursingho Bose. An istaharnamah (proclamation) was duly issued from the Adawlut for the appearance of any heir within the period of six weeks. As the maternal grandmother of the Mittra plaintiff was acquainted with the truth and validity of the said deed of gift, no objections on that head were urged by her. The hibanamah was produced in the Court by our predecessors, and testified to by them; and the Judge, considering the said deed to be genuine and proved, ordered, on the 22nd November 1825, the said Ramtunoo and Ramdoyal to be made representatives in the place of the aforesaid Ram Nursingho Bose. The said representatives, agreeably to which, conducted the suits in the Zillah and Sudder Courts, and having retained possession of all the properties specified in the hibanamah, from the date of the said hibanamah, managed the affairs, conducted several suits before the tribunal of different Courts, and even in appeal to the Privy Council."

Three issues were laid down for trial, viz.:—

"1. Whether the plaintiff, Rajoneekant, as heir to a part of the paternal and self-acquired properties of Ram Nursingho Bose, his grandfather (the father of his mother), was in possession or not; and whether, on the 16th Kartick 1264, B.S., the defendants dispossessed him by turning him out of doors; and Rajoneekant ought to recover possession with meane profits or not?

"2. Whether, according to the bill of sale given by Rajoneekant, both the plaintiffs can be entitled to possession of the property in dispute in equal proportions or not?

"3. Whether, according to the deed of gift of Rajonee's maternal grandfather, defendants have been holding possession; and whether such long and continuous possession bars the suit, and it should be dismissed or not?"

The plaint was filed on the 9th September 1858, before the Code of Civil Procedure (Act VIII of 1859), and before the passing of the present Limitation Act, XIV of 1859. The question of limitation must be determined according to the old law.

The defendant's case is that limitation began to run from the time of Ram Nursing's death. The Judge of Jessore held that there was no proof of possession by the plaintiff or by his mother or maternal grandmother.

It has been held by a Full Bench of the High Court at Calcutta, that in the case of succession by a reversionary heir after the death of a widow, who takes by inheritance from her husband, and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud, is not to be reckoned from the time when he succeeds to the estate, but from the time at which it would have been reckoned against the widow if she had lived and brought the suit. (See *Nobin Chundur Chuckerbutty v. Issur Chunder Chuckerbutty*, 9 Weekly Reporter, 505.) That rule has been acted upon in other cases, and it appears to their Lordships that the principle of that decision is correct. If in the present case limitation began to run against Soorjomoneye, the widow of Ram Nursing, the plaintiff's suit is barred.

The Judge of Jessore found that there was no proof of possession by Soorjomoneye or by the plaintiff or his mother : and he held that limitation was a bar. Many of the plaintiff's witnesses, however, deposed that Soorjomoneye was in possession. The Judge of Jessore says :—

“What he (referring to the plaintiff) relies on, is the evidence of the witnesses named in the margin, who speak to his possession and ejectment.

1. Mokun Chuander Bose.
 2. Chundee Churn Sing.
 3. Modooosoodun Bose.
 4. Tara Chand Bose.
 5. Ram Ruttun Bose.
 6. Nilmoney Bose.
 7. Krishnokant Chuckerbutty.
 8. Shoshee Bhoosun Mullick.
 9. Sristydhur Nundy.
 10. Issur Chunder Sing.
 11. Bungsheebuddun Bose.
 12. Ram Chunder Biswas.
 13. Krishno Mohun Sing.
 14. Ram Narain Mookerjee.
 15. Greedhur Chuckerbutty.
 16. Dwarkanath Mozoomdar.
 17. Gora Chand Shaha.
 18. Kassinath Shaha.
 19. Soroop Chunder Singh.
 20. Sumbhoo Chunder Biswas.
- And others, making in all 39 witnesses.

“The evidence of these persons is to the effect that after the death of Ram Nursingho, his widow and daughters, and latterly his daughter's son, were in joint possession with the defendants ; that about two years ago the plaintiff, finding that when in joint possession, he was burdened with an unfair share of the expenses, asked for a division of the shares, whereupon the defendants told him that he had no right to anything, abused him, and turned him out of the house. Most of these witnesses are well acquainted with the Bose family and their history. They live near or on the same spot. Some are to all appearance very respectable ; nearly all give a connected, and some a full account of the plaintiff's conditional prospects and treatment.”

The evidence of the witnesses above referred to is very loose and unsatisfactory ; still their Lordships are induced by it to believe that Ram Nursing's widow, Soorjomoneye, continued to live with her deceased husband's brothers and was supported by them out of the income of the estate. Nothing could be more natural or consistent with the usage of Hindoo families than that upon her husband's death she should continue to reside at the family dwelling-house as a member of the joint family. Indeed the principal defendants state in their answer that “they retained their brother's wife, the said Soorjomoneye, and unmarried daughter, under their own support and guidance, and they effected the marriage of the unmarried daughter into a suitable family, and in a proper manner.” If the widow and her daughter continued to live as members of the joint family, the presumption would be that they were maintained out of the widow's share, which she inherited from her husband, unless it could be distinctly shown, which it has not been, that she received only maintenance as distinguished from a participation in the profits of the estate, for even if she did not receive her full share of the profits, limitation would not run against her in the same manner as if she had been actually dispossessed of her husband's share of the estate.

As regards her daughters, Sarodamoye and Nittokally, the case would be different. They were married during their mother's lifetime, and would naturally go to the residences of their respective husbands and become members of their respective families.

The evidence is not such as to induce their Lordships to believe that either Sarodamoye or Nittokally, upon their mother's death, entered into joint possession of the estate with their father's brothers or their representatives, or that during the lives of their husbands they participated in the profits of the estate. Nittokally, after her husband's decease, may possibly have gone to live with her father's brothers, though it is to be remarked that in the description of her place of residence as a defendant in the suit she is stated to be of “Kattara, Pergunnah Nuldee,” which is different from that given of Bindubaséenee. It is unnecessary, however, to come to any conclusion in that respect as regards her. Sarodamoye died before her husband, and there is no sufficient evidence to induce their Lord-

ships to believe that after her marriage she continued with her father's brothers as a member of an undivided Hindoo family.

Their Lordships find that limitation began to run against the plaintiff's mother, Sarodamoye, and that neither she nor the plaintiff ever had possession of any portion of his maternal grandfather's estate or of the rents or income thereof. But the period of limitation must be calculated according to the old law, and consequently the periods during which the plaintiff and his mother were respectively under the disability of minority must be deducted. Deducting those periods, there were only eight years seven months and twenty-four days during which the plaintiff's mother, and three years two months and nine days during which he himself, was not under disability, even calculating the period of the plaintiff's majority at the age of sixteen, and not eighteen. This would give only eleven years nine months and thirty-three days as the period to be taken against the plaintiff in calculating the time which had run against him at the time when his suit was commenced. (See his replication, Record, page 11, line 23).

The High Court reversed the finding of the Zillah Judge upon the question of limitation, and stated that it had not been insisted upon before them. Their Lordships see no reason for interfering with that decision.

The question remains whether the plaintiff has made out his title; for he must recover (if at all) upon the strength of his own title, and not upon the weakness of that of his adversaries.

The title upon which he relied in his plaint was, that in consequence of his youngest maternal aunt's (*i.e.*, Nittokally's) becoming a childless widow after the death of his grandmother and in the lifetime of his mother (Sarodamoye), all the property accrued to his mother, according to the shasters. But that was not so. The right to inherit vested in Nittokally jointly with Sarodamoye, her sister, upon the death of their mother; for at that time she and her sister Sarodamoye were two young married women likely to have sons; and it is clear that, according to the Hindoo law, the right once vested in a daughter by inheritance does not cease until her death, notwithstanding she become barren, or a widow who has not borne a son. Circumstances of that nature do not destroy a heritable right which has once vested.

This at once disposes of the claim of the plaintiff to take as heir to his grandfather any portion of the estate which vested in Nittokally, for she was living when the suit was commenced. It was contended, however, that the plaintiff, as the heir to his grandfather, succeeded upon the death of his mother to one moiety of the four-anna share which descended to his mother and Nittokally, as Nittokally at the time of his mother's death was a childless widow. No proof was given that Nittokally became a childless widow during the lifetime of Sarodamoye, but it was contended on behalf of the plaintiff that the fact was alleged in the plaint and admitted by the answer. The statement in the plaint is—

"That as my youngest maternal aunt unfortunately became a childless widow in the year 1244 (that is, April 1837), so the right of succession to all the properties accrued to my mother, according to the shasters." (Record, page 3, line 1.)

The answer is at page 7, line 39, of the Record, par. 3. It is as follows:—

"From the statement in the plaint, that subsequent to the death of the maternal grandmother of Mitter, plaintiff and her three daughters lived some in a married state, some in a state of celibacy, and that all the properties left by his grandfather devolved upon his mother, it is evident that this suit has been instituted merely from a malicious and vindictive motive. For agreeably to the Dhurm Shasters and Dayabhaga, though any woman, after obtaining paternal properties, becomes a widow or sterile, yet nothing can bar her right to enjoy the said property during her lifetime; therefore the statement that subsequent to his

maternal aunts becoming widows the right and interest to all the properties devolved upon his mother, is utterly false and fallacious."

It appears to their Lordships that there is no admission in the answer tantamount to proof of the fact that Nittokally became a childless widow during the lifetime of the plaintiff's mother, Sarodamoye. There is a denial that Sarodamoye took the whole of her father's estate in consequence of Nittokally's becoming a childless widow; but no admission that at the time of Sarodamoye's death Nittokally was a childless widow, incapable of taking by descent from her father. There is merely an admission by implication in the denial of the legal effect imputed to the fact alleged; and it has been repeatedly held that an admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact (*Edmunds v. Groves*, 2 Mees. & Wels, 642; *Smith v. Martin*, 9 Mees. & Wels, 304; *Robins v. Maidstone*, 4 Queen's Bench, 815); and it scarcely needs to be remarked that the effect given in our Common Law Courts to admissions on the pleadings has always been greater than that given to admissions in the less technical pleadings in the Courts in India.

Their Lordships, however, would hesitate before determining the case upon the ground that there was no proof that Nittokally became a childless widow in the lifetime of her sister Sarodamoye; for it was assumed throughout the argument before their Lordships that such was the case. They will, therefore, proceed to determine the question upon the assumption that Nittokally was a childless widow at the time of Sarodamoye's death.

The question then resolves itself into this: had Sarodamoye an interest in the estate distinct from that of Nittokally, which upon her death descended to the then heirs of her father; or did she and her sister Nittokally take a joint estate by descent, which after Sarodamoye's death survived to her sister Nittokally? If the former was the case, then Nittokally having, during the lifetime of Sarodamoye, become disqualified as a childless widow to take by descent from her father, the plaintiff, as the son of Sarodamoye, was the next heir to her father, and upon his mother's death would have taken as reversionary heir to his grandfather the interest which had descended to his mother, and which upon her death would have descended to Nittokally as reversionary heir to her father if she had not at that time been disqualified; but if Sarodamoye and her sister Nittokally, upon the death of their mother, together constituted their father's heir, then upon the death of Sarodamoye the property which descended to the two sisters jointly survived to Nittokally, and her disqualification to inherit at that time did not destroy the right of survivorship which she had previously acquired by inheritance.

There is a great analogy between the case of widows and that of daughters taking by inheritance, though the pretension of daughters is inferior to that of widows.*

In the case of widows, it has been held by the Judicial Committee (see *Bhugwandeen Doobey v. Myna Bae*, 11 Moore's Indian Appeals, 487†) that the estate of two widows, who take their husband's property by inheritance, is one estate. "The right of survivorship," it is there said, "is so strong, that the survivor takes the whole property, to the exclusion even of daughters of the deceased widow."

In the case of *Srimuttu Muttu Vezia Raguna de Runi v. Dora-singay Tevan*, 6 Madras High Court Reports, 310, it was held that daughters, to whom as a class paternal property descends, take a joint interest, with rights of survivorship.

The former case had reference to property in Benares, and the latter to property in Southern India.

In the case of *Boidya Nath Sett v. Durga Churn Basak*, High Court of Bengal, Original Jurisdiction, decided on 28th February 1865, it was held by Mr. Justice

* Dayabaghia, cap. 11, s. 2, par. 30, p. 193, quarto edition.

† 9 W. R. P. C. 23, and 2 Suth. P. C. R. 124.

Morgan, after consulting Mr. Justice Shumbhoonath Pundit, a learned Hindoo lawyer, that in a case where two daughters succeeded, by inheritance, to their father's estate, and one of them died leaving her sister, who had then become a childless widow, the property survived to her sister; because, like widows, the two daughters collectively were, in a legal sense, one heir to their father,—Vya-vastha Darpana, by Shamachurn Sircar (octavo ed., p. 170). Their Lordships are of opinion that the last-mentioned decision was correct, and that upon principle, as well as upon authority, the estates, upon the death of Sarodamoye, survived to Nittokally, though she would, at that time, have been incompetent to take by inheritance from her father.

The High Court express no opinion upon that point; they seemed, however, to assume that the plaintiff acquired no right by inheritance during the lives of his aunts; but they decided in favor of the plaintiff, upon the strength of a petition said to have been presented to the Court by Bindubaseenee and Nittokally, who were made defendants in the suit.

In the Index to the Record, the petition is described as "the petition of Bindubaseenee, filed on the 16th April 1859," which was more than six months after the filing of the plaint. The petition forms no part of the Record transmitted to Her Majesty in Council; for in a note to the Index it is stated that the paper cannot be traced. An abstract of the petition is set out in the decree of the Zillah Judge, page 479. It is as follows:—

"Abstract of the Petition of Bindubaseenee Dassee and others.

"On the 16th April of the current year, that is, 1859, the said Dassee and Nittokally Dassee, two defendants, filed a petition, stating that they have no objection against the suit of the plaintiff; that their father, Ram Nursingh Bose's rights continued in the plaintiff, Rajoneekant, as the real heir; that their father did not execute any hibanamah; and that they agreed in the said suit of the plaintiff, etc."

The Zillah Judge, speaking of this petition, says:—"I set no value on a petition said to have been filed by these women" (referring to Bindubaseenee and Nittokally), "consenting to the plaintiff's suit. We cannot be certain who filed the petition, and women in this country may be easily induced to lend their names to anything."

With reference to this part of the case, the High Court says:—

"But another objection is taken to the suit, namely, that as plaintiff's maternal aunts, Bindubaseenee and Nittokally, childless widows, are still living, and the plaintiff's right to succeed is contingent on his surviving them, his suit is at any rate premature.

"These two ladies have filed in the record of this case a petition, in which they acknowledge the plaintiff to be the rightful heir, disclaim any right of their own, and assent entirely to the suit.

"The Judge, gratuitously as it seems to us, declares that he sets no value on this petition. He says, 'We cannot be certain who filed the petition, and women in this country may be easily induced to lend their names to anything.'

"We can find no reason for these observations.' The petition appears to have been filed in the usual way, through a pleader duly authorised; it is not suggested that the women had anywhere repudiated it, and we think it must be allowed the fullest legal effect of which it is capable.

"But, we are asked, what is its effect? Females are not at liberty to do or assent to acts which may have the effect of changing the course of succession, and these two ladies, the respondents contend, cannot combine to give the inheritance in this case to a person who might eventually not be the legal heir.

"We consider this objection untenable; a Hindoo widow, it has been ruled, is competent to alienate, with the consent of the next heirs, an estate of which

she is in possession under a life interest; she has also been permitted to convey the estate to the next heir himself.

"It is admitted that, by retiring from the world, or becoming byragees, they might immediately cause the succession to devolve on the plaintiff; and we think that when the plaintiff raises a particular question of title with the defendants, which clearly his aunts would be first entitled to raise, and he next after them, and where they expressly give up their right in his favor and assent to his suit, the defendants cannot be permitted to object that plaintiff is debarred from suing until they are, by the course of nature, out of the way.

"We see, therefore, no difficulty in the way of a decision of this suit as at present constituted."

It appears to their Lordships that the Judges of the High Court have given a greater effect to this petition than that to which it is entitled.

Admitting, for the sake of argument, that the petition having been filed in the suit might, without proof of the execution of a vakalutnamah by these ladies, or of any authority to file it, be used against the defendants Bindubaseenee and Nittokally as an admission by them in the suit that the plaintiff was the real heir, and that they had no defence to the suit, it appears to their Lordships that that is the greatest effect that could be given to the document. The petition did not amount to a conveyance or to a disclaimer of title, but merely to an admission made more than six months after the commencement of the suit, that the plaintiff was the real heir, and that they had no defence to offer. It is clear that an admission, or even a confession of judgment, by one of several defendants in a suit, is no evidence against another defendant. Suppose Nittokally, the real heir, had been barred by limitation, she could not by her admission, contrary to the fact, that the plaintiff was the real heir, have bound the other defendants, and thus have entitled the plaintiff, upon a question of limitation, to a deduction of the period of his minority, to which she would not have been entitled herself.

But there was, in fact, no evidence of any authority to file the petition. If a vakeel professing to act for Nittokally had filed a deed purporting to have been executed by her before the commencement of the suit conveying the estate to the plaintiff, it would not have been evidence against the other defendants without further proof.

The decision of their Lordships upon the first issue having disposed of the present suit, it is perhaps unnecessary for them to express an opinion upon the third issue. They think it right, however, to add that they agree with the High Court in the conclusion at which they have arrived, *viz.*, that in the present suit the defendants have wholly failed to establish the hibba on which they rely as the foundation of their title.

Their Lordships are of opinion that the plaintiff had no right to inherit any portion of the estate during the life of Nittokally, and that the petition did not vest any such right in him. His suit ought therefore to be dismissed, and dismissed against all the defendants, including Bindubaseenee and Nittokally, notwithstanding the petition. Such a petition confessing the suit cannot be admitted as warranting a judgment against them, when upon an investigation it appears that the plaintiff was not the real heir; nor could it justify a decree against them for possession and mesne profits, when there was no allegation in the plaint, nor any evidence in the cause, that they had dispossessed him. The only charge of dispossession was against the principal defendants, Prem Chund Bose, Amirtolall, and Joy Doorga Dassee. Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court be reversed, except so far as it reverses the judgment of the Zillah Judge, and that the suit be dismissed.

Considering that a great part of the costs has been incurred in consequence of the issues upon which the defendants have failed, and that it was necessary for the plaintiff to get rid of the decision of the Zillah Judge, their Lordships

think it right to order that the parties respectively do bear their own costs in both the Lower Courts and of this appeal.

The Judges of the High Court expressly declared by their decree that it was "to be known that from the death of Nittokally any dispute concerning the inheritance by other parties was not determined by their decision." Their Lordships think it right to add that they do not decide any question between Nittokally or Bindubaseenee and the other defendants, but merely the questions raised in the suit as to the rights of the plaintiff at the time when the suit was instituted.

The 3rd February 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith, and
Sir Robert P. Collier.

*Religious Endowments—Debts incurred by Shebait—Decrees—Fraud—
Collusion.*

*On Appeal from the High Court at Calcutta.**

Prosunno Kumari Debya and another

versus

Golab Chand Baboo.

In a suit to set aside two decrees, which declared that certain bond-debts, incurred by the Shebait of an idol, should be realized from the rents or profits of the dewuttur mehal, it was held that the High Court was right in holding that, in the absence of proof of fraud or collusion, it could not reopen and review those judgments. It was held also that the Privy Council, since it was not sitting in appeal to determine whether the conclusions of fact or of law on which those decrees were founded were right or wrong, could properly deal only with the operation and effect of the decrees as they stood.

Notwithstanding that property devoted to religious purposes is, as a general rule of Hindoo law, inalienable, it is competent for the Shebait, in his capacity as Shebait and manager, to borrow money for the proper expenses of keeping up worship, repairing temples, defending litigation, and other like objects; but the power to incur such debts must be measured by the existing necessity for incurring them. And judgments obtained against a former Shebait in respect of debts so incurred are binding upon succeeding Shebait.

Mr. Cowie, Q.C., and Mr. Romer for Appellants.

Mr. Leith, Q.C., and Mr. Doyne for Respondent.

Sir Montague Smith delivered the following judgment :—

The appellants sued in the Court of the Judge of Zillah Dacca as Shebait of an idol, called Lukshmi Narain Thakoor, to set aside two decrees, dated respectively the 27th February 1852 and the 25th July 1854, obtained by the respondent against their immediate predecessor, the Shebait Rajah Baboo; and to have the dewuttur property of the idol released from the attachment issued in execution of these decrees.

It was alleged in the plaint that the above decrees were obtained by fraud and collusion, and an issue was framed on this charge. The Zillah Judge gave a judgment on this issue, from which, although somewhat ambiguous and obscure, it may be inferred that he considered the charge of fraud had been sustained.

The High Court, however, on appeal, came to the distinct conclusion, and in their Lordships' opinion rightly, that this charge was unsupported by any evidence,

* From the judgment of Markby and Birch, JJ., decided on the 22nd May 1873,—20 W. R. 86.

The learned Counsel for the appellants having admitted at the bar that he could not on this point successfully impeach the judgment of the High Court, it is unnecessary to consider it further.

It should be observed *in limine* that the case does not come before their Lordships by way of appeal from the decrees sought to be impeached, but upon a fresh suit to set them aside.

The facts which led to the suit in which the first of the two decrees was obtained, are found in the judgment of the Judge of the Civil Court of Dacca. It appears that Rajah Baboo, who was a man of profligate habits, having spent the income of the dewuttur property on his own pleasures, borrowed Rs. 4,000 from the respondent to defray the expenses of the worship of the idol, and of repairing the temple. As security for this advance he gave a bond to the respondent, and also a *rehinama*, by which he pledged the dewuttur property for the repayment of the borrowed money. In both securities it is stated that the money was borrowed for the service of the idol and the expenses of the temple.

The respondent brought his suit against the Shebait Rajah Baboo on these documents, and issues were raised and evidence gone into upon the question of fact, whether the money was *bond fide* borrowed and expended for the service of the idol; and also upon the questions of law, whether Rajah Baboo could pledge the dewuttur property for money so borrowed and expended, and whether the profits of it could be attached for payment of such a debt. It appears that the Principal Sudder Ameen gave the respondent a decree for the debt and interest, but ordered the amount "to be realized from such private property of Rajah Baboo as is not prevented from being sold by auction," intimating that the question whether the dewuttur property could be so sold might be determined at the time of the execution of the decree.

The present respondent appealed from this decision to the Zillah Judge. In disposing of the issue of fact, the Judge came to the conclusion that the money had been borrowed and expended for the service of the idol. On the other questions he held, first, in conformity with the opinion of the Pundit of the Court, that the *rehinama*, or specific pledge of the property, could not be enforced; but secondly, that a decree founded on the bond for the money so borrowed might be given, to be realised from the rents of the dewuttur lands. He accordingly so framed the decree.

The second decree now sought to be set aside was obtained in a suit instituted by the respondent in the Court of the Principal Sudder Ameen of Dacca against Rajah Baboo, on a bond for Rs. 2,700, given by him for money which the bond states was borrowed for the service of the idol, part of it being to defray the necessary expenses of a law-suit affecting the dewuttur lands. Issues were framed as in the former suit, with respect to the purpose for which the money was borrowed, and the liability of the dewuttur property to be attached for the debt. These issues the Principal Sudder Ameen found in favor of the respondent, and decided that the debt should be paid by Rajah Baboo, or else realized from the profits of the dewuttur melial.

The above two decrees are entitled to the force due to judgments of competent Courts. The determination of the issues is *res judicata*, and their Lordships think that, in the absence of proof of fraud and collusion, the High Court was right in holding that it could not reopen and review the judgments founded upon them. Nor need their Lordships now say whether the Judge in the first case was right in holding upon the evidence of title before him that Rajah Baboo had no power to make a specific pledge of the dewuttur property, since they are not sitting in appeal to determine whether his conclusions of fact or of law are right or wrong. They can now properly deal only with the operation and effect of the decrees as they stand.

The question, however, how far these judgments are binding upon the

appellants, the successors of Rajah Baboo, remains, and has been argued at the bar.

It was first contended that, according to the true construction of the decrees, they were *ex facie* intended to bind Rajah Baboo alone, and not succeeding Shebait; but their Lordships during the argument stated that in their opinion the plain meaning of the decrees was that the entire debts should be realized out of the profits of the dewuttur lands.

The main point for decision remains, whether these decrees can now be legally carried into effect, which raises the question whether the profits of dewuttur lands can be attached and appropriated during the incumbency of succeeding Shebait by virtue of judgments obtained against a former Shebait in respect of debts properly and necessarily incurred by him for the service and benefit of the idol.

It is to be observed that the question is not raised whether the lands themselves could be sold under the decrees.

There is no doubt that, as a general rule of Hindoo law, property given for the maintenance of religious worship and of charities connected with it is inalienable.

In an appeal, which not long ago came before this tribunal, a question arose as to the validity of a grant of a mouroosee pottah at an invariable rent of dewuttur lands. Lord Chelmsford, in delivering the judgment, said:—

“The talook itself, with which these jummas were connected by tenure, was dedicated to the religious service of the idol. The rents constituted, therefore, in legal contemplation, its property. The Shebait had not the legal property, but only the title of manager of a religious endowment. In the exercise of that office, she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage.”

And this Committee having regard to the presumption arising from this state of things, and other facts appearing in the evidence, held that the pottah was not, in fact, established. (*See Maharanee Shibessuree Debia and others v. Mothooranath Acharjo*, 13 Moore's I. A., 270).*

But it is to be observed that this Committee, whilst considering that the grant of such a pottah by a Shebait would be *prima facie* a breach of trust, expressed an opinion that if the grant had been affirmed by a judgment, the succeeding Shebait would have been bound by it; probably for the reason that after a judgment it must be assumed either that such a pottah was warranted by the terms of the original endowment, or by usage, or was in some way beneficial to the interests of the trust. It is said:—

“If the decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings, and especially on the judgments, be viewed as *res judicata* binding on the parties and those claiming under them.”

But, notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the Shebait of property dedicated to the worship of an idol, in the capacity as Shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the Shebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir, which was thus defined in a judgment of this Committee, delivered by Lord Justice Knight Bruce:—

“The power of the manager for an infant heir to charge an estate not his own is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bond fide* lender is not affected by the precedent mis-

* 13 W. R. P. C. 18; 2 Suth. P. C. R. 300.

management of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir grounded on a necessity which his own wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt." (See *Hunooman Persaud Panday v. Mussumat Babooee Munraj Koonweree*, 6 Moore's I. A. 243.*)

It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must, in the nature of things, be entrusted to some person as Shebait or manager. It would seem to follow that the person so entrusted must, of necessity, be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them.

Assuming, then, that a Shebait may incur debts, or borrow money for necessary purposes, in the sense above explained, it appears to be right and reasonable that judgments obtained against a former Shebait in respect of debts so incurred should be binding upon succeeding Shebaites, who, in fact, form a continuing representation of the idol's property.

If such debts, and the judgments founded on them, were not held to be thus binding on successors, the consequence would be that no Shebait would be able to obtain assistance in times of need; for, on an opposite state of the law, he might defeat the creditors who had afforded it, by at once transferring the property to other Shebaites, as was actually done in the present case by Rajah Baboo, who, after the decrees were obtained against him, appointed the appellants, his wife and nephew, Shebaites in his place.

The above view is consistent with what appears to have been the opinion of this Committee in the passage already cited from 13 Moore's Indian Appeals, and with two decisions in India (*Juggut Chunder Sein* and another *v. Kishwanund* and others, 2 Select Reports, 126; and *Kishnonund Ashroon Dundy v. Nursingh Doss Byragee*, 1 Marshall's Reports, 485).

Before, however, applying the principle of *res judicata* to judgments of this character, the Courts should take care to be satisfied that the decrees relied on are untainted by fraud or collusion, and that the necessary and proper issues were raised, tried, and decided in the suits which led to them. These conditions appear to have been fulfilled in the present case.

It is to be observed that execution of the judgments sought to be set aside is decreed, and in their Lordships' view rightly, only against the rents and profits of the dewuttur lands. Whether the judgments have been satisfied by the profits already received, or whether some provision ought to be made out of such profits, during the pendency of the attachments, for the continuance of the worship of the idol, are questions not raised in this appeal. The object of the present suit is to have the properties released from attachment on the ground that the decrees were obtained by fraud, and were in no way binding on the succeeding Shebaites. In deciding against this claim their Lordships do not desire to prejudice the determination of the questions above adverted to, if they should be hereafter raised.

In the result their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

* 18 W. R., p. 81, footnote; 2 Suth. P. C. R. 29.

The 10th February 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Declaratory Decrees—Code of Civil Procedure (Act VIII of 1859),
s. 15—Title to Future Interests—Suits by Reversioners.*

On Appeal from the High Court at Madras.

Strimathoo Moothoo Vijia Ragoonadah Ranees Kolandapuree Natchiar
and others

versus

Dorasinga Tever and others.

The Code of Civil Procedure (Act VIII of 1859), s. 15, must be construed upon the principles, and by the light of the decisions, of the English Courts of Equity upon the 15th & 16th Victoria, Cap. LXXXVI, s. 50, which is in precisely the same words, and the construction which must be put upon it is that a declaratory decree cannot be made unless there is a right to consequential relief capable of being had in the same Court, or in certain cases in some other Court.

The mere quieting of doubtful titles is not sufficient reason for a declaratory decree; and it appeared to their Lordships to have been very reasonably ruled in India, that the Court will not try questions of title as to future interests where neither claimant has a right to present possession, especially questions of title which may never arise.

A suit by a reversioner to restrain a widow or other Hindoo female from acts of waste, although his interest during her life is future and contingent, must be brought with that object and for that purpose alone, and the question to be discussed would be solely between him and the widow: he could not, by bringing such a suit, get, as between him and a third party, an adjudication of title which he could not get without it.

*Mr. Leith, Q.C., Mr. Norton, and Mr. F. H. Bowring for Appellants.
Mr. Doyme and Mr. J. D. Mayne for Respondents.*

Sir James Colville gave judgment as follows :

This is an appeal against the decree of the High Court of Madras affirming a decree of the Civil Judge, of which the ordering part is in these words:—"The Court doth order and declare that, as between the plaintiff and second defendant, plaintiff be declared the next in succession to the Shevagunga zemindary, that plaintiff's claim to maintenance and apartments be dismissed, and that he pay so much of his own costs as may be found due thereon." There was no appeal to the High Court against the latter part of the decree dismissing the plaintiff's claim for maintenance and apartments, and therefore that which is the subject of the appeal must be taken to be the declaration of the two Indian Courts that the plaintiff is the next in succession to the Shevagunga zemindary.

The title to this zemindary was the subject of a very long litigation, which was finally closed by a judgment of this tribunal in the year 1863.* The points then decided were, first, that the zemindary was in the nature of an impartible raj, to be held by one member of the family; secondly, that the zemindary, having been granted by the Madras Government, after an escheat, to the istimidar zemindar, was to be treated as his self-acquired property; thirdly, that the right of succession to it was to be determined, not by any particular custom, but by the general Hindoo law prevalent in that part of India, with only such qualifications as might follow from the impartible character of the subject. These propositions were, at least in the latter stages of the litigation, not much disputed. That which was really contested between the parties was that even if the istimidar zemindar were, as he had been found to be in the strict sense of the term, a member of an

* 2 W. R. P. C. 31; 1 Suth. P. C. R. 520.

undivided Hindoo family, the succession to this zemindary, inasmuch as it was his separate self-acquired property, was to be determined by the rules which regulate the succession to the property of one separate in estate, and consequently, that his wife, daughter, and daughter's sons were entitled to inherit it in preference of a brother, a brother's son, or any more remote collateral in the male line. This last point had been first raised by the zemindar's last surviving widow, Angu Muthu Natchiar, in a suit commenced in 1845. It was decided against her by the Judge of first instance in 1847. She appealed against his decree to the then Sudder Court of Madras, but died in 1850 before her appeal was heard. Thereupon there ensued a very complicated and confused litigation amongst the descendants of the istimizar zemindar, touching their respective titles to succeed to the right claimed by the deceased widow, and to prosecute her appeal. The claimants were first Kathama Natchiar, who is the first on the record of the present appellants, her sister of the whole blood, and her half sister, all of whom seem to have been daughters of the zemindar, then having or being capable of having issue; secondly, Sowmia Natchiar, a fourth daughter, who was a childless widow; and thirdly, Moothoo Vadooga, a grandson of the istimizar zemindar by a deceased daughter, and, as would appear by the pedigree admitted in this cause, an elder brother of the present respondent, who is since dead. The final judgment of this Committee determined both the question of representation raised between these parties, and also the question of succession raised in the widow's suit, against the person claiming as nearest male heir in the collateral line of the istimizar zemindar. It determined these questions by a declaration in these words:—"We shall therefore humbly recommend Her Majesty to reverse the decrees and orders complained of by this appeal; to declare that the suit of 1856, which appears to us to have resulted from erroneous directions given by the Sudder Court,"—that was a suit brought by the widow as an original suit,—“ought to have been and ought to be dismissed; and in the suit of 1845, to declare that Sowmia Natchiar and Moothoo Vadooga were not, nor was either of them, but that the appellant and her sisters were, as against the respondent, entitled to prosecute the appeal, and to recover the zemindary: this declaration to be without prejudice to the rights of the appellant and her sisters *inter se*.” The sisters, as appears by the admitted pedigree in this cause, have since died. There is, indeed, a statement in Mr. Moore's Report, that they were dead at the time when the judgment was pronounced, but, however that may be, it is certain that under the order of Her Majesty made in pursuance of that judgment, the first appellant became the zemindar of Shevagunga, taking it as the heir of her father next in succession to the widow.

That having been the state of things for some years, the present respondent brought the suit, out of which this appeal has arisen. The first paragraph of his plaint claimed “to recover the zemindary of Shevagunga for the plaintiff as the eldest surviving male heir of the istimizar zemindar.” But this somewhat desperate attempt to reopen the question which had been closed by the judgment of this Board was shortly afterwards abandoned, and by a subsequent proceeding he withdrew the claim to any right to immediate possession, and amended his plaint accordingly. The plaint then went on to pray in the alternative,—“first, to have a declaratory decree passed, establishing the plaintiff's right to succeed to the said zemindary as next heir after the death of the first defendant, and adjudging her to pay him Rs. 60,000 per annum for maintenance, and further declaring him entitled to immediate possession of a portion of the palace, No. 1, which was occupied and enjoyed by his maternal grandmother and mother during their lifetime; secondly, to declare him entitled to immediate management of the devastanams, pagodas, and choultries situated in the said zemindary, and of the lands bestowed on them, to receive the honors done by the said devastanams and choultries, and to conduct the affairs thereof; thirdly, to grant to him such further or other relief as the nature of the case will admit of.” The plaint then stated

the title of the plaintiff, which is in effect, that inasmuch as upon the death of the present zemindar the persons entitled to inherit and to succeed to the zemindary would, according to the ordinary course of Hindoo law, be the grandsons of the istimidar zemindar if the estate were partible, he, being the eldest of such grandsons, and the estate being impartible, must be taken to be, by right of primogeniture, the person next in succession to the zemindary. The plaintiff then raised a case of waste against the first defendant (the zemindar). After mentioning certain leases which are no longer the subject of dispute, it went on to say:—"The first defendant has not leased to the sixth defendant the punnai (cultivated by the owner) and kolkriam (purchased) lands belonging to the said zemindary, which was put in her possession by virtue of the decree of Her Majesty in Council, but she, notwithstanding her being a widow, has alienated, contrary to law, a great part of the said lands, and pledged the state jewels, and incurred debts so as to affect the permanent income of the zemindary." It then stated some special grounds for coming into Court. It said:—"The first, second, third, fourth, and fifth defendants and others have combined together to defraud the plaintiff of his right to the said zemindary, and the third, fourth, and fifth defendants have executed an agreement to their brother, the second defendant, assigning to him their interest in the said zemindary, which they pretend to have on the death of the first defendant. The first defendant has also executed a document to one Ponnosamy Tever, whose daughter was lately married to the second defendant, authorising him (the said Ponnosamy Tever) to establish the right alleged by the first defendant to be possessed by her son, the second defendant, to succeed to the zemindary after her death, and to exercise other powers in prejudice to the plaintiffs' interests in the said zemindary." Then followed the case made for the relief prayed in respect of the management of the charitable institutions and for maintenance, which it is unnecessary to state in detail.

The defendants to the suit appeared and set up various defences, the first and second defendants impeaching the title of the plaintiff upon several grounds; the third, fourth, and fifth defendants setting up a case that the zemindary to which their mother had succeeded had either always been or had become her stridhanum; that according to the proper course of succession it would, upon their mother's death, devolve upon them, but that they had assigned and relinquished by deed their rights in favor of their brother, the second defendant. Upon these pleadings the following issues were settled:—"1. Whether or not according to Hindoo law petitioner is entitled to succeed to the zemindary of Shevagunga at the death of the present Ranee? 2. Whether or not petitioner is entitled to succeed to the said zemindary at the death of the Ranee by virtue of any peculiar custom which obtains in that zemindary? 3. Whether or not petitioner is estopped by this being '*res judicata*' from setting up any peculiar custom? 4. Whether or not petitioner is immediately entitled to the maintenance claimed or what maintenance as such, or to apartments in the palace, and what apartments? 5. Whether or not petitioner's claim to maintenance and apartments is barred by the law of limitation? 6. Whether or not petitioner is entitled to the immediate management of the devasthanams and chuttrams in the zemindary, and to the honors connected with the said management? 7. Whether this is a suit in which a declaratory decree can be given at all?"

From the judgment of the Court of first instance it appears that the second, third, and sixth of these issues were abandoned. That judgment conclusively disposed of the fourth against the plaintiff, and consequently made it unnecessary to adjudicate upon the fifth. But having decided the seventh issue, viz., whether the suit was one in which a declaratory decree could be given at all in the plaintiff's favor, it proceeded to decide the first issue also in his favor, and thereupon made the declaration which is the subject of this appeal. The questions

raised by these issues were the only questions which were carried to the High Court, and that Court affirmed the decree of the Lower Court upon both points.

Their Lordships, feeling that if the seventh issue has been improperly found in favor of the plaintiff, and this is a case in which a declaratory decree ought not to be given at all, it would be wholly unnecessary for them to discuss the first issue, have in the first instance confined the argument to the first of these questions, and now proceed to give judgment upon it.

They at first conceived that the power of the Courts in India to make a merely declaratory decree was admitted to rest upon the 15th Section of the Code of Civil Procedure, the effect of which has been so much discussed. Mr. Doyme, however, raised some question as to that, and suggested that the power was possessed by the Courts in the mofussil before the Code of Procedure was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited; and their Lordships conceive that if the Legislature had intended to continue to those Courts the general power of making declarators (if they ever possessed such a power), it would not have introduced this Clause into the Code of Procedure, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable, the words of the Section being:—"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." Nor does any Court in India since the passing of the Code seem to have considered that it had the power of making declaratory decrees independently of that Clause.

The point, therefore, to be determined upon this appeal is, what is the true construction and effect to be given to that Clause. It has been broadly urged at the bar that the discretion given to the Courts is absolute, or at least controlled only by those reasonable considerations upon which Courts of justice may be presumed to act in the particular case brought before them; and that in every case in which they think fit to make a declaratory decree under that Clause they are competent to do so, subject of course to having the exercise of their discretion controlled by the Appellate Court in cases in which the latter may think there are sufficient grounds for interfering with a discretion which the Legislature has vested in the Lower Court. On the other hand, it is contended that the Clause must be construed upon the principles and by the light of the decisions of the English Courts of Equity, upon the 50th Section of the 15th and 16th Victoria, Cap. 86, which is in precisely the same words, and that the true limitation of the power of the Courts is that a declaratory decree is not to be made unless there is a right to consequential relief, which, although not asked for, might, if asked for, have been given.

We have been referred to a vast number of authorities, some to show what has been the construction given to this Clause in the Presidency of Bengal, some to show what construction has been given to it in the Presidency of Bombay, and some to show that a contrary construction has been put upon it in the Presidency of Madras. We have also been referred to three decisions of this tribunal, which, if clear and explicit on the point, are of course binding upon us. Their Lordships think it will be sufficient as to the Indian cases to say that although the cases in Bengal are not uniform, and some of the Judges there have occasionally used expressions which imply that the Courts have a wide discretion in this matter, still the balance of authority is in favor of the limited construction which the appellants would put upon the Clause. In Bombay that seems to be even more decidedly the case, although the Bombay decisions to which we have been referred are not so numerous as those of the Courts in Bengal. It is obvious that an enactment which is intended to apply to all the Courts in India, and which is also a modern enactment, ought to receive the same construction in all those

Courts, and that no inconsistent course of practice should be allowed to spring up in any of the Presidencies. That construction must be governed by the decisions of this Board, and their Lordships in the course of the argument intimated an opinion that the three decisions which have been cited do in fact admit the authority and binding force of the decisions in England, and establish that, with such slight qualifications as may be required by the different circumstances of India and the different constitution of the Courts in that country, the application of the Clause is to be governed by the same principles as those upon which the Court of Chancery proceeds.

In the first of these cases (that of Sreenarayan Mitro, decided on the 15th* January 1873), there is a distinct reference to the case of *Rook v. Lord Kensington*. The learned Judge who delivered the judgment of this Committee said :—"It has been held that under the 15th and 16th Victoria, Cap. 86, s. 50, a declaratory decree cannot be made unless plaintiff would be entitled to consequential relief if he asked for it. (*Rook v. Lord Kensington*, 2 K. and J., 756.) S. 15 Act VIII of 1859, is in similar terms. The plaintiff, upon the facts so found, is not entitled to any relief against the defendant. It has been shown that, treating the documents as mere agreements between the plaintiff and the father of the child, the plaintiff could have no right to maintain the present suit." He no doubt afterwards observed :—"It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for." It appears, however, to their Lordships that that paragraph is far from claiming an unlimited discretion. The earlier part of the judgment shows that the power is limited by the construction put upon an enactment in the similar words in *Rook v. Lord Kensington*, and what follows is merely to the effect that even in cases in which some consequential relief might, if prayed, have been granted, it would still be a matter of discretion whether the Court should make a mere declaration in the particular case.

The next case was that which has been shortly called the case of *Fyz Ali Khan*, decided on the 22nd† of January 1873. Upon this point their Lordships then said :—"It must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit; otherwise the 15th Section of the Code of Civil Procedure would have no operation at all. What their Lordships understand to have been decided in India on this article of the Code, and in the Court of Chancery upon the analogous provision of the English Statute, is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that that condition is sufficiently answered in the present case even if it be assumed that no other consequential relief was in the mind of the party or was sought by him than the right to try his claim to enhance in the other forum in which he is now compelled by statute to bring an enhancement suit." The case there was that the plaintiff had sought as zemindar to enhance the rent of a tenant. He was met by the objection that the zemindary right was not in him. He then had to go, as he could only go for a final determination of that question, to the Zillah Court, but the Zillah Court not having the power to give him the consequential relief in order to which he sought that declaration, namely, the trial of his right to enhance, could only make the declaration, leaving him to seek for his consequential relief in the Revenue Court.

The correctness or effect of this decision is not affected by the fact which Mr. Doyne pointed out, that the plaintiff afterwards did go to the Revenue Court,

* 19 W. R. 133 ; 2 Suth. P. C. R. 774.

† 19 W. R. 171 ; 2 Suth. P. C. R. 785.

and there, upon the merits of the question being tried, failed to establish his right to enhance.

The most recent case is that of the Rajah of Pachete, decided on the 15th* December 1874. The judgment then delivered contains this passage:—"Their Lordships do not think it necessary to determine whether or not the High Court were right in the conclusion they came to as to the proof or the rebuttal of proof of the bromuttur tenure, because in their Lordships' opinion the judgment dismissing the suit is maintainable on totally different grounds. This is in substance a suit for a declaration of title, and it is a suit to set aside, not any deed nor any act, but a mere allegation of the defendants that they had a certain tenure. In their Lordships' view, such a suit is not maintainable." After giving the words of the Clause, the judgment proceeds:—"A similar Clause in this country has been held to give a right of obtaining a declaration of title only in those cases where the Court could have granted relief if relief had been prayed for; and that doctrine has been applied to this Clause in the Indian Act. Now applying that test, in their Lordships' opinion this suit is not maintainable. The Rajah was not entitled to relief in the shape of an order giving him possession, inasmuch as he was in receipt of the rents and profits, and he sought for and could obtain no other description of possession than that which he had." There is really no conflict between this decision and that which had been ruled in the case of Fyz Ali. In the case of Fyz Ali the plaintiff sought to establish the zemindary title, which was properly triable in the Zillah Court, in order that on the title thereby established he might bring a fresh enhancement suit in the Revenue Court. In this case of the Rajah of Pachete the zemindary title was admitted by all the defendants upon the proceedings: and the question which the Rajah sought to conclude by a declarator was that within his zemindary there was no such bromuttur tenure as that which some of the defendants alleged to exist in limitation of the right to enhance, which as a zemindar he would presumably have. In short, he wished to get a declaration, the effect of which would be to prevent the fair trial in the Revenue Court of the very question to be tried there—*viz.*, the question whether he as zemindar was entitled to enhance the rents of his tenants or not.

It seems to their Lordships that these three cases do all more or less affirm that the Indian enactment is to be construed as the English Courts have construed the similar provision in the English Statute, but inasmuch as this question has been so fully discussed at the bar, and there treated as not concluded by those decisions, and as it is desirable to have an authoritative decision upon it, their Lordships think it right to say that if these three cases had not been decided, and if the question were before them as *res integra*, they would come to the above-mentioned conclusion, and I will state as shortly as I can the reasons upon which they would do so.

It is clear that very shortly after the passing of the English Statute, in fact in the course of the following year, the construction of its 50th Section came in question in the Court of Chancery. The first decision of Vice-Chancellor Wood, which is reported in the Appendix to the tenth volume of Hare's Reports, no doubt states somewhat broadly the discretionary power of the Court to make declarators under that enactment, but in the two other cases which were decided a month or two afterwards—namely, the case of Greenwood v. Sutherland, and Garlick v. Lawson—the learned Vice-Chancellor receded from that, and held that the powers of the Court were not so enlarged by the statute as to enable him to make any declaration touching future interests during the life of a tenant for life. In the case of Garlick v. Lawson he said:—"Now a declaration in the lifetime of the tenant for life with regard to the interests of the parties entitled in reversion could not have been made in a cause at the time that statute passed,

* 23 W. R. 150; and p. 77 *ante*.

and therefore could not have been made on a special case. Then came the new Act, which merely said that a suit should not be open to objection on the ground that a merely declaratory decree or order was sought. It enabled the Court, in its discretion, where it should appear to be necessary for the administration of an estate, or to the relief to which a plaintiff might be entitled to make a decree, notwithstanding it should be merely declaratory. But this was not a case in which it was necessary to do so."

The question next came before Vice-Chancellor Kindersley in *Jackson v. Turnley*. At the close of his elaborate judgment on the particular case, the learned Judge says:—"I am of opinion that this question cannot be litigated; that the representative of a deceased lessee cannot file a bill against the lessor to litigate the question whether, in the event of a breach of a covenant taking place, the lessor would have a right founded upon it, and I may observe that the last branch of the Section is not unimportant. It says:—'It shall be lawful for the Court to make binding declarations of right, without granting consequential relief.' That seems to imply that it contemplates a case in which the Court is capable of giving consequential relief. Here there is not merely no consequential relief asked, but none is capable of being given."

In the case of *Rook v. Lord Kensington*, Vice-Chancellor Wood also put the same construction upon the words of the Clause. He said:—"The form of that Section of the statute implies that there is a consequential relief which might be granted in each case when the right has been so declared, but that the parties are not to be compelled to ask for that relief, and they may satisfy themselves by simply asking a declaration of right, and not pursuing the matter further."

That decision was followed shortly afterwards by the case of *Lady Langdale v. Briggs*, which is the more important, because there, as here, the question was whether the Clause empowered the Court to declare future interests. Lord Justice Turner went at great length through the earlier cases, in order to show that it was against the general course and practice of the Court to do this; that that had not been altered by his own Act, enabling the parties to state a case for the adjudication of the Court; and then he proceeded to deal with the argument which had been raised before him, to the effect that under the more recent statute, the 15th and 16th Victoria, Cap. 86, that power was given. He says:—"Some aid to the appellant's argument on this part of the case was also attempted to be drawn from the 50th Section of the 15th and 16th Victoria, Cap. 86, the improvement of Jurisdiction Act, but I take the same view of that enactment as the Vice-Chancellor Wood seems to have taken of it in *Garlick v. Lawson*—that it does not extend the cases in which declarations of right may be made, but merely enables the Court to declare rights without following up the declarations by the directions which, according to the old practice, would have been necessarily consequent upon them." Those directions which according to the old practice would have been necessary and consequent, would have involved consequential relief in one shape or another. There is, therefore, no ground for saying that the judgment of Lord Justice Turner did not go to the full extent, as to the construction of the Clause, of the judgments of Vice-Chancellor Wood in *Rook v. Lord Kensington*, and Vice-Chancellor Kindersley in *Jackson v. Turnley*.

What then has been the history of this Clause in India? It appears that before the passing of the Code of Procedure, it had been extended to India by Act VI of 1854, the 19th Section of which is in precisely the same words as the English enactment. I may remark that some of those who sat in the Supreme Court of Calcutta, were always anxious that when an English Statute was extended to the Presidency Courts, it should be so extended in precisely the same words, in order that those Courts might have, on questions of construction, the advantage of the English authorities, and that it should not be open to Counsel to make nice distinctions upon the varying language of the two statutes. In this instance

that principle seems to have been acted upon by the Legislature, and not long after the Indian Act was passed, the question of its construction appears to have come before the Supreme Court in the cause of Sreemutty Rajcoomaree Dossee v. Nobocomar Mullick and another (Boulnois' Reports). That Court was bound to act upon the English authorities, and accordingly that portion of its judgment which dealt with this question is in these words :—"One argument, which has been strongly pressed in support of this view, is founded on the 29th Section of Act VI of 1854. But that enactment only removes the objection to the suit, which consists in its seeking merely a declaration of right without a consequential relief. It leaves untouched the objection that may consist in the want of sufficient interest in the plaintiff to maintain such a suit, or in the absence of material parties interested in the question. And the cases cited by Mr. Advocate-General, show that the Courts at home, neither under the similar Section in the English Statute, nor under Sir George Turner's Act, will exercise their discretion in declaring rights where the parties principally affected are not before them." The cases cited were the cases which had then been decided on the construction of the English Act. And this decision shows that the construction which had obtained in the Court of Chancery was adopted and acted upon by the Supreme Court of Calcutta.

Then came Act VIII of 1859, or the Code of Procedure, in framing which the Legislature thought fit to pick out of Act VI of 1854 the 19th Section, and to embody it in the very same words in the new Code. It seems to their Lordships unreasonable to suppose that the Legislature did not mean to use the words in the sense which by judicial construction they had been obtained. Again, it is to be observed that when the Supreme Court of Calcutta ceased to exist, and the High Court was created, the Charter of the new Court required that Court to be guided in its original jurisdiction by the principles which had governed the Supreme Court. Unless, therefore, the limited construction put upon the Clause by the Supreme Court is to prevail generally in all the Courts of India, we must come to the absurd conclusion that the same words are to be interpreted by the High Court in one sense when it is exercising its original jurisdiction or sitting on an appeal from a decree made under that jurisdiction, and in a different sense when it is sitting on an appeal from a mofussil Court; and further that the Legislature has by the same form of words intended to make one law for the mofussil Courts, and another for those of the Presidency towns.

It appears, therefore, to their Lordships, that the construction which must be put upon the Clause in question is, that a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court, or in certain cases in some other Court. They admit the qualification introduced by the case of Fyz Ali.

With respect to the course of decision in the Presidency of Madras, it is to be observed that some of the earlier cases decided there adopted the English construction. In others, the Judges who claimed a wider discretion as to making declaratory decrees, have assigned as a reason for its exercise, that there does not exist in India the power of entertaining a suit to perpetuate testimony. That reason does not apply to the present case, in which there is no testimony to perpetuate, but in no case is it a satisfactory reason. The proper remedy for such a defect in the administration of justice, if it exists, is an Act of the Legislature. It cannot be supplied by putting an erroneous construction, or a different construction from that which prevails in other parts of India, upon a statute which has no reference to the subject. It may be observed further upon the Madras cases that the Courts there do not appear really to have claimed, as Mr. Doyne has claimed for them, an uncontrolled discretion in making declaratory decrees. The judgment of Chief Justice Scotland in this very case, certainly does not go so far. He says :—"It has been decided by this Court that the rule of the Equity

Courts in England is not applicable to declaratory suits here, and it is now settled that a suit praying nothing more than a declaration of title, is maintainable under the 15th Section of the Code of Civil Procedure, although no consequential relief be grantable upon the declaration, if a good ground for seeking the protection of such a suit is shown to exist." What I have already said on the part of their Lordships shows that they dissent from that position; but still the very proposition admits that there must be some special ground "for seeking the protection of such a suit." He then refers to the last decided case, and the conclusion which he draws from the decision is this:—"To support such a suit there must appear to have been some act done which had worked or was likely to cause injury or serious prejudice to the plaintiff's alleged title, and in the present case I think that ground does appear." Then he proceeds to consider the special grounds which exist in this case. Mr. Justice Holloway goes further, and says that the mere quieting of doubtful titles would be a sufficient reason and a better reason than the fact of alienations having been made. The principle so stated, if acted upon, would open the door to the determination of future interests whenever one party chose to think it desirable that a dispute as to title which might at any time afterwards crop up, should be determined by a declarator.

Having said thus much on the construction of the Act, their Lordships will now deal with the arguments which have been addressed to them to show that even upon the limited and strict construction of the enactment this decree may be maintained. The first point upon which it is desirable to observe is that of the claim to maintenance. Upon that it is only necessary to say that the suit must now be treated as if the claim to maintenance had never been put forward. There has been a final adjudication between the parties as to the right to maintenance. It was held by the Lower Court that, even if the plaintiff were unquestionably the next in succession to the zemindary, he would have no right to claim present maintenance from the zemindar, and there was no appeal from that decision to the High Court.

It will be convenient to consider next the grounds which the High Court of Madras seems to have considered sufficient to justify the declaration. The Chief Justice says:—"It appears that the first defendant favoring the second defendant's title, and concerting with him in opposition to the plaintiff, had employed an agent, and executed a power of attorney to him, for the purpose of assisting the second defendant to possess himself of the zemindary, and withhold possession after her death. This, without reference to the other acts alleged, is sufficient to show an extreme determination of hostility towards the plaintiff, and there can be no doubt, I think, that serious injury to the plaintiff's right is the probable, if not certain, result of the opposition thus begun." It appears to their Lordships that the defendant, the zemindar, was perfectly competent to grant that power of attorney, and that there is nothing in it which would give the plaintiff a right if he had brought a suit for that purpose to have it set aside. It can from the very nature of the instrument, operate only during the zemindar's lifetime, and we are not to assume that any act will be done under it which the plaintiff would have a right to impeach; but if any such act is done under it; as, for instance, if she were to devolve the succession upon her son, so that his interest might become absolute, or the like, their Lordships, by their decision upon the present question, would by no means preclude the plaintiff from seeking to impeach that act, and to treat it as invalid. They do not prejudice any question of that kind which may arise. Mr. Justice Holloway, as before remarked, rested his judgment broadly on the necessity of quieting titles, which their Lordships think is a ground far too wide for adoption, and one that cannot possibly justify the declaration in this case, because, independently of the construction of the statute, it appears to have been very reasonably ruled in India that the Court will not try questions of title as to future interests where neither claimant has a right to present possession,

especially questions of title which, like the present, may never arise. (See *Pranputty Koer, mother and guardian of infant Isreenundun v. Lall Futteh Bahadoor*, 8 Sevestre, 277.*)

A further question is raised by the pleadings, which was hardly adverted to in the argument,—namely, the title set up by the sisters and the grant of their interest to the second defendant; but that cannot give the plaintiff a right of action in this case if it does not otherwise exist. That transaction cannot affect the interests of the plaintiff; if these ladies would have no title against him they cannot have given a better title than they had themselves to the second defendant. It, at most, raises another point to be determined, should the title to this zemindary come, on the death of the existing zemindar, to be properly litigated between the plaintiff and the second defendant.

The point which, though not adverted to in the judgment of the High Court, has been mainly pressed upon their Lordships by the learned Counsel for the respondents, is, that the plaintiff originally made a case of waste, that it was necessary that the right of the plaintiff as nearest reversioner should be ascertained in order to support such a suit, and that if the suit had been tried out as it was at first framed, there would have been a case for consequential relief. The course the case took was that when it came before the Judge for the settlement of issues, he thought that the question of waste ought not to be tried in this suit. There was afterwards an application made to him to frame an additional issue, which he rejected; and the reasons for his coming to that conclusion are given at page 11. They are the following:—"At the settlement of issues the Court was of opinion that the question of alienation of the revenues of the zemindary was not one which had any place in the present suit, which should be confined as much as possible to the real object in view, which is to ascertain whether or not plaintiff is the proper person to succeed to the zemindary at the death of the Ranees. At present plaintiff has no title either in possession or expectancy, and until he has established his right as remainderman, he is not in a position to question anything that may be done in regard to the disposal of the property by the present proprietor. Moreover, it would be impossible to frame an issue on this point, when the property said to be alienated is not distinctly specified, and when the parties who must necessarily be in possession are not parties to the suit. It is not contended that these alienations can operate beyond the lifetime of the present Ranees, and therefore if plaintiff is successful in establishing his right to succession, he will have ample opportunity in future of preventing injury to the property. If, on the other hand, he is unsuccessful, the disposition of the property is a matter with which he has no concern." The plaintiff appears to have acquiesced in this interlocutory order. If he had thought it had improperly affected his case, he might have raised before the Appellate Court the question of its propriety, under the Section of the Code which enables him to do so, and that question would then have been regularly before us. Considering the frame of the suit, their Lordships do not think the order was improper or unreasonable.

The arguments now under consideration are founded on the right of a reversioner to bring a suit to restrain a widow or other Hindoo female in possession from acts of waste, although his interest during her life is future and contingent. Suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*. It seems, however, to their Lordships that if such a suit as that is brought, it must be brought by the reversioner with that object and for that purpose alone, and that the question to be discussed is solely between him and the widow; that he cannot by bringing such a suit get, as between him and a third party, an adjudication of title which he could not get without it. Here if the plaintiff had brought his suit to restrain the widow from acts of waste, he might, no doubt, have had to prove, not merely the acts of waste

alleged, but a title sufficient to give him a *locus standi* in Court. Their Lordships are not prepared to say that by showing that he was a grandson of the istimimar zemindar, although a doubtful question might thereafter arise between him and the second defendant as to which should succeed to the zemindary, he would not have established a sufficient *locus standi* against the widow, and the right to have her acts of waste restrained for the protection of the estate. This, however, would not necessarily give him a right to bring the second defendant into Court in order to obtain a final adjudication of title against him.

It appears, therefore, to their Lordships that even if the plaintiff had proved acts of waste against the widow, which he has not done, that would not have given him a right as against the second defendant to have the question which arises between them determined by a declarator.

Upon these grounds, their Lordships think that both the Courts below have come to a wrong conclusion upon the seventh issue; and holding that, they conceive it would be improper for them to intimate any opinion as to the correctness or incorrectness of the very learned judgments given in India on the first issue. Consequently it will be their Lordships' duty humbly to advise Her Majesty, on the finding upon the seventh issue, to dismiss the suit of the respondent, but without prejudice to any question of title to the zemindary which he may hereafter be entitled to assert on the death of the first defendant, the zemindar. We think that as he brought a suit which he ought not to have brought, he must pay the costs of the suit in the Indian Courts and those of this appeal.

The 12th February 1875.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Enhancement of Rent—Dependent Talooks—Reg. VIII of 1793
s. 51—Act X of 1859 ss. 15 & 17.*

*On Appeal from the High Court at Calcutta.**

Hurronath Roy and others

versus

Gobind Chunder Dutt.

A suit brought to recover rent on account of a dependent talook at an enhanced rate after notice was decreed by the Collector. The case came in appeal before the High Court, who thought that the rent admittedly never having varied, the defendant was protected from enhancement under Act X of 1859 s. 15. Plaintiff appealed to the Privy Council pleading grounds upon which the rents of ryots having rights of occupancy, were liable to enhancement under s. 17:

HELD that these grounds were not applicable to a dependent talook created before the decennial settlement; such talooks being protected from enhancement by Reg. VIII of 1793 s. 51, except under the circumstances therein mentioned.

HELD that even a dependent talookdar who, under the provisions of that Section (51), might otherwise be liable to enhancement, was exempted by Act X of 1859 s. 15, if he held his tenure otherwise than under a terminable lease and at a fixed rent which had not been changed from the time of the permanent settlement.

HELD that as these conditions were satisfied in the case of this talook, it was protected from enhancement; for although a decree of the Sudder Court of 1821 had declared that the jumma should be fixed at pergunnah rates, and a decree of 1860 construed the earlier decree as declaring that plaintiff was entitled to enhance, the rent never was assessed at pergunnah rates, and never was enhanced.

* From the judgment of Jackson and Phear, JJ., decided on the 15th January 1866.

This was a suit brought to recover rent at an enhanced rate after notice of enhancement for Turuf Oomedpore, a dependent talook comprised within the plaintiff's three annas and four gundas share of the zemindaree Pergunnah Mahomedshahee in Zillah Jessore. This suit was brought in the Revenue Court under Act X of 1859. The Collector who tried the case thought that the rent ought to be enhanced, and he decreed accordingly. He says:—"The case has been pending since 1862, when the issues were first fixed after hearing the pleadings on both sides. I come to the conclusion that the only issue on which there is any dispute between the parties is that first laid down, *viz.*, whether the provisions of ss. 15 and 16 Act X of 1859 do not apply to the talook regarding the rents of which the present suit is brought, and whether the rent under these circumstances can be enhanced. Defendant's mookhar admits the fairness of the pergunnah rates assessed, but bases all his resistance to the paying of the enhanced rent on the principle above mentioned. I do not think there can be any doubt that the rent can be enhanced under the power conveyed in the two decisions above quoted" (referring to two decisions of the Sudder Court of the 30th April 1821 and of the 11th December 1860 respectively, which will be considered presently). The Collector proceeds:—"It is distinctly laid down there that the rents of Talook Oomedpore may be enhanced by the plaintiff after issuing the notices required by law at the pergunnah rates, and in the face of these decisions of the highest judicial authorities, I cannot see that the plea of defendant can for a moment be entertained. I accordingly reject it."

The case came on appeal before the High Court, who thought that the main question was whether, under the circumstances, the rent admittedly never having varied, the talookdar was not now protected by s. 15 Act X of 1859, and desired that the argument might be confined to this point, and having heard both parties upon it, were of opinion that, under the provisions of s. 15 of Act X of 1859, the defendant was protected from enhancement, and they decreed accordingly.

The present appeal is against that decision, and the question is whether the plaintiffs are entitled to enhance the rent in the manner in which they claim to enhance it. The notice of enhancement is this:—"Be it known that in the three annas and four gundas share of Pergunnah Mahomedshahee our zemindaree, the 37 mouzahs with hoodahs julkur, etc., of Turuf Oomedpore, on a jumma of Rs. 8,346-14-4 without settlement, and liable to increase or decrease, used to be recorded in the name of the late Baboo Nil Comul Pal Chowdhry. On a survey of the lands of the said jumma, the same has been shown to comprise 26,236 beegahs and 8 cottahs of land, and after deduction of 1,041 beegahs and 3 cottahs on account of ghur-lack (unculturable), khal khonduck (ditches, etc.), a net area of 25,196 beegahs and 5 cottahs at the prevailing pergunnah rate was assessed at Rs. 36,001-11-8, and a notice having been served accordingly, and a suit No. 63 of 1855 brought for assessment of the said jumma in the Court of the Principal Sudder Ameen of this zillah. On an appeal preferred by us, the Judges of the Sudder Court, on the 11th December 1860 (referring to the decree in the former suit), declared that the said mehal was liable to assessment, in accordance with the decision of the Zillah Court, after service of notice, therefore, as there is in your possession an excess of land on a deficient jumma, and the productive powers of that land have increased, we consequently serve you with this notice, under the provisions of s. 13 of Act X of 1859, for the purpose of getting from you from the year 1269 the rents of 25,196 beegahs and 5 cottahs out of 26,236 beegahs and 8 cottahs of land, less 1,041 beegahs and 3 cottahs of unculturable ditch, waste land, etc., comprised within the 37 mouzahs and hoodahs, with julkurs of the aforesaid Turuf Oomedpore, by assessment thereof at the prevailing pergunnah rates." Therefore, the ground upon which the plaintiff seeks to enhance the rent is, that there is in the

defendant's possession an excess of land on a deficient jumma, and that the productive powers of that land have increased.

Those are grounds, though not accurately expressed, upon which the rents of ryots having rights of occupancy are liable to enhancement under s. 17 Act X of 1859, but they are not applicable to a dependent talook like the present, which was created before the decennial settlement. Talooks of that description are protected by s. 51 Reg. VIII of 1793 from enhancement, except under the circumstances therein mentioned; see also Reg. XLIV of 1793 s. 7. The decree of the Collector, therefore, could not be supported even if the rent of the talook were liable to enhancement under the provisions of s. 51 of Reg. VIII of 1793.

It may, however, be well to consider whether the High Court was right in holding that the defendant was by s. 15 of Act X of 1859 protected from enhancement in any case and upon any grounds. S. 15 says:—"No dependent talookdar, or other person possessing a permanent transferable interest in land intermediate between the proprietor of an estate and the ryots, who, in the provinces of Bengal, Behar, Orissa, and Benares, holds his talook or tenure (otherwise than under a terminable lease) at a fixed rent which has not been changed from the time of the permanent settlement, shall be liable to any enhancement of such rent, anything in s. 51 Reg. VIII of 1793, or in any law to the contrary, notwithstanding." To bring the case within that Section, he must hold his tenure otherwise than under a terminable lease, and he must also hold at a fixed rent, which has not been changed from the time of the permanent settlement. It should be remarked that s. 15 does not render liable to enhancement dependent talookdars, who were exempted by s. 51 Reg. VIII of 1793, but exempts from enhancement, amongst others, dependent talookdars who, under the provisions of that Section, might otherwise be liable to enhancement.

Now the first question is, did the defendant in this case hold at a fixed rent? Proceedings which have been taken from time to time between parties who were represented by the parties in the present suit, the zemindar on the one side, and the owner of the talook on the other, have been put in evidence. The first decision to which it is important to refer is that of the 30th May 1811. That was a suit brought by Rajender Deb Roy, the then talookdar, against, amongst other defendants, Kishen Mohen Banerjee, who derived his title to the zemindaree through a purchase at a sale in execution of a decree of the Supreme Court of Calcutta in the month of Srabun 1207, and who also claimed Turuf Oomedpore under the same purchase. The plaintiff claimed the talook under a gift from his father, the former zemindar, dated the 27th Bysack 1195, before the date of the sale in execution. The Zillah Judge, acting upon the bill of sale of the Supreme Court, dismissed the plaintiff's suit. The plaintiff thereupon appealed to the Provincial Court of Calcutta, and filed the deed of gift from his father dated the 27th Bysack 1195. The case was heard in the first instance by the second Judge, who held that although Kishen Mohun Banerjee purchased the zemindaree rights of the former zemindar, yet the talookdaree rights of the appellant could not be destroyed, and under those circumstances it was his opinion that the decision of the Zillah Judge was wrong and should be reversed, and that the appellant should pay to the respondent the rents of the talook as he did to the former zemindar at the rates of the taloot of the decennial settlement. The case afterwards came up in the Court of the first Judge, who agreed with the second Judge, and a decree was accordingly passed as follows:—"The first and second Judges, having agreed in their judgment that the decision of the Zillah Court should be reversed, and that talook Turuf Oomedpore be declared as the right of the appellant in the manner of a mofussil talook, therefore it was ordered that the decision of

Mr. James Devienne Thourne, acting Judge of the Civil Court of the above zillah, dated the 21st March of the year 1808, be reversed and set aside; and that the appellant having been put and maintained in possession of the turuf aforesaid, do pay the rents thereof to the respondent Kishen Mohun Banerjee, in accordance with the amount laid down in the tahoot of the decennial settlement, which the appellant used to pay to the former zemindar." (See Record, pp. 32 to 35.) Now the rent is there treated as a fixed rent, which the defendant talookdar used to pay to the zemindar.

That decree having been passed in the year 1811, a suit was commenced on the 17th September 1812 by the then zemindars, Petumber Ghose and Kishen Mohun Banerjee, against Mohes Chunder Deb Roy, minor son of Rajender Deb Roy, and against Ramender Deb Roy, guardian of the above minor in the Court of Zillah Jessore, for the recovery of Rs. 1,443-3-12, alleged to be due for arrears of rent, upon the following allegation, *viz.*, that having purchased the three annas and four gundas share of Pergunnah Mahomedshahee, etc., the zemindaree of Gobind Deb Roy, they went on paying year by year the sum of Rs. 9,268-8-1 sicca, the jumma of the above. That on the 30th of the month of May of the year 1811 A.D., by a decision of the Judges of the Provincial Court, the talooks aforesaid were decreed as the right of Rajender Deb Roy as his mofussil talook. After the death of the aforesaid, the defendants had possession, and when we called for from them the sum aforesaid, being the jumma as per tahoot, which was the proper rental, they, out of the jumma of the decennial settlement, acknowledged only the sum of Rs. 7,825-4-8-1 sicca. But as out of the total of jumma claimed after deduction of the amount of jumma acknowledged by the defendants a sum of Rs. 1,443-3-13 remains due, we therefore institute a miscellaneous suit in the Zillah Court for the recovery of the rent at the rates of the decennial settlement. This appears from the decree of the Sudder Court of the 30th April 1821. It also appears from the said decree that on the 23rd December 1813 the acting Judge of the Zillah Court, on all the grounds stated in his decision, and in accordance with the decision of the Provincial Court, dated the 30th May 1811, already referred to, ordered,—“that the said suit be decreed, and that the defendants were to pay to the plaintiffs year by year the sum of Rs. 9,268-8 as the rents of the said talook.” The defendants preferred an appeal to the Provincial Court, and that Court, in accordance with a judgment of an appointed Judge of the Court that the former owner of the zemindaree had before the decennial settlement, made over the talook at a yearly jumma of Rs. 7,825-4-8-1 sicca, ordered,—“that the decision of the acting Judge of Zillah Jessore, dated the 23rd December 1813, be reversed and quashed, and that the costs of both Courts be borne by the respondents.”

The case came before the Sudder Court on special appeal from the Provincial Court. In their decree dated the 30th April 1821 they state that, amongst other documents, two papers were put in, *viz.*, on the part of the plaintiffs, a dhol of the decennial settlement for the year 1197, showing the jumma of Turuf Oomedpore at the sum mentioned in the plaintiff's plaint; and, on the part of the defendants, a hustabood paper of the year 1197 B, showing a decrease of the jumma recorded in the heba, and fixing it, after deduction of improper abwabs, at the sum of Rs. 7,631.” They then proceed:—“In the opinion of this Court, after examination of those two documents, they are held to be unworthy of credit or reliance, because the document filed by the plaintiff being alleged to be a document from the Collector's office, does not bear the signature or initials of any Government officer, and although on the second document there appears to be the initials of the Collector's name, yet his name is not even mentioned in the said hustabood, and therefore none of those documents appear sufficient to determine the amount of jumma on the tahoots of the settlement of that year. In short the amount of jumma of the disputed talooks, as alleged by both parties, has not been

proved by them before this Court ; and the decision of the Provincial Court as to the amount it maintains for those talooks by rejecting the claim of the plaintiffs should be confirmed, as the parties do not agree as to the amount of jumma of those talooks between them ; under those circumstances, for the purpose of putting an end to quarrels and disputes between the parties, suits have been instituted for a very long time, that is, from the time of institution of the old suit and of the new one, about the jumma of the disputed talooks in the Zillah and in this Court. The order of the Court is that the jumma of Talook Oomedpore be fixed according to pergunnah rates, and in accordance with the rules laid down in s. 8 Reg. V of 1812." Not that the jumma shall be enhanced, but that there being a dispute between the parties as to what was the amount of the jumma, it shall be fixed according to pergunnah rates, etc. They thought that it ought to be paid according to pergunnah rates, because they could not ascertain what was the actual amount of the rent ; but they did not assess the rent or fix by their decree the amount to be paid for arrears ; nor did they order the rent to be enhanced. The suit was not for the purpose of enhancing the rent, but a miscellaneous suit for recovering arrears. This Committee has already pointed out in a former case of Gopal Lal,* which was cited in argument, that there is a great distinction between a suit to enhance and a suit to recover arrears. They there say :—" Their Lordships are of opinion that a suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and that it is founded entirely upon different principles. To a suit for enhancement it will be no bar to plead that all arrears according to the original rate have been paid."

The zemindar acting upon that decision of the Sudder Court, subsequently brought a suit to enhance the rent. We have not the decree of the Court, but we have a reference to it in the 22nd volume of the printed decisions of the Sudder Court, of the 11th December 1860. The Court says :—" This suit was brought to enhance the rents of Talook Oomedpore, upon a given measurement and pergunnah rates, on the averment that the said talook constituted an under-tenure, comprised in the plaintiff's three annas and four gundas share of Turuf Mahomedshahee, purchased by him at an auction sale, held by order of the Master in Equity of the Supreme Court." It is to be observed that it was purchased, not under a sale for arrears of revenue, but in execution of a decree. Then they proceed to state what the different contentions were, and they finally come to this conclusion :—" As then it is evident that Gobind Chunder Dutt, who purchased the right of Issurchunder, the mortgagee proprietor, is entitled to be regarded as talookdar of the entire turuf of Oomedpore, and as it is nowhere pleaded that notice of enhancement has been served upon him, the decree in plaintiff's favor giving him the authority to assess must be subject to plaintiff's serving the notice required by the law. The present order, therefore, will, under the peculiar circumstances of the case, merely be to the recognition of plaintiff's right to assess after proper service of notice on the proper parties." Probably they used the word " assess " instead of " enhance," and intended to declare that the plaintiff had a right to enhance upon service of the proper notice. After that decision had been pronounced, an application was made to the Court to review their judgment. The Court say :—" Now it is urged through the present petition, and it is objected in Court, that if the decree of the year 1821 confers on the plaintiff the power to assess, the contention now arises, what rates is the plaintiff entitled to obtain on such reassessment of the rental. It has been urged that in the case decided in the Sudder Court in the year 1821, the former owner in that case had merely based his right for assessment at an increased rental on the following grounds :—That the rents of the said lands should be of an amount equal to the amount of sudder jumma of the zemindaries, that is, that it should be Rs. 9,400, and the talookdar had pleaded in reference thereto that he could

remain in possession of the mokurruree (fixed) rental of Rs. 7,400; consequently, in the above suit the only point at issue was whether the *owner* of the property could enhance the rent to Rs. 9,400, or whether the talookdar was entitled to remain in possession on the jumma of Rs. 7,400." Then they say:—"Mr. Peterson now asks that an enhancement be decreed in our decision in accordance with the increase granted in the old suit. Our judgment is, that as the Court had merely decided that the plaintiff could enhance after service of the necessary notices on the tenants, and therefore the present contention as to the amount of enhancement which will have to be fixed in accordance with other rates as above mentioned, belong to another subject. And after service of the notices above mentioned upon the tenant, it will then be time to decide that question." Therefore, the Court proceeding on the decree of 1821 declared that the plaintiff was entitled to enhance, but refused to decide to what extent the enhancement could be made, and left that question, involving the construction of the decree of 1821, open for decision after notice of enhancement should have been served.

Now, it does not appear that either after the decree of the 30th April 1821, or after that of the 11th December 1860, the defendant or those under whom he claims ever paid a higher rent than Sa. Rs. 7,825 odd, or 8,346 odd, the corresponding amount in Company's rupees, or that the plaintiffs or the zemindars under whom they claim ever obtained a decree for arrears assessed at a higher rate; on the contrary, it appears that after the decree of 1821 and before that of December 1860, viz., on the 22nd March 1827, a farmer of the zemindaree sued for and obtained a decree against the talookdar for arrears of rent at the rate of Sa. Rs. 7,825 odd, the jumma which he stated was acknowledged by the talookdar (Record, p. 47). In his plaint in that suit he says the talook was the talook of Rajender Deb Roy; that after his death Mohesh Chunder Roy, having come into possession by right of inheritance without any settlement as to the jumma, used to pay me the sum of Rs. 7,825-4-8½ as the yearly rental acknowledged by him (p. 46).

On the 19th August 1847 a similar decree for arrears was obtained, the jumma of the talook being stated to be Co.'s Rs. 8,346 odd (p. 63).

On the 31st March 1848 there was a similar decree for arrears recovered by the zemindar, who, in his plaint, stated that the talook was recorded in the name of the defendants, liable to increase or decrease, at the rent of Co.'s Rs. 8,346 odd (p. 65).

Numerous other decrees were obtained by the zemindars against the talookdars for arrears of rent between 1826 and 1860, either at the rate of Sa. Rs. 7,825 odd, or at the corresponding rate of Co.'s Rs. 8,346 (*see* Record, pages 45 to 74).

It appears, therefore, to their Lordships that there was ample evidence, independently of any presumption arising under Act X of 1859 s. 16, to prove that the talook was held at a fixed rent, and that such rent had not been changed from the time of the permanent settlement. The rent was not changed by the decree of 1821, for whether right or wrong, it at most amounted to a declaratory decree that the jumma should be fixed at pergunnah rates; or, according to the construction put upon it by the decree of 1860, that the plaintiff was entitled to enhance. The rent never was assessed at pergunnah rates, and never was enhanced. Besides, there is the statement in the judgment of the High Court that the rent had admittedly never varied.

We have been referred to the case of Nuffer Chunder Paul Chowdhry and another *v.* Poulson,* decided by this Committee on the 24th January 1873. It appears to their Lordships that that is quite a different case from the present. That was the case of a mokurruree tenure, and it was proved that it was created as late as 1824. Their Lordships say:—"It should be stated that this suit was decided before Act X, to which reference has been made, came into operation.

* 19 W. R. 175; 2 Suth. P. C. R. 798.

The state of the law then was that he could defend himself by showing an ancient tenure going back twelve years before the decennial settlement; but he made no case of the kind. He made a case of mokurruree tenure established by pottahs in 1824." The fact that those pottahs were created in 1824, long since the time of the permanent settlement, rebutted the presumption that the tenure had been held from the time of the permanent settlement.

Our attention has been called by the learned Counsel for the appellant to the following paragraph in the judgment in that case:—"In their Lordships' opinion the defendant did establish that the rent at which the talook was held had not been changed for a period of twenty years before the commencement of this suit, and that he thereby cast upon the plaintiff the burden of showing 'the contrary' (in the words of the Act), or that the rent had been fixed at some later period; and their Lordships are of opinion that the plaintiff has succeeded in proving that which was cast upon him to prove." But that opinion merely goes to the effect that proof that the pottahs were created subsequently to the permanent settlement rebutted the presumption created by the 16th section of Act X of 1859, that the tenure had been held at a uniform rent from the time of the permanent settlement.

It should be remarked that a rent may be a fixed rent though liable under certain conditions to be enhanced. That position is fully borne out by s. 15 Act X of 1859. The Section does not merely say that the tenures therein described shall not be liable to enhancement "if held at a fixed rent," but "if held at a fixed rent which has not been changed from the time of the permanent settlement." If the mere fact of holding at a fixed rent was a bar to enhancement, the Section would have been unnecessary. The term "fixed rent" in that Section cannot mean a rent so permanently fixed that it cannot be enhanced under any circumstances.

It is unnecessary to determine what would have been the effect of the decrees of 1821 and 1860, so long as they were unreversed, if Act X of 1859 had not been passed. Their Lordships concur entirely with the High Court that the effect of those decrees did not put the plaintiffs in a better position than other landlords who, previously to the passing of Act X, had a good right to enhance, but whose right, if not exercised from the time of the permanent settlement, was taken away by the 15th Section of that Act.

Upon the whole, their Lordships are of opinion that the High Court came to a correct conclusion in holding that the rent was not liable to enhancement, and they will humbly recommend Her Majesty that the decree of the High Court be affirmed, and the appeal dismissed with costs.

There is another appeal which was consolidated with this. The recommendation to Her Majesty will be the same in both cases.

The appellants will pay the costs of both appeals.

The 13th February 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Possession—Certificate—Benamée—Act VIII of 1859 s. 260—Principal and
Agent—Execution Sale.*

*On Appeal from the High Court at Calcutta.**

* From the judgment of Kemp and Paul, JJ., decided on the 19th December 1870.

Lokhee Narain Roy Chowdhry and others
versus
 Kallypuddo Bandopadhyaya and others.

In a suit for possession brought by the holder of a certificate of purchase of property sold at an execution sale, it is open to the real owner if in possession (Act VIII of 1859 s. 260 notwithstanding) to show that plaintiff is the apparent owner only (benameedar) and a mere trustee.

Where a man steps in during an auction sale and assumes the character of a principal agent, and deposing another who is really acting as agent purchases the property, he cannot afterwards be allowed, in equity, to turn round and claim to have purchased not for the principal but for himself, and to obtain a profit out of his purchase.

This suit was brought by the widow and two sons of Ishan Chunder Banerjee against Baboo Lokhee Narain Roy, to recover possession of a nine annas share of the zemindaree called Kishenpoora. The case set up in the plaint was that the nine annas had been purchased at an auction sale held in execution of a decree obtained against a lady of the name of Monmoheenee Dabea, and that the certificate of purchase was given to Ishan Chunder; and it is alleged that Lokhee Narain Roy obtained forcible possession of the nine annas subsequently to the certificate of sale. The defence was that Ishan Chunder was the manager of Lokhee Narain, and had purchased the nine annas benamee for him. It appears that Lokhee Narain is himself the owner of seven annas of the zemindaree, and that Monmoheenee was the owner, for life only, of the other nine annas; and that it was her life interest which was sold. It would seem also that Lokhee Narain claims the reversionary interest after Monmoheenee's death in those nine annas.

The Judge in settling the issues refused to lay down any issue upon the question whether the purchase was benamee or not, in consequence of a decision of the Full Bench of the High Court of Calcutta* which had determined that it could not be shown against the holder of a certificate of sale under an execution that he purchased benamee for another, whether the suit was brought by any person against him, or was brought by such holder himself as plaintiff. The Section of the Code of Civil Procedure upon which the question turned is s. 260, and the words applicable to the question are these:—"And any suit brought against the certified purchaser on the ground that a purchase was made on behalf of any person not the certified purchaser, though by agreement the name of the purchaser was used, shall be dismissed with costs." It was held by this Committee in appeal from the case referred to,—the case of *Mussamut Buhuns Kowur v. Beharee Lall*, reported in the 14th Moore, p. 496,† that this Section should be construed strictly and literally, and was applicable only to a suit brought against the certified purchaser to assert the benamee title against him, that the statute did not make benamee purchases illegal, and that the real owner for whom the purchase was made, if in possession, and if that possession had been honestly obtained, might defend a suit brought by the holder of the certificate and show that he was the apparent owner only and a mere trustee. However, these issues being settled before the case had been decided on appeal, the Judge of course felt bound by the decision of the full Court and settled the following issues only:—"First, is the defendant in possession of the disputed share of the zemindaree under circumstances which amount to a transfer to him of the title which the plaintiffs derived from their purchase (made by Ishan Chunder Banerjee)? If not, can the plaintiffs obtain the relief sought for, and, if in possession, under such circumstances, can the defendant's possession be disturbed?" The Judge adds the note:—"The plea set up by the defendant, that the plaintiff's father had purchased the property in question benamee for defendant's benefit, and with his money, was not allowed under the Full Bench Ruling of 12th November 1868."

In *Mussamut Buhuns Kowur v. Beharee Lall*, it was stated in the judgment of the High Court that if the certified purchaser was really benameedar, or a

* 11 W. R. F. B. 16.

† 18 W. R. 157; 2 Suth. P. C. R. 575.

trustee for another person, and after the certificate of sale did some fresh act to put the real purchaser into possession, that might operate as a transfer of the property to him. They say :—" If a person who has gained a title by limitation waives that title in favor of the real owner, and gives up possession to him as the rightful owner, such act would probably be held to amount to a waiver of the right which he had gained by limitation, and to confer it upon the real owner. In like manner, if a benameedar should acknowledge the purchase to have been made benamee, and waive the right conferred upon him by ss. 259 and 260, and give up possession to the real purchaser as the rightful owner, such act would probably amount to a transfer of the title as well as of the possession to the real purchaser." This passage in the judgment was the authority under which the Judge laid down the two issues. It is obvious that in the decision of those issues it becomes material to inquire under what circumstances possession was given by one party to the other, and whether by reason of the antecedent relation between the parties it was meant to operate as a transfer of the property. Therefore the relation of the parties, whether they really were benameedar and beneficial owners, was very proper to be enquired into and tried upon the issue in fact laid down; and accordingly the Judge of the Court of Cuttack, having taken evidence as to the sale and the circumstances under which it was made, proceeded to give his opinion upon the question whether the purchase was made by Ishan Chunder on his own behalf, or as the manager and on behalf of Lokhee Narain.

A good deal of evidence was given upon that question, but the learned Judge seems to have rested his decision entirely upon two witnesses, and resting his decision upon those witnesses he came to the conclusion that the purchase had been made by Ishan Chunder on his own account and with his own funds. He says :—" It is proved from the evidence of two of the most trustworthy of their witnesses, both of them native gentlemen, whose evidence is entitled to the fullest belief, *viz.*, Kanie Lall Pundit and Baboo Mohun Persad Roy, that the purchase of the zemindaree in dispute was made by Ishan Chunder on his own account and with his own funds." Their Lordships will refer to that evidence presently, but it seems to them that the learned Judge has drawn too broad a conclusion from the facts which they proved. On the case coming before the High Court, the Judges seemed to think that it was unnecessary to go into the facts. They thought themselves bound by the decision of the full Court, and that they could not enquire into the transaction of the sale, whether it was benamee or not, and so tying their hands they came to the conclusion that what was done after the sale did not amount to a transfer of the property from Ishan Chunder to Lokhee Narain. Their judgment proceeds on those short grounds.

As the law at present stands, it is open for their Lordships to consider what was the real state of the case between these parties, and whether or no this purchase was made by Ishan Chunder on his own account, or on behalf of Lokhee Narain.

It is right to see in the first place what was the relation between the parties. It is plain, and indeed is not denied, that Ishan Chunder had been for a period of about a year the manager of this zemindar, Lokhee Narain, and had the possession and management of some at least of his funds. It seems that a month only before this sale, he had advanced a sum of Rs. 4,400 to this lady Monmoheenee upon a mortgage-bond. That bond was taken in his own name, but it is admitted by the plaintiffs that the bond, although taken in his own name, was in respect of an advance out of Lokhee Narain's money, and that he held the bond on behalf of, and as benameedar for, Lokhee Narain. The transaction of this sale followed soon after. The lady appears to have been in difficulties. A creditor obtained a judgment against her, and there was to be a sale in execution of her life-interest in nine annas of an estate in which Lokhee Narain held the other seven in his own right, and a reversionary interest in the nine that were sold. It would be a

very proper thing for his general manager, to look after that sale and see whether he could make an advantageous purchase for him.

It seems to be a fair conclusion from the evidence that Ishan Chunder had no express instructions previous to the sale from Lokhee Narain to purchase these nine annas for him. But these facts are proved, that Russool, who was an agent, or acting at that time as an agent, of Lokhee Narain, was a bidder for these nine annas, and had bid Rs. 2,260 for the property. At that stage, when he had given that bidding which was the last of four, somebody suggested to him that he ought not to bid for the zemindar, but that Ishan Chunder, the manager, was the proper person to purchase the property for Lokhee Narain. Accordingly, the evidence is that Ishan Chunder was called into the room, the state of the biddings made known to him, and then he made upon the last bidding of Russool the small advance of Rs. 2. If the witnesses are believed, he took the bidding 'out of Russool's hands, who was professing to act for Lokhee Narain, saying at the time, or shortly after, that he purchased for Lokhee Narain. No doubt, that depends upon the credit due to the witnesses, but there are circumstances in the case which corroborate them. There is the undoubted relation in which Ishan Chunder stood to the zemindar; the facts, also, that Russool bid no more, and the very small advance upon his previous bidding, seem to show that there was an understanding between the two agents, otherwise it is very unlikely that that small advance should have stopped the biddings, and that the property should have been knocked down at that point.

But not only do the circumstances attending the bidding at the sale give corroboration to the story, but the subsequent conduct of Ishan Chunder is inconsistent with his having purchased on his own account, and is entirely consistent with the view that he purchased on behalf of the zemindar for whom he was acting as manager. The possession is one of the real facts in the case about which there can be little dispute. It is not pretended that Ishan Chunder or his sons after his death obtained anything more than formal possession by the officer of the Court. They obtained that formal possession. How did they lose it? They assert in their plaint, and for a purpose, that Lokhee Narain took forcible possession. There is not the slightest evidence of it, and it is conceded now that nothing like forcible possession was or could be taken. But what is proved is this,—by two ryots who appear to have no interest one way or the other,—that they went to Ishan Chunder, hearing that he was the auction purchaser, to pay their rents. One of them says he went to him in the first place and was told by him to go to Lokhee Narain and pay it. The other says that he went first of all to Lokhee Narain, who told him that Ishan Chunder was the auction purchaser. He went to him, and Ishan Chunder said, It is true I am the auction purchaser, but the rents are payable to Lokhee Narain. There is beyond that the fact that Lokhee Narain received the rents from those two ryots, and therefore was in possession so far as possession can be obtained of property which is in the hands of ryots.

He also paid the Government revenue. The petitions he presented to the Collector have been relied upon by the plaintiffs as showing that he did not then put forward his own title. He made no allusion to it in either of the petitions, and in the second petition he put forward Ishan Chunder as the owner of the property. It is perfectly well known to be a common practice in India where property is in the name of a man, although not the true owner, that all the proceedings as far as the Government is concerned take place in his name. All that Lokhee Narain then wanted to do was to pay the Government revenue, so that the estate should be in no danger of being forfeited. Their Lordships think that no very strong inference can be drawn against him from the fact that in the petition he states the title according to what it ostensibly was. It is stated by several witnesses that before Ishan Chunder left Cuttack to go to Calcutta, he promised Lokhee Narain to give him a kobala for the property, saying:—"There

is no immediate haste about it; you are in possession; it shall be done when I return." He went to Calcutta and died there. His sons returned to Cuttack, and then made a claim to the property upon the ground that Ishan Chunder had purchased it for himself and out of his own funds. The question having arisen, the parties very sensibly called a punchayet to decide the matter between them, and three or four respectable persons appear to have assembled and to have heard the whole case. They came to the conclusion that Lokhee Narain ought to have the estate, but they also appear to have thought that Ishan Chunder had not funds in his hands sufficient to pay the purchase money unless he had realized Monmoheenee's bond. Probably, the amount was not immediately available, and they directed that the bond should be given up by the sons to Lokhee Narain, having no doubt that it was a benamee transaction, and that the sons should convey the nine annas to the zemindar, on his paying Rs. 2,800, which is the purchase money and interest with a small sum for profit, the sons having contended that their father bought in order to sell again at a profit.

Now it is as well at this point to refer to the evidence of Kanie Lall, the pundit, on which the Judge of Cuttack relied for the conclusion to which he came. That witness says:—"Before the arrival of the plaintiffs from Calcutta, Lokhee Narain Roy Chowdhry said that the zemindaree of Kishenpoora had been purchased benamee in the name of Ishan Baboo, on which I replied that we shall know this when the son of Ishan Baboo arrives from Calcutta. Afterwards, when Kallypuddo, the said son of Ishan, came from Calcutta, he was one day called to the presence of Lokhee Narain Roy Chowdhry, and he said that the said zemindaree was purchased by his father, and if a profit were allowed to him, he would execute a kobala. This took place in my house at the time;" several persons, mentioning them, "were present. I do not recollect who besides these were present. The Baboo (Ishan) had requested me and Shodanund Mohapatter and Mokoond Persad Roy to take care of his property before he left." These two persons, then, one the pundit, were to take possession and manage Ishan Chunder's property in his absence. It might be expected that they would receive rent and pay the Government revenue if the estate had really belonged to Ishan Chunder. He goes on:—"After his death, according to a letter written by his son Kallypuddo, we continued to take care of his property. We were assembled there with the object of coming to a settlement in respect of this Kishenpoora zemindaree." He says the mookhtars of both parties were present, and goes on thus—"We arranged that Lokhee Narain was to pay the purchase money, together with interest from the date of purchase at the rate of 1 per cent. per mensem. Kallypuddo said that he would take a profit of Rs. 1,000 and the Chowdhry said, 'I will give Rs. 300 as profit.' On that Kallypuddo said, that he would consider and give his answer early next morning. This was what passed on that occasion. At the time of attempting a settlement the Chowdhry said that he would pay Rs. 2,800. The next day the Chowdhry sent me a sum of money, but I did not count how much." However, there is no doubt the money was sent. Then it appears that one of the sons intimated that in consequence of some advice he had received from his mother, he would not assent to the arrangement, nor would she; and so it appears to have gone off. The other witness, Shodanund Mohapatter, states the award still more explicitly. He says:—"The arrangement was to the effect that when the sum of Rs. 2,800, together with the stamp for the kobala, was deposited with Kanie Lall Pundit, Kallypuddo and Shamapuddo should execute a kobala."

The award of the punchayet is really consistent with the case of Lokhee Narain. They evidently came to the conclusion that Ishan Chunder had not funds in his hands sufficient to pay the purchase money, but they thought that Lokhee Narain ought to have the estate, and they accordingly made an award, that he was to have the estate, and the others the purchase money, allowing, probably by way of compromise, a small profit over.

Their Lordships, therefore, upon the whole matter, think that although Ishan Chunder may have had no previous instructions to purchase from Lokhee Narain, yet that being his manager and finding himself at this sale he purchased for him, after having stopped Russool, who was there before him bidding for the zemindar, in that operation. It would be contrary to equity to allow a man who steps in and assumes the character of a principal agent, and deposes another who was really acting as agent, afterwards to turn round and say, I purchased the estate not for the principal but for myself, and to obtain a profit out of the estate he had so purchased. Ishan Chunder himself does not appear to have intended to act in this manner, because, as already observed, he gave possession of the estate to the zemindar, by directing the tenants to pay their rents to him, and does not appear to have interfered in any manner inconsistent with the character he took upon himself at the sale—the character of a manager for the zemindar.

Under these circumstances, their Lordships think that the judgments of the Courts below cannot be sustained, but they are anxious that the whole question between these parties should be determined without further litigation. In their view, the parties having agreed to submit to the award of arbitrators, it is right and equitable that if the estate is maintained in the zemindar Lokhee Narain's hands, he should pay to the representatives of Ishan Chunder the Rs. 2,800 which the arbitrators thought was the proper sum to be paid to them, together with interest thereon. It is difficult to fix the precise date from which the interest should run, but their Lordships think it is equitable the respondents should receive interest for six years at 6 per centum per annum, making the sum of Rs. 1,008 for interest. Their Lordships are desirous to secure the execution of this arrangement, and they will therefore humbly recommend Her Majesty to reverse the decrees below, and to direct that in case the appellant pays into Court within six months the sum of Rs. 3,808 (being the Rs. 2,800 and interest thereon as aforesaid), the respondents be at liberty to take such sum out of Court upon executing a kobala of the property to the appellant, the stamp of which is to be paid by the appellant, and that upon such payment into Court being made, the suit be dismissed, and the respondents do pay to the appellant the costs of the litigation in India and of this appeal.

That in case the appellant does not pay the above amount into Court, the suit at the end of the said six months be dismissed, but in that case, without any order as to the costs in India or of this appeal, and without prejudice to the right of the respondents to retain the certificate of sale, and to take such proceedings as they may be advised to recover any moneys due to them from the appellant in respect of the purchase of the said property or otherwise.

The 26th February 1875.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

*Claim to Debuttur Land—Form of Plaintiff—Agreement—
Presumption of Fraud.*

*On Appeal from the High Court at Calcutta.**

Radha Mohun Mundul and others

versus

Jadomonee Dossee.

* From the judgment of Couch, C.J., and L. S. Jackson and F. A. Glover, JJ., dated 15th November 1870.

A suit was brought by a Hindoo widow to recover her share, as heiress to her husband, in certain family property of which she claimed a portion in her absolute right, and a portion as one of the joint shebaita of certain idols. Among other properties plaintiff claimed one-fifth share in a talook, not as a debuttur property, but, in right of her husband, as her absolute property. The first Court found that this share was the property of a certain idol, and held that she had not maintained the allegation in her plaint, and even, if entitled to it in her right of joint shebait, she could not recover in that capacity, as she had not framed her plaint in that way and had not sued as shebait. The Privy Council held the High Court to be right in treating this objection as one rather of form than of substance, and in giving the relief prayed for.

The defendants having pleaded that certain Government paper in which plaintiff claimed a share, had been appropriated by a memorandum of agreement, to the service of an idol, and the agreement was substantiated by very strong evidence and shown to have been acted upon by all the parties for years, the Privy Council held that it could not be set aside as a colorable transaction having no validity, merely upon the suggestion that the amount set aside was exorbitant, and that there might possibly have been an intention to defraud widows and others.

Mr. Leith, Q.C., and Mr. Doyle for Appellants.

Sir Robert Collier delivered the following judgment:—

This was a suit brought by the widow of one of six sons of one Nurronarain, to recover the share which she was entitled to as heiress of her husband in certain family property, and she claimed a portion of that property in her absolute right, and a portion as one of the joint shebaita of certain idols, that latter property being debuttur property. Her share became a fifth instead of a sixth by a family arrangement, whereby the share of one of the brothers had been extinguished. Her case came in the first instance before the Judge of the Twenty-four Pergunnahs; that judgment, together with the judgment of the High Court, and the course which the case has taken, make it unnecessary to refer to a great number of issues and of statements and a great deal of evidence in the case. That Judge decided in her favor with respect to a certain portion of the real property and a certain portion of the personal property, and so far there is no question with respect to his decision. With respect to her claim to the debuttur property, he decided in her favor as to a portion of it, namely, a fifth share of Government papers for the sum of Rs. 14,000. He decided that she was entitled to a fifth share of those securities, and to retain them in her hands; but that inasmuch as they were debuttur property, she was not competent to waste the same either by gift, sale, or in any other way. Upon the question—which was one of the main questions in the cause, raised between the parties—whether she had any right or title at all to property which was debuttur, he observed:—"It is admitted by both the parties that there exist ornaments, plates, and furniture as well debuttur lands and rents for the use" of certain idols. The "question which then presents itself for my consideration is, whether the plaintiff can have possession of the said properties. The defendants do not allege that the widows of the family shall not be competent to hold possession of the said endowed properties; in other words, that they have not the power of exercising that control over the same which the male members of the family can exercise. They merely say that as the said properties are of a debuttur character, they are not susceptible of division among the shareholders; and that since the plaintiff is a childless widow, she is not competent to carry on the service of the gods. That the properties in question do not admit of any partition among the co-sharers is a fact which must be admitted by me; but I do not see any reason why a widow of the family should be incapacitated from superintending the service of the gods. It is not urged by the defendants that any such rule has been laid down in the family, and that under it the widows have been excluded from the above superintendence. On the other hand, among the Hindoos, persons belonging to no other caste except that of Brahmins can perform the service of a god with his own hands, that is, worship the idol by touching its person. Men of other castes simply superintend the service of the gods and goddesses established by themselves, while they cause their actual worship to be performed by Brahmins. Thus, when persons of the

above description can conduct the service of idols in the above-mentioned manner, why should not the widows of their family be able to carry on worship in a similar way?" And after citing a decision of the High Court, he came to the following conclusion:—"Consequently, there is nothing to prevent the Court from finding that the plaintiff has a right to hold possession of the debuttur properties enumerated by the defendants in the 12th paragraph of their written statement, and to superintend the service of the gods conjointly with the other co-sharers."

Two other questions arose which it is necessary to notice, and two only. The plaintiff claimed, among other properties, a right to a one-fifth share in a talook called Talook Chunder Hatt, which is No. 86 in the particulars of her plaint; and she claimed that, not as debuttur property, but in right of her husband, as her absolute property. The Subordinate Judge found that this property was in fact the property of a certain idol which may be called Sreedhur; and, therefore, he held that she had not maintained the allegation in her plaint. It was, indeed, suggested by her advocate before him that, although she had failed to prove an absolute right in the property, still she was entitled in her right of joint shebait to a share of the property of the idol; but the Subordinate Judge held that as she had not framed her plaint in that way, and had not sued as shebait, she could not recover in that capacity, and, therefore, he decided against her upon that point.

The other question, which is the most important question in the cause, was this:—The defendants contended that other Government papers for a sum of two lakhs and Rs. 15,000 which with the accumulations of interest had become a sum of two lakhs and Rs. 57,000, had been, by an agreement of the whole family then in existence in 1859, devoted to the service of this idol Sreedhur, and, therefore, that the plaintiff could not recover a share of that property, which she sued for, not in her capacity of shebait, but as part of her husband's estate. It was contended on the part of her advocate that the supposed agreement of dedication, even if actually executed, was colorable and collusive, that it was not intended to have effect, and was merely entered into for the purpose of defeating the possible rights of the widows, and keeping the property in the hands of the male members of the family. The Subordinate Judge found in favor of the defendants upon this contention: that the agreement was executed, and was a *bond fide* agreement; and upon the same argument being used which had been used before with respect to the talook, namely, that if the plaintiff was not entitled to any share of this as heiress of her husband, still she was entitled to some share of it as shebait, he made the same reply that she had not sued as shebait, and therefore dismissed her claim to it.

The decree is in these terms:—After giving her certain relief, it says "that she be further competent, by furnishing security against waste, to keep in her own possession a fifth share of the Company's papers for Rs. 14,000, belonging to the estate of Manick Chunder Mundul, and owned by the idol Gopeenath Thakoor, which are now in the hands of the principal defendants: that with the exception of the idol Sreedhur Thakoor, in regard to whose shebaitship the competency or otherwise of the plaintiff has not been determined in this suit, she shall have the power of holding joint possession with the principal defendants of the realties and personalties belonging to the other joint gods of the litigant parties."

Upon this, both parties appealed to the High Court. It is not necessary to notice the appeal of the defendants. That was dismissed with costs, and no question is now raised about it; but it is necessary to notice the main points which were raised by the appeal of the plaintiff. She contended that, in addition to the relief which she had obtained in the Court below, she was entitled to a share of this talook which had been mentioned, and also to a share of the Government papers for two lakhs and Rs. 57,000, either beneficially or as shebait. The High Court upon the first issue, namely, as to her share of the talook, decided

in her favor that she was entitled to claim one-fifth as shebait, and they observed that, although perhaps by a strict construction of the declaration, she might be held not to have expressed her claim to it properly, nevertheless, this was an objection rather of form than of substance, and that looking to the whole case, and considering that the evidence of both parties was gone into, they thought the justice of the case required that they should give her this relief.

Their Lordships are of opinion that the High Court was right in treating the objection which had been made to the reception of this claim by the Subordinate Judge as an objection rather of form than of substance, and in giving her the relief which she prayed for.

Then comes the question, and the more important question, as to her right to a share of the large sum of rupees, being Government paper, which the defendants allege had been appropriated irrevocably by the family to the service of the idol Sreedhur by a memorandum of agreement of the 9th February 1859. Upon that question the High Court, after intimating that there was no estoppel on the part of the plaintiff, as there would have been none on the part of her husband from setting up that the agreement of appropriation on the part of the family was fraudulent and collusive, a point on which it is not necessary now to enter, came to the conclusion that the agreement was collusive. They do not appear to have doubted that such an agreement was executed upon the day it bears date, but they treat it as invalid, and their reasons are to this effect:—They observe that in the memorandum of agreement, “no person is named whose duty it would be to see that the income from the notes was applied for the purposes mentioned, nor any provision for its being applied, and further, that upon the defendants’ own showing it was not applied, but was allowed to accumulate, and was invested in the purchase of other notes.” Then “that the notes have not been produced.” Then that Hurry Mohun, the late husband of the plaintiff, had pledged some of these notes at the Bank of Bengal; then, further, that there were no attesting witnesses to the memorandum, although they do not lay much stress upon that; and then they proceed to observe:—“The real aspect of the transaction appears to us to be that the parties, not wishing at that time to divide the whole of the Government notes amongst them, or, possibly, in order to prevent a widow from taking any part of it, and to preserve it for the male members of the family, resorted to this contrivance to keep a portion as a joint fund to accumulate, and be afterwards used or divided as they might have occasion.”

Their Lordships are unable to concur in this finding of the High Court. The document is conclusively established, at all events, as far as its execution is concerned, about which there never appears to have been any serious dispute. Two of the defendants, Radha Mohun Mundul and Issur Chunder Mundul, give evidence, and very distinct evidence, upon this point, and that evidence is confirmed by other witnesses. The occasion which is said to have given rise to it appears a legitimate one, and one not unlikely to suggest the execution of such a document. It is said that one of the brothers, Chundernarin, being in an ailing condition, and probably not expecting to live long, desired that a division should be made of the family property, as far as it consisted of Company’s paper, and was divisible; whereupon a memorandum of agreement was entered into, which is to this effect:—That the heads of the family then existing, being the five brothers, and Bhuggobutty Dossee, the widow of Uddoito, a deceased brother, agree to set apart certain promissory notes of the value of two lakhs and Rs. 15,000 for the daily service of a certain idol called Sreedhur, and other religious objects connected with such service, and to divide the residue among them, in shares amounting to Rs. 45,000 for each. They take each the share of Rs. 45,000, and they all sign the agreement. There is abundant evidence of this document being subsequently acted upon. It appears that about three years after the document was executed, Nistareenee Dossee, the widow of Romanath, the son of Uddoito,

one of the brothers, brought an action against the brothers who were then alive to recover her share as a widow, whereupon the defendants, including Hurry Mohun himself, the husband of the present plaintiff, set up this agreement. It does not appear that the plaintiff in that suit disputed it; and finally she accepted a compromise upon the terms of that agreement, she retaining what she would be entitled to receive on the supposition that it was valid, namely, altogether Rs. 45,000 of which 20,000 had been previously paid to her mother-in-law Bhuggobutty Dossee, who, as has been observed, was a party to the agreement. But, further, in addition to the evidence of the defendants themselves, there is that of gomastahs and others that this agreement was acted upon, that a temple was erected to the idol at a considerable cost, though the precise cost can scarcely be determined without going through a number of accounts, and that that temple took several years in erection. A number of accounts are put in, which, no doubt, may be open to an observation made by the High Court that specific entries in them were not sufficiently called attention to in the Court below, but which nevertheless cannot be disregarded; and unless these accounts are wholly fabricated, which their Lordships see no reason whatever to suppose, they do show beyond all doubt that the agreement was acted upon to a great extent for many years, and that a great deal of money was spent upon the purposes contemplated by it. With regard to the observation of the High Court that the interest was not applied to the purposes indicated by the agreement, but was allowed to accumulate, and was invested in the purchase of other notes, it must be borne in mind that the amount accumulated, some Rs. 42,000, would by no means be the whole interest of those notes, and that such an accumulation would not be at all inconsistent with the agreement having been acted upon, and a considerable portion of the income having been applied to the purposes stated in it.

On the whole, it appears to their Lordships that this agreement is substantiated by very strong evidence. It is shown to have been acted upon by all the parties; and their Lordships do not think themselves justified in putting it aside and declaring it to be a colorable transaction having no validity, merely upon the suggestion—for it amounts to no more—that the amount set aside was an exorbitant amount, and that there might possibly have been some intention to defraud widows or some other persons. It is not upon mere speculations of this sort that an agreement proved by evidence so strong to have been not merely executed, but acted upon for a number of years, can in their Lordships' judgment be properly set aside.

This agreement being, in their Lordships' opinion, established, the question still remains whether the plaintiff is not entitled to her share of this property as joint shebait of debuttur property appropriated to the service of this idol; and this question appears to their Lordships to depend very much on the same considerations as those which have induced them to uphold the judgment of the High Court with respect to her share of a talook which was purchased for the same idol, and, as far as it appears, by the same fund. It may be here observed that, although there is evidence of some parol agreement (one of the witnesses putting it as an agreement before the execution of this memorandum of February 1859) that the head of the family, the eldest brother, should be the sole shebait, nevertheless that evidence appears to their Lordships to be inconsistent with the documents. The document itself, of February 1859, contains no mention or suggestion of there being any one shebait to the exclusion of the rest. On the contrary, it would appear from it that all parties were equally entitled to be shebait of the idol. But, further, the accounts which have been put in by the defendants show by their heading that such was the intention; for, so far from stating that any one member of the family is entitled to retain all the property and to see to its application himself, the heading of the accounts treats all the members of the family, including widows of deceased brothers, as joint shebait.

Under these circumstances, it appears to their Lordships that the plaintiff, although she has failed to establish the title which she relied upon to the two lakhs and Rs. 57,000, is nevertheless entitled to a share of it as joint shebait; and therefore their Lordships will humbly recommend Her Majesty to reverse so much of the decree of the High Court as declares the plaintiff's right to a fifth share of the two lakhs and Rs. 57,000, and the interest thereon, and as directs that one-fifth share and interest be delivered over and paid to her, and as condemns the defendants in the payment of the costs of that appeal; and, in lieu thereof, to declare that the plaintiff is entitled as joint shebait to a fifth share of the Government notes for two lakhs and Rs. 57,000 and is competent by furnishing security against waste to keep in her own possession the said fifth share and to hold the same, subject to the trusts for the worship of the idol Sreedhur, and by ordering that each party should bear his own costs of that appeal, that is, the appeal to the High Court; and their Lordships think that there should be no costs of this appeal.

The 27th February 1875.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Account Books—Evidence—Onus Probandi—Proof of Signatures.

*On Appeal from the High Court at Calcutta.**

Baboo Gunga Persad and another

versus

Baboo Inderjit Singh and another.

Where the fact of payments by a banking firm is distinctly put in issue, the books of the firm being at most corroborative evidence, the mere general statement of the banker to the effect that his books were correctly kept is not sufficient to discharge the burden of proof that lies upon him; particularly if he has the means of producing much better evidence.

In a suit to recover moneys unaccounted for, where defendants plead payments endorsed on documents, and the endorsements purport to have been signed by the plaintiffs, the formal and regular method of proof is to call on the plaintiffs to admit or deny their signatures, and then to call upon witnesses to state whether they saw the plaintiffs sign or could speak to the handwriting or generally what took place.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Appellants.

The appellants in this case are bankers in the district of Monghyr, and the respondents, who were the plaintiffs in the action, are zemindars resident in that district. They appear to have been in embarrassed circumstances, many decrees having been recovered against them. In this state of things they borrowed, as is admitted, from the respondents, Rs. 29,000 upon a zurpeshgi lease, the effect of which may shortly be stated to be that it was a lease for fifteen years at a rent calculated to cover the interest on the Rs. 29,000 at 9 per cent., and also the Government revenue payable on the property leased, the lessees and mortgagees undertaking to keep down the Government revenue, and to pay themselves such interest, and being at liberty to make what further profits they could out of the zurpeshgi, or farming lease. At the end of the fifteen years the principal sum was to be paid down in a lump sum and the property redeemed. That was the mortgage transaction. It is, however, admitted that it was further arranged

* From the judgment of Phear and Morris, JJ., dated 16th July 1873.

between the parties that this sum of Rs. 29,000 should not be paid by the mortgagees, the bankers, into the hands of the mortgagors, but should be transferred to their account in the books of the former, to be applied, as occasion should require, in satisfaction of their judgment and other debts. The result of that arrangement was to make the bankers accounting parties to the plaintiffs for Rs. 29,000.

It was, however, alleged by the plaintiffs, though the transaction is denied by the defendants, that the Rs. 29,000 proving insufficient to pay all the debts that were to be paid, one of the plaintiffs, Bidyanund Singh, borrowed from his father-in-law a further sum of Rs. 3,157-8, and paid it into the bank, the bankers giving a deposit note in the name of the father-in-law, but treating the money as the money of the plaintiffs, or, at all events, of Bidyanund Singh. The effect of this transaction, if it did take place, was of course to increase the sum for which the bankers were accountable by the amount of the further deposit.

That being the position of the parties, the plaintiffs brought their suit, in which they claimed upwards of Rs. 10,000 as unaccounted for. They gave credit for admitted payments on their account to the amount of upwards of Rs. 22,000, and claimed the difference between that sum and the original Rs. 29,000, *plus* the Rs. 3,157-8, with interest. Therefore, as Mr. Justice Phear has observed, it lay upon the plaintiffs to prove the payment of the additional sum of Rs. 3,157-8; and it lay upon the defendants to disprove that payment, if the other side succeeded in establishing a *prima facie* case against them; and in any case to account for so much of the Rs. 29,000 as the plaintiffs did not admit to have been paid.

In the Court below the Subordinate Judge seems to have considered that the plaintiffs' case was wholly false, and the defendants' case wholly true, and to have dismissed the suit. It went on appeal to the High Court; and the learned Judges there considered it to have been very unsatisfactorily tried in the Lower Court. They doubted whether it would not be proper, in the circumstances of the case, to remand it for re-trial; but ultimately came to the opinion that after making one small allowance in favor of the defendants, they ought to give the plaintiffs a decree for the amount claimed. It is against that decree that the present appeal has been brought, which has imposed upon this Board functions which it is not often called upon to exercise—namely, those of settling the items of a disputed account.

Their Lordships are disposed to concur generally with the High Court in the conclusion to which they came, that the case was unsatisfactorily tried by the Subordinate Judge, and that his decree cannot stand. The evidence which he seems to have considered sufficient to prove the payments which the defendants were bound to prove, consisted of the mercantile books of the banking firm and of a general statement by the defendant Gunga Persad that the items in those books were correct. Their Lordships are of opinion that the books being, as is admitted, at most corroborative evidence, the mere general statement of the banker, where the fact of the payments was distinctly put in issue, to the effect that his books were correctly kept, was not sufficient to satisfy the burden of proof that lay upon him, particularly as with respect to many of the disputed items he had the means of producing much better evidence.

Again, the documentary evidence on which the defendants' case principally rested consisted of the two amanutnamas at pp. 40 and 45 of the Record, and the endorsements of payments thereon, which purported to have been signed by the plaintiffs; because these, if really signed by them, were proof of settled accounts comprehending most of the disputed payments. In this country, or in any country where the administration of justice is conducted with any degree of formality and regularity, one would have expected to find that these documents had been put into the hands of the plaintiffs; and that they had been called upon

to admit or deny their alleged signatures, and that the proof of these documents to be given by the defendants would have been far more specific than a mere statement that they were identified and verified, as the Judge says, by the witnesses; the witnesses would have been called upon to state whether they saw Bidyanund Singh sign the first, or Bidyanund Singh and Inderjit sign the second, or, if not, whether they could speak to the handwriting, and generally what took place on the two occasions on which the accounts are vaguely said by one of the witnesses to have been adjusted. Those amanutnamas, it may be remarked, were important, not merely by way of admissions of the actual sums that were therein stated by the endorsements to have been paid, but also as admissions of the liability for the rent and of the transfers of a balance of account into the joint names of Addyanund and Hunsraj, and of another and subsequent balance into the separate names of Addyanund and Hunsraj, transactions which do not on the face of them appear to be in the ordinary course of business, and therefore required explanation. No such explanation has, however, been given by the witnesses or has been supplied by any document showing that those transfers were made by the authority or at the desire of the plaintiffs. The importance of proving that the last of those transfers was so made is very great, because such evidence would have gone far to show that the admitted amanutnama, that for the Rs. 3,157, which was given by the firm to Hunsraj, was really given in consequence of a direction that the existing balance of the Rs. 29,000 should be so transferred, and not, as the plaintiffs contend, as a deposit receipt for the additional sum which had been paid in.

Their Lordships, therefore, are clearly of opinion that even if they dissent from the judgment of the High Court, they are not in a condition to affirm the judgment of the Subordinate Judge which dismissed the plaintiffs' suit.

On the other hand, their Lordships feel that in some respects the judgment of the High Court has gone too far, and contains here and there a passage which evinces some misconception of what took place in the Court below. For instance, at page 74, the learned Judge, who delivered that judgment, says, that neither Gunga Persad nor the gomashas "say a single word about the receipt of Rs. 3,157-8, which Bidyanund Singh swears that he paid into the kotli. Gunga Persad does not say that that was not received." The record, however, shows that Gunga Persad in his evidence did state that neither Hunsraj nor Bidyanund had paid him money in cash, evidently meaning thereby to deny the transaction in question. Then, again, the learned Judges, in dealing with a circumstance that can hardly have failed to strike them as it has struck their Lordships, namely, the probability that the bankers would in the ordinary course of business have given an amanutnama for the original deposit of Rs. 29,000, say that the necessity for such a document was obviated by the zurpeshgi itself, "which contains express mention of all the particulars relative to the deposit of the Rs. 29,000, and the duty of the defendants in regard to its application." Their Lordships, however, on examining that instrument, cannot find that it contains anything of this kind. It says:—"We have taken the same into our possession for the purpose of paying off debts due to mahajuns." But if the document be examined, it will be found that the pronoun "we" imports the plaintiffs, not the defendants; and consequently that the whole passage expresses the receipt of the mortgage-money by the mortgagors, and not the real transaction between the parties, namely, that the money should be carried to the account of the plaintiffs in the mahajuns' books.

It is further to be observed that the learned Judges appear to have been struck with the fact that, if the Subordinate Judge had acted more in accordance with the rules of evidence, and had not given an undue credit to the books, and the general statement of their correctness, he would have gone much more carefully into the trial of the issues before him, and to have thought at one time that his miscarriage in the conduct of the enquiry might be a sufficient reason for

sending the case down to be re-tried. They came, however, ultimately to the conclusion that it would not be right to send the case back to a re-trial, because the defendants had failed to make out so good a case as they might have done.

Their Lordships fully recognise the force of the consideration, which ultimately prevailed with the Judges of the High Court. They admit that a re-trial ought not to be directed solely to enable a party to mend his case, and that to do so in India would be especially objectionable. Nevertheless, considering in this particular case the doubt that exists as to what really took place in the Sub-ordinate Judge's Court, and as to what is implied in his statement that the documents of which he speaks were identified and verified by the witnesses; considering also how much the conduct of a trial in India depends on the Judge, and that the defendants may have been misled by his giving undue weight to the books, and to what was said concerning the entries in the books, and so prevented from going more fully into their case; and further, considering that in this case the question is not merely one of money but one of character, and that the evidence on this record fails to establish satisfactorily on which side the truth lies, their Lordships are disposed, if the defendants should be so advised, to send back the case for re-trial; but they think that it would be unjust to do so, except upon putting the defendants, who ought to have seen that their case was conducted better, upon the terms of paying the costs of the litigation so far. If they are willing to accept those terms, then their Lordships would be prepared to recommend Her Majesty that the case should be remanded. Their Lordships desire to observe that if it should go back, the case should be tried much more strictly both with reference to the genuineness of the signatures of the endorsements on the two amanutnamas, and with reference to particular payments. It is only necessary to instance one of the latter, namely, that which is said to have been made in satisfaction of the judgment-debt of Ram Churn Singh, as to which the case of either side, if true, might have been far better proved. It will be for the appellants to consider whether they accept these terms, or whether they are content to leave matters as they are. If they do not accept them, their Lordships will have no other alternative but that of recommending Her Majesty to dismiss the appeal, with costs.

The appellants, having considered the terms proposed to them by their Lordships, intimated by their Counsel that they accepted the same; and their Lordships, therefore, agreed humbly to report to Her Majesty that the case ought to be remanded to the High Court, with directions, upon payment by the appellants, within six months after the date of Her Majesty's order on this report, of the costs incurred by the respondents in the two Indian Courts except the stamp on the plaint (so far as the same remain unpaid), and also of the costs (if any) of the respondents incurred on this appeal (the amount thereof to be certified by the Registrar), to remit the said case back to the Zillah Court for re-trial; and with a declaration that in default of such payment within the said six months, the decree of the High Court do stand affirmed; and that the costs of this appeal be paid by the appellants.

The 2nd March 1875.

Present :

Sir James W. Colville, Sir Montague Smith, and Sir Robert P. Collier.

*On Appeal from the High Court at Calcutta.**

* From the judgment of Couch, *C.J.*, and Phear and Ainslie, *JJ.*, dated 21st March 1873;—19 W. R. 351.

Ram Tuhul Sing
versus
 Biseswar Lall Sahoo and another.

Mr. Leith, Q.C., and Mr. Macnaghten for Appellant.
. No one for Respondents.

An estate was sold for arrears of revenue, under Act XL of 1859, and after the necessary deductions, the surplus proceeds remained in deposit with the Collector. Of these upwards of Rs. 35,000 was the share of appellant, one of the shareholders, who instituted a suit to set aside the revenue sale, and after some litigation proved successful. An appeal from the decree having been dismissed by the Privy Council on 18th December 1873, the sale was conclusively set aside.

Meantime, one S. P. S., a judgment creditor, attached the appellant's interest in the surplus proceeds, and sold it in execution for Rs. 8,000 to one J. P., agent for respondents. The Rs. 8,000 was drawn out from the Court, and applied in satisfaction of decrees held by S. P. S. and others. Subsequently, respondents applied to the Collector for payment to them, as purchasers under the execution sale, of the appellant's assumed interest in the surplus proceeds of the revenue sale. But as the revenue sale had been set aside, the Collector refused the application. Upon which the respondents sued the appellant, the heir of S. P. S., and the other judgment-creditors, for the Rs. 8,000 with interest. The High Court on appeal gave them a decree against the appellant.

HELD, that respondents had established no title to recover the sum sued for from appellant.

HELD, that the doctrine of Courts of equity that a plaintiff who comes to be relieved from his own act must submit to the equitable conditions which the Court may see fit to impose, was inapplicable to the case of the appellant, who was not seeking the aid of the Court, but was himself sued for money paid under no contract or consent of his, but under proceedings taken *in iudicio*.

HELD, that respondents bought the appellant's interest in the surplus proceeds subject to the contingency of his succeeding in his suit to set aside the revenue sale, in which event that interest would be *nil*. There is no general equity existing between the parties upon which appellant ought to be compelled to restore to the respondents their original position, because the event on which they speculated was gone against them.

Sir James Colville delivered the following judgment:—

The point raised by this appeal is one of novelty, and of some nicety. The facts out of which it arises are undisputed.

The appellant is one of the registered shareholders of a certain estate which on February 16th 1867 was sold for arrears of Government revenue, under the last Sale Law, Act XL of 1859. The sale was confirmed by the Revenue Commissioners on the 14th of the following June; and, after deducting the arrears of Government revenue and sale expenses, the sum of Rs. 139,692:2:5 remained as surplus proceeds in deposit in the hands of the Collector. The share of the appellant in such surplus proceeds, if the sale had stood, would have been upwards of Rs. 35,500. On the 24th February 1868, however, the appellant, suing *in forma pauperis*, instituted a suit for the purpose of setting aside the revenue sale, on the ground of the non-observance of one of the formalities prescribed by the Act. The suit was dismissed by the Subordinate Judge; but, on appeal, the High Court, by an order dated 3rd May 1870, reversed his judgment and remanded the cause for the trial of an issue which he had left untried; and on its coming back to them with the finding on that issue, made a final decree in the appellant's favor, on the 31st January 1871. Against that decree there was an appeal to Her Majesty in Council, which was dismissed, in conformity with the judgment delivered at this Board on the 18th December 1873. The sale, therefore, has been conclusively set aside; the estate restored to the appellant and his co-sharers; and the purchase-money returned to the purchaser.

Before this, however, and on the 25th November 1867, one Sheo Pershad Sookul, a judgment-creditor of the appellant, attached his interest in these surplus proceeds in the Collector's hands, and, on the 23rd December 1867, obtained an order for the sale of that interest in execution. The sale was originally fixed for the 3rd February following, but, on the appellant's application, was postponed for a fortnight, and took place on the 18th February 1868, when the appellant's interest in the surplus proceeds was knocked down for Rs. 8,000 to one Juldhari Panday, who afterwards declared that he bought, as agent for, and on account of,

the respondents. On the 16th March 1868, the appellant filed a petition for the reversal of this sale on two grounds; 1st, that the surplus proceeds had not been ascertained to belong to the petitioner, inasmuch as he had instituted a suit to set aside the revenue sale, which was then pending; and secondly, that the sale had been held in contravention of the 242nd section of the Code of Procedure, which prescribes a different mode of enforcing an execution against money in the hands of a third party, and, consequently, that the sale was irregular. The Principal Sudder Ameen, in whose Court these execution proceedings were pending, by two orders, dated the 18th April 1868, disallowed these objections, and confirmed the sale; the formal certificate was, however, not delivered to the respondents until the 28th August 1868. Of the Rs. 8,000 which had been paid into Court upon the sale, about Rs. 5,318 were drawn out by Sheo Pershad Sookul, and applied in satisfaction of the decrees held by him; and the residue was drawn out by other judgment-creditors of the appellant, and similarly applied by them.

On the 14th August 1871, the respondents petitioned the Collector for payment to them as purchasers under the execution sale of the whole of the appellant's assumed share in the surplus proceeds of the revenue sale, being upwards of Rs. 35,500. The High Court had then made its final decree setting aside the sale; and the Collector therefore refused to part with the fund. Upon that, and on the 4th August 1872, the respondents instituted the present suit for the recovery of Rs. 11,714:10:8, being the Rs. 8,000 with interest, calculated from the date of the payment into Court. It was brought against the appellant, against the heir of Sheo Pershad Sookul, and against the other judgment-creditors of the appellant who had shared in the Rs. 8,000; and the cause of action is thus stated in the plaint: "As the rights of the judgment-debtor, with respect to the surplus sale proceeds of the said mehal, did exist up to the time of the execution sale held in the case of Sheo Pershad Sookul, and as by reason of the revenue sale having already been confirmed, there was no reasonable ground of apprehension with respect to such surplus proceeds; and as the Collector now objects to make over the surplus proceeds on the ground of the revenue sale being set aside; for these reasons, and, moreover, in consideration of the fact that the debts due by the judgment-debtor have been satisfied out of the consideration-money paid by your petitioners, and that the judgment-debtor cannot be permitted to derive two-fold advantages, since he has been benefited by the reversal of the sale of the land, and he has not deposited in Court the amount of the purchase-money paid by your petitioners, the plaintiffs are, under such circumstances, entitled by all means to recover the said purchase-money, with interest. The cause of action has accrued from the 25th August 1871" (the date of the Collector's refusal to pay).

It does not appear very clearly with what object the respondents sued the execution-creditors, whether or not in order to establish an alternative case for relief against them, in case the suit should fail against the appellant. The issues settled however seem to imply that the claim was for recovery of the money against one or other of the defendants.

The Court of first instance dismissed the suit with costs against all the defendants, holding that the plaintiffs had established no title to a refund of the purchase-money paid. But the High Court on appeal reversed this decision, and made a decree for the recovery of the amount claimed from the appellant; dismissing the suit as against the other defendants, but without costs as regarded the representative of Sheo Pershad Singh.

The appeal is against the last decree, and the single question is, whether the plaintiffs (the respondents) have shown that they have any cause of action for the recovery of this money against the appellant.

The appeal has, to their Lordships' great regret, been heard *ex parte*. This circumstance has rendered them the more anxious to give full weight to every reason assigned by the learned Judges of the High Court in support of their

decree, and to every consideration that can be suggested in favor of the absent respondents. But they have, nevertheless, come to the conclusion that the respondents have established no title to recover the sum sued for from the appellant, and that the appeal ought to be allowed.

The learned Chief Justice of Bengal, in the judgment delivered by him, with the concurrence of the two other Judges who sat with him, says :—"I think the rule that ought to be applied in this case, is that which is applied by Courts of equity where sales are set aside on account of fraud, or for other reasons which are held by the Court to vitiate the sale." And he then cites and relies upon a passage in Lord Cottenham's judgment in *Bellamy v. Sabine*, 2 Phill., which he treats as establishing the broad proposition—that where a transaction ought never to have taken place, the rights of the parties are, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction. This observation of Lord Cottenham's was, however, made with reference to a particular objection taken to the granting equitable relief in that somewhat complicated case. The bill in *Bellamy v. Sabine* impeached two transactions: one, by which a needy father, tenant for life, and a needy son, tenant in tail, had, at the instigation of Sabine, a creditor of the father, come to a certain arrangement which involved the barring of the entail; the other, a transaction by which the son had sold and conveyed his remainder in fee, thus acquired, to Sabine. The son died in his father's lifetime, and the suit was brought by another son, who was next in remainder under the entail. Lord Cottenham held that the plaintiff was entitled to sue either in that character, or as heir-at-law of his brother; that the transaction between the father and the elder brother could not be successfully impeached; but that the purchase from the latter by Sabine was fraudulent, and ought to be set aside. And then proceeding to deal with the objection which had been taken, that the personal representative of the elder brother had an interest in supporting that purchase, part of the purchase-money being still unpaid, and that it was contrary to the course of the Court to deal with the conflicting rights of the real and personal representatives, he made the observation relied upon. In fact, he ruled only that an interest derived under the conveyance impeached could not affect the equitable right of the heir-at-law to have that conveyance set aside for fraud. If this principle has any application to the present case, it seems to be against rather than in favor of the respondents. The conveyance was set aside on the terms ordinarily imposed, viz., the repayment by the plaintiff to Sabine of sums actually paid by him.

In their Lordships' opinion, however, the case of *Bellamy v. Sabine*, and the other cases in equity which are cited in the judgment under appeal, are inapplicable to the present, upon the broad ground that they all proceed upon the doctrine of Courts of Equity—that a plaintiff who comes to be relieved from his own act, or the act of one whom he represents, on equitable grounds, must do equity, and submit to those equitable conditions which the Court may see fit to impose on its grant of relief. Here the appellant is not seeking the aid of the Court, but is sued as a defendant, and the money sought to be recovered has not been paid under any contract of his, or in any transaction to which he was a consenting party, but under proceedings taken *in invitum*.

Again their Lordships must observe that a fallacy, occasioned by some confusion in the use of the words "transaction" and "sale," seems to run through the judgment. What is the transaction or sale which has been set aside? It is not the execution sale under which the Rs. 8,000 were paid, but the statutory revenue sale. A good deal, no doubt, has been said in the judgment of the Court of First Instance, and something has been said here at the bar, of the irregularity of the execution sale, and of the miscarriage of the Principal Sudder Ameen in putting up the appellant's possible interest in the surplus proceeds for sale,

instead of proceeding under s. 242 of the Code of Procedure. And their Lordships think it is much to be regretted that that officer did not proceed under the wholesome provision which was designed in such cases to remedy a mischief of frequent occurrence in India—the ruinous sacrifice of property which an execution sale is apt to involve. But they must observe that since the objections of the appellant were overruled, no attempt has been made to question the regularity or legal effect of that sale; that the respondents held to it as long as there was a hope of their getting anything by it; that their present suit is not framed with the object of setting it aside, or of being relieved from it; and consequently that any judgment declaring its invalidity, or treating it as a nullity, would be extra-judicial.

The learned Chief Justice no doubt seeks to meet the objection just taken by saying that the appellant ought to have made the respondents parties to the suit for setting aside the revenue sale, and holds that the Court ought to give them in this suit the relief which he assumes they would, if they had been made parties to it, have obtained in the other suit, by way of condition on the relief then granted. Their Lordships, however, fail to see that there was any obligation on the appellant to make the respondents parties to that suit, and have some doubt whether this question could have been litigated in a suit, the only object of which was to determine whether a statutory sale was to stand good, or was to be set aside upon the terms prescribed by the Statute. And in any case it would seem that the respondents, if they conceived that they had an interest entitling them to defend that suit, of which they had full notice, might have applied to be made parties to it under s. 73 of the Code of Procedure.

Upon the whole, then, their Lordships are of opinion that the course and practice of the Court of Chancery in setting aside transactions on account of fraud, or other recognized ground for equitable relief, afford no support to the decree under appeal.

Upon what ground, then, can the respondents be said to have a substantive cause of action for the recovery of this money from the appellant?

What was the real nature of their purchase at the execution sale? What did they buy? They bought the appellant's interest in the surplus proceeds, subject to the contingency of his succeeding in his suit to set aside the revenue sale, in which event that interest would become *nil*. They did this with their eyes open, since, at least before the sale was confirmed, they had notice that his suit had been commenced. There was no warranty or contract on his part. The sale was had under proceedings *in invitum*, and indeed against his express protest. The parties were at arm's length. The appellant was free to prosecute his suit; the respondents free to enforce their rights, should he fail, to the uttermost farthing. What they bought, then, was the chance of getting Rs. 35,500 for Rs. 8,000, dependent on the happening or non-happening of a certain event. And a substantial chance it must be taken to have been, since the construction of the clause in the Sale Law, on which the right to annul the sale depended, was doubtful, and the Court of First Instance determined the question against the appellant. If that judgment had stood, he would have lost his land; and the respondents would have taken from him all its proceeds, except the Rs. 8,000 applied in satisfaction of his debts. It is difficult to see upon what general equity existing between parties thus situated the appellant ought to be compelled to restore the respondents to their original position, because the event on which they speculated has ultimately gone against them.

Then it is said that if the respondents fail in the present suit, the appellant will not only keep the estate in which he has recovered, but will get debts to the amount of Rs. 8,000, for which his property was liable to be attached and sold, paid with the plaintiff's money.

But even if this were true, it is not in every case in which a man has

benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt. Still less will the action lie when the money has been paid, as here, against the will of the party for whose use it is supposed to have been paid (*Stokes v. Lewis*, 1 Term Reports, 20). Nor can the case of A be better because he made the payment not *ex mero motu*, but in the course of a transaction which, in one event, would have turned out highly profitable to himself and extremely detrimental to the person whose debts the money went to pay.

Their Lordships can find no ground on which the legal liability of the appellant can satisfactorily be rested. The case seems to them to fall within the principle of that reported in the 4 Bengal Law Reports, Full Bench Ruling, page 11.* The fact that in this case the worthlessness of the subject purchased was a consequence of the success of the judgment-debtor in his own suit, and not of a recovery by a third party under a superior title, does not appear to them in the circumstances of this case to afford a distinction which ought to prevent the application of that principle.

Their Lordships, for obvious reasons, express no opinion whether the respondents could have had any remedy against the execution creditors by a suit for setting aside the execution sale or otherwise; whether in such a case the right of the judgment creditors would not have been revived against the appellant; or whether, if such a remedy ever existed, the plaintiffs have lost it by the dismissal of this suit against those creditors. These and other questions were suggested in the course of the argument, but in determining this appeal it is unnecessary, and, indeed, would be improper to decide them.

Their Lordships will humbly advise Her Majesty to allow this appeal, and to direct that the decree of the High Court be varied by omitting so much thereof as orders and decrees "that the plaintiffs do recover from the first defendant the sum of Rs. 11,714: 10: 8, the principal and interest of money which they had paid upon a sale to them of the rights and interest of Ram Tuhul Singh in the surplus sale proceeds of a Talook Muleck Alypore Buzoorg, which had been sold for arrears of Government revenue, and purchased by the plaintiffs on the 18th February 1868;" and as orders and decrees "that Ram Tuhul Singh, defendant, respondent, do pay to the plaintiffs, appellants, the sum of Rs. 470: 10: 2;" and as orders and decrees "that the said first defendant do pay to the plaintiffs the costs incurred by them in the Lower Court;" and by ordering and decreeing in lieu thereof that the suit of the plaintiffs do stand dismissed as against the defendant, Ram Tuhul Singh, and that the plaintiffs do pay the costs incurred by the said defendant both in the Lower and in the High Court.

Their Lordships are disposed to recommend an order in the above form, because they do not wish to interfere with the discretion exercised by the High Court in refusing to give his costs of the suit to the defendant Byjnath Sookul. The appellant must also have the costs of this appeal.

* *Sowdamini Chowdrain and others v. Krisna Kishore Podar*, 12 W. R. (F. B. R.), p. 8.

The 10th March 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, and Sir Montague E. Smith.

Settlement Officer (Powers of)—Proprietary Rights of Government.

On Appeal from the High Court at Allahabad.

Poorun Singh and others

versus

The Government of India.

An officer who is appointed to consider and revise the revenue assessed upon certain estates, has no power to convey away the proprietary rights of the Government in those estates.

Mr. J. D. Bell for Appellants.

Mr. Cowie, Q.C., and Mr. Bigland Wood for Respondent.

Sir Barnes Peacock delivered judgment as follows:—

This suit was brought by the plaintiffs to have it declared that they are possessed of, and absolutely entitled to, the full proprietary rights in Mouzah Dharaotee Pergunnah Koonch, Zillah Jaloun. There is no dispute in this case as to the facts, and it appears that the plaintiffs who are now the appellants were originally the proprietors of the Mouzah. They had acquired it by purchase at a sale for arrears of revenue. The revenue assessment was admittedly very high, and the plaintiffs being unable to pay that revenue parted with their estate. Subsequently, in consequence of two sales for arrears of revenue, the proprietary rights became vested in Government by reason of their purchase at the last sale for arrears of revenue. The question then is, whether the Government has ever parted with those proprietary rights to the plaintiffs, entitling them to maintain the suit to have it declared that they are now entitled to the proprietary rights in the estate? It is contended that the proprietary rights were parted with by the Government, and substantially re-granted to the plaintiffs by the revenue settlement which was entered into with them in the year 1860. At that time there was a 30 years settlement of the pergunnah which would expire in the year 1871, but the revenue assessed upon the different estates in the pergunnah was so high that it was determined they should be revised and lowered in those cases in which it should be found necessary. The officer who was first appointed to consider the amount of assessments was told that his primary duty was merely a fiscal one; that he had no judicial power to exercise, and consequently it is clear that he had no power to convey away the proprietary rights of the Government.

It is contended that two letters, one of the 30th April 1860, which is set out at page 2 of the Supplementary Record, and the other of the 14th June 1860, which is set out at page 34 of the Original Record, amount to a sanction on the part of the Government to the re-grant to the plaintiffs of their proprietary rights. The Commissioner in his judgment, at page 50, has commented upon these letters. He says:—"The first plea I pronounce untenable. In it the appellants, though necessarily acknowledging the absolute property of Government in the village in suit at the time of the revision of settlement, assert or apparently intend to assert that Government by its letters No. 359, dated 30th April 1860, and No. 615, dated 14th June 1860, sanctioned the settlement with them as proprietors. This was clearly not the case. After a careful perusal of these letters I am unable to perceive a single sentence or portion of a sentence which supports the plea. The letters are clear and simple. There is no possibility of misunderstanding their drift and meaning. The first, No. 359, sanctions the proposed reduction of jumma in Pergunnah Koonch, and does nothing more. The second, No. 615, merely

sanctions the reduced jummas in the other pergunnahs of Jaloun district." Their Lordships, having carefully considered those letters, entirely concur with the Commissioner in the view which he has taken of them. The Commissioner decided against the plaintiff who appealed to the High Court. The only ground of appeal is this, namely,—“The decision of the Lower Court is bad, because it is clear that even if Government did not in so many words hand over the property to appellants, yet it clearly and distinctly sanctioned the acts of its officers who did so, and who, not once but in many instances, deliberately and distinctly recognized the appellants as absolute proprietors of the property in dispute.” The learned Judges of the High Court went fully into the matter and have given their reasons in detail. Their Lordships concur in those reasons, and consider that the High Court was right in confirming the view which had been taken of the case by the Commissioner.

Under these circumstances their Lordships will humbly recommend Her Majesty that the decree of the High Court be affirmed, and that this appeal be dismissed, with costs.

The High Court have made some remarks with regard to the hardships of the case. Their Lordships have no power to deal with them, but certainly it does appear rather hard that after the plaintiff had had the settlement made with him an alteration should be made at the expiration of that settlement, and that the recommendation of the Commissioner should be carried out, namely, to settle half with Ram Dyal, and to sell the other half of the estate.

Mr. Cowie. Those observations, my Lords, will be conveyed to the Government.

The 11th March 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, and Sir Montague E. Smith.

Hindoo Law—Inheritance—Cognates (Bundhoo), Sapindas, etc.—Appointment of a Daughter to raise a Son.

*On Appeal from the High Court at Calcutta.**

Thakoor Jeebnath Singh

versus

The Court of Wards and others.

A bundhoo or cognate only cannot inherit as long as there is a sapinda or samanodaka in existence.

Quære.—Is the old rule of Hindoo law obsolete, or does it still exist, that a daughter may be specially appointed to raise a son, and the son of a daughter so appointed is entitled to succeed in preference to more distant male relatives?

Mr. Leith, Q.C., and Mr. J. D. Bell for Appellant.

Mr. Cowie, Q.C., and Mr. Doyne for Respondent.

Sir Montague Smith gave judgment as follows:—

This was a suit brought by Thakoor Jeebnath Singh against Baboo Brumnarain Singh, represented by the Court of Wards, and the Maharanee Heeranath Koowuree, to recover the possession of the raj of Ramgurh, which is an impartible raj. The principal question raised in the suit turned upon the Hindoo law of inheritance, and was whether the plaintiff Jeebnath Singh, or Baboo Brumnarain

* From the judgment of Couch, C.J., and L. S. Jackson and Glover, JJ., dated 12th July 1873,—14 W. R. 117.

Singh, was entitled to succeed the Rajah Trilokenath, who was the last proprietor, of the raj. Rajah Trilokenath died childless, and, indeed, a minor. The appellant Jeebnath Singh claims as father's sister's son, and no doubt he is a nearer relative, in one sense, to the deceased Rajah than the respondent Brumnarain Singh: going back to the common ancestor, Brumnarain is the great-grandson of that common ancestor.

It was admitted by Mr. Leith in argument that the case which was lately decided by this tribunal, of Bhyah Ram Singh v. Bhyah Ugur Singh, in the 13th Moore, page 371,* was an authority decisively against the appellant's claim. It is immaterial to consider whether Brumnarain was a sapinda or samanodaka, because he was clearly in one of those two classes, and whether in one or the other he was in the line of male descendants from the common ancestor, and the decision referred to is that this line must be exhausted, before bundhoo is resorted to, in order to discover the heir of the last proprietor. Jeebnath Singh is a bundhoo or cognate only, and therefore he cannot take as long as there is either a sapinda or a samanodaka in existence. The case, therefore, to which Mr. Leith referred, in the 13th Moore, has really decided the appeal, so far as that question is concerned, against the appellant, and that case in principle followed two previous cases, one in the 2nd Moore, page 132,† and the other in the 4th Moore, page 292.‡

The other point which Mr. Leith raised was this:—That assuming the appellant, Jeebnath, was not the nearest heir according to the ordinary rules of succession, he was made an heir by the act of Maharajah Sidnath Singh, who, he says, appointed a daughter, Jeebnath's mother, to raise a son to him; and he contends that, by a rule of Hindoo law, a son of a daughter so appointed is entitled to succeed in preference to more distant male relatives. That a rule of law of this nature is to be found amongst old collections of Hindoo law appears to be established by the text to which Mr. Leith referred, but there seems to be an opinion amongst the text-writers that that rule has become obsolete. In Sir Thomas Strange's book, under the head of "Inheritance," he thus speaks of it:—"Daughters.—The right of daughters to succeed in default of sons and widow, is not to be confounded with that of the appointed daughter under the old law; that appointment was one of the many substitutions for the son, and by fiction no longer subsisting regarded as one." Then he says, referring to another custom:—"This is analogous to the law as applicable to the appointed daughter, but that substitution, with others of a more questionable kind, became obsolete." In Sir William Macnaghten's Treatise on Hindoo Law, in the Chapter on "Adoption," he says:—"In former times it was the practice to affiliate daughters in default of male issue, but the practice is now forbidden. The other forms of adoption enumerated by Menu appear to be wholly obsolete in the present age." This appointment of a daughter may not be strictly an adoption, but the text-writers evidently refer to this custom, amongst others, as being obsolete. It is not necessary in this case to decide that this is so, although there certainly does not appear to have arisen in modern times any instance in the Courts where this custom has been considered. But supposing it to exist, inasmuch as it breaks in upon the general rules of succession, whenever an heir claims to succeed by virtue of that rule, he must bring himself very clearly within it.

It is difficult to discover the precise ground on which the plaintiff originally based this claim. The plaintiff certainly does not state enough to bring him within the rules as laid down in Menu and in the Mitakshara. The plaintiff says this:—"Your petitioner's maternal uncle, Maharajah Luchmeenath Singh Bahadoor,

* 14 W. R. P. C. 1; 2 Suth. P. C. R. 330.

† Rutchepetty Dutt Jha, Bholanath Jha, and others, appellants v. Rajunder Narayn Rae and Coower Mohinder Narayn Rae, respondents, 12th February 1839, 2 Suth. P. C. R. 1.

‡ Rany Srimuty Dibeah, appellant, v. Rany Koond Luta, Ram Rung Luta, and others, respondents, 2nd and 3rd December 1847, 7 W. R. (P. C.) 44; 1 Suth. P. C. R. 182.

agreeably to the counsel of his father, Maharajah Sidnath Singh Bahadoor, having given in marriage your petitioner's mother, kept her under his roof declaring and giving her hopes that, if a son be born to her, such son will stand in the relation of son's son to his mother's father, and that, if at any time occasion arise, he will observe the religious rites of *sradh* (obsequies), and keep the estate intact; and accordingly your petitioner, from the day of his birth to the present moment, lived with the deceased Maharajah in common for all the purposes of board, lodging, and worship." Now, in this statement it is not said that the Maharajah Sidnath by any act of his appointed the daughter, nor that the son, her brother, Luchmeenath Singh, did any formal act appointing her to raise a son to his father; the plaint says no more than that the latter gave her hopes that, if a son was born to her, such son would stand in that relation.

Looking at the text, it seems not only that the act of appointment must proceed from the father himself, but apparently should be made by himself, because all the forms of expression which are given are those which it is supposed the father himself would utter. In Menu, the leading passage referred to by Mr. Leith in Chapter 9, Section 127, is:—"He who has no son may appoint his daughter in this manner to raise up a son for him, saying, the male child who shall be born from her in wedlock shall be mine for the purpose of performing my obsequies." The passages in the *Mitakshara* are to the same effect. In ch. 1 s. 11, cl. 3:—"The son of an appointed daughter is equal to him,—that is, equal to the legitimate son. The term signifies son of a daughter. Accordingly, he is equal to the legitimate son, as described by *Vasishtha*:—'This damsel, who has no brother, I will give unto thee decked with ornaments: the son who may be born of her shall be my son.' Or that term may signify a daughter becoming by special appointment a son." The last is not the present case. As their Lordships understand, what is set up is, not that the daughter became a son by appointment, but that she was appointed as a special daughter from whom might proceed a son who should stand in the place of a son's son. "Still she is only similar to a legitimate son, for she derives more from the mother than from the father. Accordingly, she is mentioned by *Vasishtha* as a son, but as third in rank." Then the note to that is:—"The *putrica-putra* is of four descriptions: the first is the daughter appointed to be a son; she is so by a stipulation to that effect. The next is her son. He obtains, of course, the name of son of an appointed daughter, without any special compact. This distinction, however, occurs: he is not in place of a son, but in place of a son's son, and is a daughter's son,"—that is, the son of a daughter who is herself appointed to be in the place of a son. Then there is this:—"The third description of son of an appointed daughter is the child born of a daughter who was given in marriage with an express stipulation in this form. The child which shall be born of her shall be mine for the purpose of performing my obsequies." The attempt is made to bring the appellant within this third description of son of an appointed daughter. A special form of stipulation is given. It is stated that it must be expressed, and Menu also speaks of an express appointment proceeding in the same way from the father himself upon the marriage of the daughter. In this case no appointment was made by the father, and it certainly requires positive law or evidence of a custom from which the law may be presumed, that supposing the rule still to exist that a father may appoint a daughter for this purpose, it is a part of it that he may delegate the appointment to his sons. There is nothing said of that power to delegate being a part of the law, but, on the contrary, the rules as to the manner of appointment given in the old authorities point to the act proceeding personally from the father. The law as to adoption of sons bears an analogy to this, but the usages of that law cannot, without authority, be imported into this mode of appointment. These adoptions must stand upon the authority relating to each. In this case, there was no formal appointment by the

father himself in his lifetime, and no sufficient authority has been cited to establish that what was done afterwards can have the effect of making the son of the daughter, who appears to have been married with the consent of her brother upon the condition that the husband should live in the house, equal for the purposes of succession to the son of a son. But, however the law may be, the evidence of the authority supposed to have been given by Maharajah Sheebnath to his sons, and of the exercise of it by them, is most vague and unsatisfactory. No more appears respecting the supposed exercise of it by the sons, than that when their sister married, a condition was imposed upon the husband that they should live in the Maharajah's (her brother's) house, and the son be brought up as one of his. No ceremonies are proved to have been performed, nor any express form of appointment used. This evidence seems to be wholly insufficient to establish a formal appointment which is to have the serious consequences of altering the line of succession.

On the whole, therefore, their Lordships think that the judgments of the Courts below are correct, and they will humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

The 11th March 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, and Sir Montague E. Smith.

Arbitration Award—Act VIII of 1859 ss. 324 and 325—Appeal—Resignation of Arbitrator.

*On Appeal from the High Court at Calcutta.**

Maharajah Joymungul Singh Bahadoor

versus

Mohun Ram Marwaree.

A suit having been referred by the District Judge to arbitration, the arbitrators made their award, and the Judge passed a decree in conformity therewith. That decree on appeal was set aside for irregularity, the award having been signed by the arbitrators separately and ten days not having been allowed for objections; and the case was remanded with a view to these defects being cured. On remand one of the arbitrators in a letter to the Judge tendered resignation; but was induced to withdraw it. The award was then properly signed and, after objections heard, duly adjudicated upon under Act VIII of 1859 ss. 324 and 325. A decree was then passed:

HELD, that no appeal lay from this decision to the High Court, and *a fortiori* none lay to the Privy Council.

HELD, that the arbitrator, who first tendered and then withdrew his resignation, did not formally divest himself of his character of arbitrator, and was therefore not *functus officio* when he signed the award.

This is an appeal against a judgment of the High Court, dated the 18th January 1871, which dismissed an appeal that had been brought against a judgment of the Zillah Judge of Bhaugulpore, dated the 1st February 1870.

The circumstances out of which this appeal arises are shortly these:—The respondent, who is a mahajun, sued the appellant, who is a person of high rank in the district, for the balance of an account arising out of transactions between them. That suit was first dismissed. There was an appeal by the respondent from that decision to the High Court, and the High Court remanded the case for

* Remand order by Kemp and E. Jackson, *JJ.*, 6th March 1868; second remand order by Norman and E. Jackson, *JJ.*, 14th September 1869,—12 W. R. 397, decided by Norman and Loch, *JJ.*, 18th January 1871.

re-trial to the Zillah Judge with certain directions. Upon its coming back to the Judge, it was suggested by him that all matters in dispute should be referred to arbitration; and that was done by the consent of the parties,—the arbitrators being a European gentleman, formerly the Judge of Bhaugulpore, and a member of the Bengal Civil Service, and a Mahomedan who exercised judicial functions in the district as the Judge of the Small Cause Court. Those gentlemen entered upon the enquiry, and in the course of it certain books of account which had been produced by the plaintiff were, on his application, given back to him. He took them out of the hands of the arbitrators, meaning, as he says, to bring them back; but they were, according to his account of what happened afterwards, taken from him by violence; and in any case they disappeared, and have not since been forthcoming. The arbitrators, however, made their award. It is not necessary to state in detail the form in which it was made. It suffices to say that they did not sign that award, as first made, together. The Mahomedan Judge first expressed his opinion, and after going through the facts stated that in his opinion the balance found by him to be due should be paid by the appellant to the respondent. It then went to Mr. Sandys, the other arbitrator, who seems to have made further enquiry, and to have had some communication on the subject with his co-arbitrator. But the award was on that occasion signed by them separately. It was then filed in the Zillah Court, and the Judge passed a decree in conformity with it. From that decree there was an appeal to the High Court, and the decree was set aside, and properly set aside, by the High Court, apparently on two grounds. The first was that the Judge had proceeded irregularly, inasmuch as he had passed his decree without allowing the parties the ten days for bringing in objections to an award which the Code of Procedure allows them. The other ground on which the learned Judges of the High Court, or at least Mr. Justice Norman, proceeded, was that the award was altogether informal, inasmuch as it had been signed by the arbitrators separately. The result of that proceeding in the High Court was that the judgment appealed against was reversed with costs, and the case sent back to the Zillah Judge,—Mr. Justice Norman observing:—"The Judge will consider whether it would not be proper to send back the papers signed in pursuance of his former suggestion that an award may be duly and regularly signed by the arbitrators in the presence of each other." And in another passage he said:—"We leave it to the Judge, on hearing any objections made by the defendant, or on the application of the plaintiff for that purpose, to remit the award to the arbitrators under the provisions of the 323rd Section, if he thinks that the ends of justice will be served thereby." The other Judge, Mr. Justice Elphinstone Jackson, after expressing a doubt whether there was any informality in the separate signature by the arbitrators, says:—"As, however, my learned colleague is of an opposite opinion, I am ready to concur with him in remanding this case to the Judge, in order that he may take steps to have the award formally signed by the arbitrators at the same time, and not on different dates. I think also that there must be a remand, in order that the appellant may obtain ten days' time after the award is signed within which to prefer any objection he can legally urge against the award."

Now, Mr. Doyme has pressed strongly upon their Lordships that the intention of the Court in making this remand was that the case should go back again to the arbitrators for reconsideration and readjudication before it came at all before the Judge in the shape of an award, and that it was an essential part of that proceeding that the missing books should be produced and considered by the arbitrators, or that, if they could not be produced, their loss should be in some manner enquired into and accounted for. But their Lordships do not take that view of the order of remand. It seems to them clear, upon the face of the judgments of the learned Judges, that their intention was that the case should go back to the Judge; that he should in the first instance have the award put into

a formal shape by getting it signed by both the arbitrators together; that when so signed it should be regularly filed; that the parties should have ten days within which to take their objections, whether founded on the abstraction of the books, or any other legal ground, to the validity of the award; and that the Judge should then proceed to adjudicate upon those objections. He himself seems to have taken that view of his duty, and he accordingly proposed to have the award signed by both the arbitrators in his presence. Then arose a new difficulty. Mr. Sandys, taking exception to some things that had been done, wrote a letter to the Judge, in which, after stating these objections, he says:—"Under the circumstances above detailed, I feel that I cannot with any seemly propriety continue to act any longer in this arbitration; and in the perplexity this gives rise to, I can discover no other alternative to be left me than herewith to submit my resignation." The Judge was very unwilling to accept that resignation, and induced Mr. Sandys to withdraw it. The result was that Mr. Sandys and the Mahomedan gentleman came before the Judge; they signed the award; the award was then regularly placed upon the file of the Court, and formal objections were brought in by the appellant. One of these objections, the 5th, was that the act of the Moulvie (the Mahomedan arbitrator) in allowing the plaintiff to take away his books was an irregular and illegal proceeding, and amounted to such misconduct as would vitiate the award. The Judge adjudicated upon those objections, under ss. 324 and 325 of the Code of Procedure, and overruled them. He then made a decree in conformity with the award, going neither beyond it, nor altering it in any way. Upon that there was a final appeal to the High Court, which resulted in the judgment now under appeal.

Their Lordships entirely concur with the first point taken by the learned Judges of the High Court, namely, that the appeal was an appeal against the judgment passed in pursuance of an award made by the arbitrators; and that the judgment, being in accordance with the award, was, under s. 325 of the Code of Procedure, final. If this were so, it follows that no appeal lay against that decision of the Judge to the Court; and, *à fortiori*, that this appeal from the judgment of the High Court cannot be maintained. Their Lordships have already dealt with the objection raised by Mr. Doyne, to the effect that the award was not in fact an award within the meaning of the Code of Procedure, inasmuch as it had not been made pursuant to the instructions with which the case was remanded; and that the arbitrators ought again to have considered the questions referred to them with the books, if they could get them, or to have pursued the enquiry concerning the books. Therefore, it is not necessary to say more upon that point.

It was, however, further objected that the award was informal, and not properly the subject of a final adjudication by the Judge, because Mr. Sandys, at the time when he signed it, was *functus officio*. But their Lordships, looking to the mode in which he merely tendered his resignation to the Judge in a letter addressed to him, and afterwards withdrew it at the request of the Judge, are of opinion that he never formally divested himself of his character of arbitrator; and concur with the High Court in thinking that the award was a formal award; that there has been an adjudication as to its validity, and that that adjudication is final.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

The 18th March 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Practice (Privy Council)—Leave to Appeal—Ultra Vires—Special Leave to
Appeal nunc pro tunc—Mortgage—Compromise—Withdrawal of Deposit.*

On Appeal from the Court of the Judicial Commissioner of Oudh.

Gajadhur Pershad

versus

The Two Widows of Emam Ali Beg and others.

Though the objection to an appeal that it is without proper authority because the leave to appeal is *ultra vires*, should be taken at an early period, yet it is competent to the Privy Council to hear it at any stage of the appeal, and it has not been unusual to entertain it when the appeal is called in and before the argument upon the merits has been commenced.

Though there have been cases where, upon the appeal being called on and the objection discussed, the Privy Council has given special leave to appeal *nunc pro tunc*, such special leave was refused in this case, where one of the questions was that the proper amount was not paid into Court under a compromise, the alleged deficiency appearing to have been of a small sum of Rs. 7; and where the other and substantial ground was that, in a suit for foreclosure of mortgage, before a decree was finally obtained, a compromise was entered between the mortgagor and mortgagee, in pursuance of which the mortgagor paid into Court a sum of money which the mortgagee refused to accept, and which the Court thereupon irregularly directed to be repaid to the mortgagor without notice, the Privy Council being of opinion that the mortgagee's rights arising from the withdrawal of the money out of deposit might be ascertained more satisfactorily in some other proceedings than by that tribunal under the irregular appeal which had been sent up.

Mr. Leith, Q.C., and Mr. J. H. W. Arathoon for Appellant.

Mr. Doyne for Respondents.

Sir Montague Smith gave judgment as follows :—

This case comes before their Lordships under circumstances of great irregularity in the proceedings. The leave to appeal granted by the Judicial Commissioner, Mr. Currie, is clearly *ultra vires*, and therefore the appeal is now before them without any proper authority. Mr. Doyne has taken the objection that the appellant is in that position. He was met by a counter objection on the part of Mr. Leith that the respondents could not now be heard to object, inasmuch as they had not done so at an earlier period when they first became aware that the irregular petition of appeal had been lodged. Their Lordships think that the right practice is to take objections of this kind at the earliest moment, for the obvious reason that the great expense of preparing for the hearing is thereby saved, which is uselessly incurred if, when the objection is ultimately taken, their Lordships feel obliged to yield to it. But although their Lordships think that the objection should be taken at an early period, it is clearly competent to them to hear it at any stage of the appeal; and it has not been unusual to entertain it when the appeal is called on, and before the argument upon the merits has been commenced. Mr. Doyne has taken it at that time, and their Lordships think his objection ought to prevail. Mr. Leith then suggested that he desired to apply to this Board for special leave to appeal; and no doubt there have been cases where, upon the appeal being called on and the objection discussed, their Lordships have given special leave to appeal, *nunc pro tunc*, directing that the petition to appeal should go to Her Majesty with the report upon the appeal itself. An appellant, however, cannot be in a better position with regard to the application than that in which he would have stood if he had made it at an earlier period; and their Lordships have had to consider whether or no this is a case in which they ought to grant special leave to appeal; and they have come very clearly to the conclusion that it is not.

It seems that the plaintiff is mortgagee, and the original defendant Emam Ali Beg was mortgagor. Emam Ali Beg is dead ; his two widows are on the record, and there is a third party now on the record as an intervenor, the Rajah of Bhinga, the respondent, who became a purchaser of the estate from Emam Ali Beg or of some interest in it. The original suit was for foreclosure of the mortgage in which various questions as to the right to tack and other matters arose ; and it seems that before a decree of foreclosure was finally obtained, a compromise was entered into between the plaintiff and Emam Ali Beg. The compromise contained the following terms :—"That the plaintiff is to get Rs. 10,000, the balance remaining after remission of a certain sum on account of interest recently accruing out of the aggregate amount of the principal, costs, and interest accruing up to the month of November 1868. That from 1st December 1868 the defendant is to be liable for interest at the rate of Rs. 1 : 8 per cent. per mensem. That the defendant's rights and interests in the village are to remain as before hypothecated to plaintiff, mortgagee. That defendant is to put the plaintiff in possession of the estate, and to have the mutation of names effected in the Collector's Register of Proprietors, before Bysakh 1276 F. Plaintiff is to appropriate the proceeds towards payment of the interest due. Defendant is to pay to plaintiff the whole amount in cash due to him within two years from this day, in the case of the mutation of names having been effected in favor of and possession given to plaintiff."

It seems that the defendant did pay into Court a sum of about Rs. 10,700, the Rs. 700 being for interest, in pursuance of this compromise, and that the plaintiff refused to accept it or to take it out of Court, upon the ground that by the terms of this compromise he was entitled to have the possession of the estate for two years, and a mutation of names, and afterwards to get this money. He petitioned the Court to give effect to this contention ; but the Deputy Commissioner rejected the application, and stated that the petitioner refused the money at his own risk, and would receive no interest from the time it had been paid into Court. This rejection was confirmed on appeal. The money having been thus refused, it appears that an order (dated 26th April 1869) was made by the Deputy Commissioner for the repayment of the deposit of Emam Ali Beg. That was an irregular proceeding. The money ought not to have been paid out without notice. However, that was done. Thereupon began a set of proceedings on the part of the plaintiff, the mortgagee, to have the compromise carried into effect, which has led to the present appeal. It seems that the plaintiff contended that he was entitled to have a decree of foreclosure in consequence of the withdrawal of the money. It is sufficient to say that the Deputy Commissioner held that he was entitled to the money, but not to a decree of foreclosure. The officiating Commissioner reversed that decision, and held that he was entitled to foreclose. The case then came before Mr. Capper, the Judicial Commissioner, and, on the 28th June 1870, he made a decree reversing the decree of the officiating Commissioner, setting up that of the Deputy Commissioner, and holding that the plaintiff could not have that relief. In the course of his judgment Mr. Capper says,—“It is not denied that this was a full payment of the sum due under the compromise, and, consequently, on that date all the conditions and stipulations of the mortgage contract, and all rights accruing under it to the mortgagees actually ceased, and were at an end.” He also says the Rajah, the intervenor, “has agreed in Court to repay the Rs. 10,725 withdrawn, and it is asserted that this amount is actually in deposit in the treasury of the Deputy Commissioner.” It appears Mr. Capper was not rightly informed, and that this money had not been so deposited, although it had been agreed that it should be. It is against this order that their Lordships are now for the first time, in March 1875, asked to grant special leave to appeal.

Several subsequent proceedings have taken place. There was a petition for review, heard by Mr. Capper himself, who rejected it ; and then the plaintiff filed proceedings which it is difficult to characterise. There is a claim or petition to

revive the decree of foreclosure, which had been reversed on appeal, another petition to review Mr. Capper's decision, and to revive the decree of the 5th January 1869, upon the ground that this money having been taken out after it was deposited, the plaintiff ought to be restored to the former state of things. But matters had greatly changed. The Rajah of Bhinga had come in as purchaser, and his rights as purchaser have never been tried. There are, it appears, conflicting contentions on the part of the Rajah and the representatives of Emam Ali Beg which have not been determined. These petitions came on before Mr. Ouseley, the then officiating Commissioner, and he, it appears, felt some difficulty in dealing with them. He says in his judgment :—" It seems to me that at this stage of the proceedings the only thing that can be done is to call on the Rajah of Bhinga to show cause why he should not pay the money which he agreed in Court to pay." The counsel for the Rajah apparently objected to that on the ground that the case was not heard in review of judgment, and that the Court could not call on his client to show cause why he should not pay the money. It does not appear what was done before Mr. Ouseley upon that objection.

Then the case comes before Mr. Currie, who apparently feeling the same difficulty, declined to admit a review of the order. He says this :—"As Mr. Capper has already declined to admit a review of this order, and as the entire facts of the case as above detailed were before him at the time he passed his order, I do not feel justified in admitting his order to review ; but taking the entire circumstances into consideration, and being of opinion that the plaintiff was justified in urging his claim to possession under the deed of compromise, and that the defendant fraudulently withdrew the money out of deposit before that point was determined, I am of opinion that the case is one which may properly be appealed to Her Majesty's Privy Council."

The Judicial Commissioner, therefore, feeling unable to give any relief himself, without any application apparently on the part of the plaintiff, grants leave to him to appeal to Her Majesty in Council, which, as already observed, it was beyond his power to do.

Under these circumstances, their Lordships think it would be a wrong exercise of their judicial discretion to grant the special leave now applied for. There are only two grounds on which it is suggested that the appeal ought to be heard. The first is that Emam Ali Beg did not pay the proper amount into Court under the compromise. It seems to have been suggested in the course of the proceedings that a small sum of Rs. 7 had not been paid in. Whatever may be the case in a proceeding where the party is entitled to avail himself of the strict law, it is obvious their Lordships would not give special leave to appeal upon any question of that kind. The other and substantial ground upon which alone leave could be granted, if at all, is that there is a large sum of money, to which the plaintiff is clearly entitled, withdrawn under the circumstances already alluded to. How that sum is to be recovered, and what are the rights of the plaintiff, arising from its withdrawal, and against whom, it is not for their Lordships, in dealing simply with the preliminary question of leave to appeal, to determine. It is enough to say that they think those rights may be ascertained more satisfactorily in some other proceedings than by this tribunal under the irregular appeal which has been sent up.

Their decision dismissing the appeal being upon the ground that the appeal is not properly before them will not of course prejudice any rights the plaintiff may have either against the representatives of Emam Ali Beg or the Rajah of Bhinga.

Under these circumstances, their Lordships will humbly advise Her Majesty to dismiss the appeal. But this being upon a preliminary objection, only taken when the appeal was called on to be heard upon the merits, their Lordships think that there should be no order as to costs.

The 25th March 1875.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Joint Hindoo Family—Division of Ancestral Property.

*On Appeal from the High Court at Calcutta.**

Maharajah Ram Kissen Sing

versus

Rajah Sheonundun Sing and another.

As regards the joint property of a Hindoo family, there may be a division of right and interest, which will operate to change the character of the ownership from joint to separate, although it may not be intended at once to perfect it by an actual partition by metes and bounds ; and therefore the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his allotted share in severalty, severs the joint interest, and extinguishes the rights springing from united family ownership.

Mr. Cowie, Q.C., and Mr. Doyne for Appellant.

Mr. Leith, Q.C., and Mr. J. D. Bell for Respondents.

Sir Montague Smith gave judgment as follows :—

Maharajah Ram Kissen Sing (the appellant) brought this suit in the Civil Court of Zillah Sarun, so long ago as the year 1852, to recover shares of numerous villages in Pergunnahs Mahashqee and Bibrah, which he claimed as maternal grandson and heir of Rajcoomar Radha Mohun Sing, who died on the 24th December 1850.

The principal defendants, the now respondents, Rajah Sheonundun Sing and Rajcoomar Deonundun Sing, are the grandsons of Rajah Dost Doon Sing, an elder brother of Radha Mohun. Sheonundun is sued as guardian of his minor brother, Deonundun. Rajah Dost Doon died before Radha Mohun, leaving two sons, Rajah Rughoonundun, who survived his uncle, Radha Mohun, and died childless on the 16th September 1852, and Judoonundun, who was the father of the two defendants, and died in Radha Mohun's lifetime.

It appears that Radha Mohun had a son, Hurnundun, who died in his lifetime, leaving a widow, Munroop, and a daughter, Jankee. These ladies were made defendants in the suit, but do not appear in this appeal.

The family was one of distinction, and had formerly possessed considerable estates. It appears that the bulk of their property had been sold under Government and execution sales, but much of it had been again acquired by them through the powerful aid of the Rajahs of Benares, who were related to the family by marriage, and seem to have taken great interest in its welfare.

The family is governed by the law of the Mitakshara.

The plaintiff bases his claim on the ground that the property was the separate estate of Radha Mohun, to which as the son of a daughter, in default of descendants in the male line, he was, by this law, entitled to succeed as heir.

The defendants oppose to this claim two defences : (1) that the family was joint, and the property undivided, and that, consequently, on Radha Mohun's death, it devolved on Rajah Rughoonundun and themselves, as the male descendants of his brother, Rajah Dost Doon ; and (2) that if this were not so, Radha Mohun made a deed of gift or will by which he declared his grand nephew, Deonundun, to be his heir, and gave all his property to him.

It may be observed in the outset that the disposition in this alleged will (which in the commencement of the litigation was the ground of defence principally relied on)

* From the judgment of L. S. Jackson and Macpherson, JJ., dated 11th July 1871 ;—16 W.R., *Civil Rulings*, 142.

constituting Deonundun sole inheritor, to the exclusion of his uncle and brother, is not very consistent with the theory that the property with which it deals was joint and undivided family estate. It is true that the uncle and brother seem to have been consenting parties to the will, and in that way validity might have been given to it ; but if the property had been really joint, it is highly improbable that such an arrangement would have been thought of.

The origin of the separation of the estate appears to have been an award of Maharajah Odeet Narain, a former Rajah of Benares, made in April 1819, by which a large part of the possessions of this family was divided into two unequal shares of 10 annas and 6 annas ; the larger share being allotted to the sons of Rajah Dost Doon, the elder brother, and the smaller to Radha Mohun.

This award is recited at length in some later proceedings before a succeeding Rajah of Benares, the Maharajah Isree Pershad. This recital states that disputes having arisen between Rughoonundun and Judoonundun, sons of Rajah Dost Doon (deceased), on the one side, and Radha Mohun on the other, respecting a share of the zemindaree of certain villages, the parties had executed an ikrarnamah to the effect "that the Maharajah has the full power to fix our title and divide our shares, and whatever he should think proper to assign for any party, none of the other parties shall object thereto." It states that the Maharajah, "in order to remove doubts for ever," accepted the ikrarnamah and drew up and passed a decision, the effect of which is set forth as follows :—

"The villages detailed below in Pergunnahs Mahashee and Bibrab, which had been purchased at auction in the names of Rajah Dost Doon Sing, Baboo Radha Mohun Sing, Baboo Rughoonundun Sing, and others, and were, till then, in the joint possession of both the brothers, without specification of shares.

"Now, as Rajah Dost Doon Sing is dead, and there appear indications of disagreement between Baboo Radha Mohun Sing and the sons of the said Rajah, therefore is it settled to divide the shares ; whereas these auction-purchased villages were not their ancestral property, but were acquired with the aid and assistance of the Maharajah—both the above persons knowing me as the real owner, and leaving the determination of the shares to my judgment and decision—have appeared and executed an ikrarnamah to the above effect, under their own seals, therefore, in order to the preservation, agreement, and management of both houses, in consideration of the title of both parties with respect to this sircar and old usage, and the consideration always shown to them, judgment and decision were made to this effect—that, after defraying collection expenses, and paying the Government revenue, and debts due to creditors, and costs of the Courts in the joint suits instituted previously and recently, which were joint from the lifetime of the said Rajah, whatever profits of the said villages might remain, Baboo Radha Mohun Sing and Hurnundun Sing, his son, shall take 6 annas per rupee ; and Rajah Rughoonundun Sing and Baboo Judoonundun Sing, sons of the said Rajah, 10 annas per rupee ; and none of them shall deviate from, or refuse this partition, and both the brothers shall remain in union with each other as they are up to the present moment. Any person who shall be appointed by the judgment of both parties shall make collections from the villages detailed below, and, after defraying the above-mentioned expenses, pay in the profits according to the division of both parties. The said villages shall remain in the name of the party in whose name they were purchased, and whose name is entered in the settlement book. With respect to the name, no one party will be able to alter or deviate from this decision, and decrease or increase the share, because the decision and division of shares is made with respect to all the villages specified below."

There is abundant evidence that this award was acted on.

The division was notified to the Collector of Sarun, as appears from the copy of a kyfeut or "memorandum of the shares of villages of Rajah Rughoonundun and Judoonundun, deceased proprietors of Pergunnahs Mahashee and Bibrab," found in

the Collectorate, in which the division into shares of 10 annas and 6 annas is stated, and the 6 annas are referred to as Radha Mohun's share.

From the account books in evidence it appears that, whilst the collections for the villages were joint, the net proceeds were divided into shares in accordance with the mode of collection and partition prescribed by the award.

In several transactions Radha Mohun acted as owner of the 6 annas share. In 1842 he mortgaged, by way of conditional sale, his 6 annas share in some of the villages. This mortgage was foreclosed in 1845, and a mutation of names effected, without the intervention of other sharers.

Again, on the 6th February 1846, Radha Mohun made another conditional sale by way of mortgage to Sheonundun himself. The deed disclosed the fact that the other 10 annas belonged to Rughoonundun and Sheonundun. There was afterwards a suit to foreclose followed by a decree. It is evident that in this transaction the parties were treating the shares as separate estate.

Besides the above, other mortgages were made by Radha Mohun of his 6 annas share.

Some leases to indigo planters and others were put in evidence by the defendants which the proprietors of the 10 annas shares and Radha Mohun joined in granting. But their so joining is in no way inconsistent with their being owners of separate shares. Until an actual partition of the land, they were in the position of tenants in common in England, and would for convenience join in granting leases. Besides it is to be remembered that the collections were by the terms of the award to be joint.

The cases which have been recently decided by this tribunal on questions touching the separation of the joint property of a Hindoo family establish the principle that there may be a division of right and interest, which will operate to change the character of the ownership from joint to separate, although it may not be intended at once to perfect it by an actual partition by metes and bounds; and therefore, that the agreement of a family to divide the proceeds of the joint property among its members in definite shares, with the intention that each should hold his allotted share in severalty, severs the joint interest, and extinguishes the rights springing from united family ownership.

The question of intention, as was pointed out in the latest of these decisions, must arise in all such cases and be determined in each upon its own circumstances, (See *Appovier v. Rama Subba Aiyar*, 11 Moore's I. A. 75.* See also three cases in 13 Moore's I. A., pp. 113,† 181,‡ and 497,§ and another in L. R., 1 Indian Appeals, 55.¶)

Applying these principles to the evidence, it appears to their Lordships to be clear, both from the terms of the submission to the Rajah of Benares, and of his award of 1819, and also from the subsequent conduct of the parties, that their intention was that the shares specified by the Rajah should be the subjects of separate ownership.

The recital of the agreement to refer states it to have been to the effect that "the Maharajah has full power to fix our title and divide our shares." Then the award, which the recital says was made "to remove disputes for ever," states that the villages which it was proposed to divide had been purchased at auction, and were not the ancestral property of the parties, but acquired with the aid of the Maharajah. It further states that the parties knowing the Maharajah to be the real owner, had left the determination of the shares to his decision; and then the award, after determining the shares of the profits which each should take, directs that none shall "deviate from or refuse the partition."

* 8 W. R. P. C. 1; 1 Suth. P. C. R. 657.

† 12 W. R. P. C. 40; 2 Suth. P. C. R. 265.

‡ This case turns purely on a question of boundary; the reference to *Appovier v. Rama Subba Aiyar* being merely incidental.

§ 14 W. R. P. C. 33; 2 Suth. P. C. R. 365.

¶ 21 W. R. P. C. 214; 2 Suth. P. C. R. 939.

This award carefully excludes ancestral estates, which would therefore remain joint as before, and deals only with newly acquired property, which being purchased with his aid, the Maharajah deemed himself to be, in some sense, entitled to dispose of. It discloses throughout a general intention to give a separate ownership in the specified shares. The passage that "both the brothers should remain in union with each other as they are up to the present moment," which was relied on by the respondents as having a contrary tendency, is not sufficient to rebut this general intention. It is not at all clear that the words mean more than that the brothers should remain in concord. They would be satisfied also by supposing that the brothers were to remain joint as to the ancestral family property. But, be this as it may, the whole tenor of the rest of the award shows that, as regards the purchased estates, a final division into separate shares was intended to be made.

The evidence already referred to of the dealing with the property, and the conduct of the parties subsequent to the award, furnish very strong proof that from the first they understood the arrangement to mean a separation of ownership.

The Principal Sudder Ameen came to the opinion that this separation had been effected, in which opinion, for the reasons above given, their Lordships concur, disagreeing on this part of the case with the judgment of the High Court which overruled it.

Coming to the second defence that Radha Mohun had executed a deed of gift or will constituting his great nephew Deonundun his heir, their Lordships find that both the Courts in India, upon a full review of the evidence, have arrived at the conclusion that the execution of the instrument propounded by the defendants has not been established. Their learned Counsel, adverting to the general practice of this Committee, admitted that no special grounds existed on which they could hope to disturb on appeal these concurrent judgments upon a question of fact; but they attempted to show that, independently of the particular instrument, the evidence was sufficient to warrant the conclusion either that a previous disposition of the property had been made by Radha Mohun to the effect of that contained in the will, or that he had so acted as to estop him and his representatives from denying that such a disposition existed.

It is to be observed that this is a new case, set up for the first time at their Lordships' bar, the defendants having throughout the suit, in all its previous stages, propounded a particular will executed by Radha Mohun, as they alleged, on the 7th September 1849.

The defence now suggested is raised neither by the defendant's answer, the issues, nor the grounds of appeal. It would, therefore, be improper to give effect to it, unless the evidence to support it was so clear and uncontradicted that it could not, without manifest injustice, be disregarded.

But this is far from being so. It appears, no doubt, that a strong effort was made in the family to induce Radha Mohun, after the death of his son Hurnundun, to come to such an arrangement. He had, it seems, incurred debts, and mortgaged some of his property, and there was a desire on the part of Rughoonundun, representing the other branch of the family, to prevent the descent of his estate in the female line.

With this view it was agreed to submit to the advice of the then Rajah of Benares. The parties accordingly attended him, and there is evidence that it was then arranged that Radha Mohun should execute a wussyutnamah or will to the effect of that propounded, and a draft of it was prepared. This took place in June 1848. It is said that Radha Mohun took away this draft, but it is not at all clear he had then determined to execute it, for, although the matter was urgent, it is not alleged that he, in fact, executed the will until fifteen months afterwards (the 7th September 1849).

A good deal of evidence was given by the defendants of acts alleged to be done by Radha Mohun in his lifetime, to corroborate the proof of the *factum* of the

will. The facts disclosed in this evidence are undoubtedly deserving of consideration; but they were investigated, and the inferences sought to be drawn from them answered by the Judges of the Indian Courts in determining the question of the validity of the will. On the other hand, Mr. Cowie, for the appellant, referred to the mortgage from Radha Mohun of the 29th October 1848, and also to the fact that on the 18th January 1849, Sheonundun took proceedings to foreclose Radha Mohun's mortgage to him of the 6th February 1846, already adverted to, as being acts altogether inconsistent with the supposition that, at the time they took place, the arrangement contemplated in the month of June 1848 had been finally agreed upon.

In this state of the evidence, and of the findings of the Indian Courts upon it, their Lordships think it is not possible for them, in this final stage of the suit, to give effect to the new ground of defence raised by the respondent's Counsel.

For these reasons their Lordships must hold that the plaintiff, as heir of his maternal grandfather, Radha Mohun, is entitled to recover such of the villages enumerated in the plaint as were his grandfather's separate property.

Their decision is founded mainly on the arrangement evidenced by the award of 1819, to divide certain villages into shares of 10 and 6 annas. This award is confined to the villages "detailed below," described as having been purchased at auction by the aid of the Maharajah in the names of Rajah Dost Doon, Radha Mohun, Rughoonundun, and others, and which, it states, "were not their ancestral property." This is a clear indication that ancestral villages were to remain joint as before, and there is no evidence of any subsequent partition of such villages. The Principal Sudder Ameen seems to have been of opinion that the sons of Rajah Dost Doon were separate in food and had ceased to form a joint family; but their Lordships think the evidence is insufficient to support this conclusion. The limited partition of 1819 is inconsistent with an intention wholly to destroy the joint family, and no subsequent agreement to that effect is shown.

Unfortunately, the detail of the villages which formed part of the award is not in the record. The respondent's Counsel have contended that, at the most, only the villages contained in this detail were separated, and that there is no proof that any of the villages mentioned in the plaint were included in it. On the other hand, the appellant's Counsel have urged that the villages enumerated in the plaint being the same as those in the schedule of the alleged will, which was put forward by the respondents, it must be assumed that the plaint contains only such separate property as Radha Mohun could have disposed of by will.

In their Lordships' view neither of these contentions is well-founded. It appears to them, with reference to the contention of the respondents that, although the detailed list contained in the award is not forthcoming, there are means in the record of distinguishing the newly purchased from the ancestral villages; and, with regard to the argument of the appellants, derived from the schedule in the alleged will, they think it cannot be assumed that it contains only separated property. Looking at the object the parties had in view in putting forward this document, it is probable that they would so prepare it as to include all the villages in which Radha Mohun had any interest, whether joint or several. Indeed, it was contended by the respondents that this will would be valid, even with regard to joint estate, by reason of its being made with the consent of the other members of the family.

This tribunal is no doubt placed in some difficulty in this matter, as they are without the assistance of the opinion of either of the Courts in India upon it. The High Court having dismissed the suit, it was unnecessary for them to consider it, and the Principal Sudder Ameen made no distinction in his final decree between ancestral and purchased property, thinking, apparently, there had been an entire separation between the brothers. Their Lordships, however, are reluctant to prolong a suit, which has been already pending upwards of twenty-two years, by directing further enquiries, especially as they think the result of the proceedings on remand, in an early stage of the cause, will enable them to dispose of the question.

These early proceedings show that the original positions taken up by the parties have been considerably shifted in the course of the litigation. In his first judgment the Principal Sudder Ameen found that this family were separate in food and estate, and then decided two things according to a bywastha :—(1) that the plaintiff, as a maternal grandson, was Radha Mohun's heir ; and (2), assuming, apparently, that the villages were ancestral, that Radha Mohun could not disinherit him by will. Upon this view of the case, he did not think it necessary to decide on the *factum* of the will, although he expressed great doubt of its authenticity.

The defendants appealed to the Sudder Court, one of their main grounds being that the villages were not ancestral, but purchased by Rajah Dost Doon and his brothers, and thus were the self-acquired property of Radha Mohun, which he was competent to alienate by will.

The Sudder Court thought the Judge below had overlooked this distinction, and remanded it to him for re-trial, and especially "to determine whether any and what portion of the property sued for was acquired personally by Radha Mohun, and specifically to distinguish that from the portion which is ancestral."

A new issue was accordingly framed as follows :—"Out of the property in suit, the estate of the maternal grandfather of the plaintiff, what was the ancestral property of Radha Mohun Sing, deceased, and what was acquired by the deceased himself?"

The judgment of the Principal Sudder Ameen on this issue will be found at p. 624 of the record. It appears from his finding, which, although made for a somewhat different object, seems to be in substance sufficient for the present purpose, that, as their Lordships understand the judgment, twenty-six of the lots mentioned in the plaint, that is to say, Nos. 1, 11, 12, 18, 19, 24, 25, 33, 49, 53, 56, 74, 80, 81, 87, 96, and 105, which the Judge groups together; Nos. 13, 31, 34, 40, 50, and 51, which he places in another group; and Nos. 60, 62 (being Chuk Fatima, in Pergunnah Mahashee), and 108, which last three lots he deals with separately, were ancestral property; and that all the remaining lots were acquired by means of various purchases in the ostensible names of Rajah Dost Doon Sing, Radha Mohun, Rughoonundun, Sheonundun, and others.

The ancestral property was, as already shown, clearly excluded from the partition in 1819, and their Lordships therefore think, for the reasons already given, that the plaintiff is not entitled to recover in respect of the above twenty-six ancestral villages or lots, and that his suit as regards them ought to be dismissed.

But, with regard to the remaining lots found to be newly purchased, they think the plaintiff is entitled to maintain this suit. The bulk of these villages would seem to have been acquired before the award of 1819, which referred to large purchases then recently made; and it is reasonable to presume that the lots which were subsequently acquired were purchased and held by the brothers and their descendants in the shares specified in the award, since neither the parties themselves nor the Principal Sudder Ameen appear to have made any distinction between the villages purchased before and after the award. They are all placed in his judgment in the category of newly-acquired estates, as distinguished from ancestral.

In the result their Lordships will humbly advise Her Majesty that the decrees of the Indian Courts be reversed, and that in lieu thereof it be decreed that, so far as regards the twenty-six lots found as above to be ancestral property, the plaintiff's suit be dismissed, and that, as to the remaining lots, that the plaintiff is entitled to a six annas share in such lots, and to possession thereof, and that the costs of the litigation in India be apportioned between the parties in the usual way, according to the value of the property to which they have been held to be respectively entitled, and in case either of the parties shall have received from the other a larger amount of costs than he would have received if the costs had been apportioned as above, the difference is to be ascertained and refunded.

There will be no order as to the costs of this appeal.

The 16th April 1875.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

General Rule as to Findings of Fact—Finding by Civil Court—Rights of Parties.

*On Appeal from the High Court at Calcutta.**

Koer Poresh Narain Roy

versus

Robert Watson and Co. and others.

Ranee Surrut Soondree

versus

Robert Watson & Co.

As a general rule, an appellant to Her Majesty in Council cannot hope to succeed upon a pure question of fact as to which the decisions of both Courts below are against him.

A finding by a Civil Court must be taken altogether; a party is not entitled to a decree upon one part of it where the decree would be inconsistent with another part of the same finding, unless he can show that such other part is incorrect.

A party, who is not willing to accept a finding in his favor in a suit, is not in a position to ask for a decree based upon it in the appeal, though he ought to have the benefit of it in some future proceeding.

Mr. J. D. Bell for Appellants.

Mr. Fitzjames Stephen, Q.C., Mr. Leith, Q.C., and Mr. Doyne, for Respondents.

In the first appeal of Koer Poresh Narain Roy v. Robert Watson & Co., their Lordships think there is no other course to take than to dismiss the appeal.

The suit was brought to recover some chur land which was alleged to have accreted to five different estates or parcels of estates. As to the three first, Ramkristopore, Jotashahye, and Chuck Futtehpore, it was admitted by Mr. Bell, the learned Counsel for the appellant, that the questions arising with regard to those estates were purely questions of fact, and that the decisions of both Courts below were against him. Therefore he felt that, consistently with the general rules of this Committee, he could not hope to succeed in the appeal as regards those estates.

With respect to the fourth and fifth parcels, namely, the original Nowshurra and the resumed Nowshurra Sooltanpore Futtehpore, he argued that the appeal should be heard, and, if heard, decided in his favor, although there were the judgments of both the Courts against him, upon the ground that the Ameen, who had been directed to make a local enquiry by the first Judge, had reported in favor of the appellant as regarded those estates. But upon investigation it appeared that the materials upon which the Ameen had reported were not in the record, and their Lordships feel that it would be quite impossible to reverse the concurrent judgments of the Courts below upon questions of fact merely on the ground that the Ameen had reported in a different way, when they have not the materials before them upon which the Ameen formed his opinion.

Mr. Bell then contended that as regarded the resumed Nowshurra he was entitled to succeed as to the parcel in front of that resumed Nowshurra, by reason of a special finding of the Judge, Mr. Belli, which finding was as follows:—"There only remains Nowshurra Sooltanpore Futtehpore, which is a Government khas mehal, now under resettlement. The Watsons admit that the proprietary right of Poresh Narain in this has been allowed by the Government officers to be coincident with his proprietary title in Pergunnah Lushkurpore, viz., annas 4-13-1-1, and that the remainder was farmed by the Government to them. If, however, it is a khas

* From the judgment of Sir Barnes Peacock, C.J., and Hobhouse, J., dated the 12th February 1868.

mehal, the proprietary right in it belongs to no one but the Government, who may settle it with the Watsons or with Poresb Narain or with any one else whom it likes; and the fact of the last settlement having been made between the Watsons and Poresb Narain must be regarded as merely a happy accident for those parties. I say therefore with regard to the land opposite to Nowshurra Sooltanpore Futtehpoore the right to it will appertain to any party with whom the Government may settle that mehal." Now it is true that the Watsons admit that the proprietary right of Poresb Narain has been allowed by the Government officers to be coincident with his proprietary title to Pergunnah Lushkorpore, which shows that they disclaim any title in themselves; but that is not sufficient to entitle the plaintiff to a decree unless he can show, which he fails to do, that the Judge was wrong in saying that Nowshurra was a Government khas mehal then under re-settlement; the finding must be taken altogether; and apparently the Judge is right in coming to the conclusion that it was a khas mehal in the hands of the Government which had not been re-settled; and if he was right in that, then of course neither the appellant nor any other person until the settlement can be entitled to a decree with regard to the chur land in front of that resumed Nowshurra.

The result is that the appellant has entirely failed in the present appeal, and their Lordships will therefore humbly advise Her Majesty to affirm the judgments of the Courts below and to dismiss the appeal with costs.

The other appeal of Ranee Surrut Soondree against Watson & Co., it is conceded, must follow the same fate, and be dismissed as regards the main part of the claim; but in the course of the argument it was stated by Mr. Bell that the judgment of the High Court had taken no notice of a finding of the Judge upon the remand. It appears that upon the remand there was no second judgment of Mr. Belli, but merely a report by him to the High Court which was to make the decree in the cause; and no doubt Mr. Belli says:—"I find this, that at the date of the thakbust proceedings, the recorded proprietors of Ratapore, as ascertained from the thakbust map, were Mohesh Narain Roy, who was represented as holding 3 annas 10 gundahs; Bhoyrub Narain Roy, 5 annas 10 gundahs; and Jogendro Narain Roy's predecessor, Ranee Soorjyamonee, 7 annas. The representative of these 7 annas is now the widow of Jogendro Narain, the Ranee Surrut Soondree, and the remaining shares are held by the Watsons in farm. Therefore the lands opposite to Rajapore will fall to the Watsons and Ranee Surrut Soondree as joint holders, in the proportion of 9 and 7 annas." It appears that upon the appeal from this judgment objections were made on the part of the present respondents to that finding, which will be found on page 355 of the record in the other appeal. The objection is:—"The share of petitioners in Rajapore is 12 annas, and the Judge has made a mistake in supposing that any other person could have a share in excess of 4 annas." Therefore Watson & Co. claim to be entitled to 12 annas in respect of Rajapore. It appears that the present appellant was also dissatisfied with the finding, and her objection takes this form. It appears on page 94 of the record in her appeal:—"That the investigation of the Ameen with regard to the question as to whether the lands marked being original land, or only original, and the others alluvial, is based upon mere conjecture, also the finding of the Ameen that all these lands belong to Rajapore in Jotashahye and not to Ramkristopore, is not borne out by the evidence on record." Therefore the appellant is not disposed to accept that finding. Her original plaint put forward a claim to a large portion of land as being accretions to the estate of Ramkristopore, and she was not willing to accept the finding in her favor in respect of Rajapore. That circumstance may account for the High Court not having noticed that finding or given any decree based upon it, and they may also have felt, inasmuch as there was no claim in respect of Rajapore in the plaint, that it was not competent for them to deal with it in this suit. Their Lordships, therefore, think that although there is a finding, which, if it be a correct one, the appellant ought to have the benefit of in some future proceeding, yet that the

appellant is not in a position to ask for a decree based upon it in the present appeal.

Their Lordships will therefore humbly advise Her Majesty that this appeal also ought to be dismissed, and with costs; but they desire that this should be without prejudice to any claim that the appellant may have in respect of land accreted to Rajapore, and therefore they propose to advise Her Majesty to declare, in the terms which were read by one of their Lordships in the course of the argument, that the dismissal of this appeal shall be without prejudice to the appellant's right to any portion of the chur land in dispute, as a shareholder in Rajapore, and without prejudice to the question whether she is entitled to a 7-anna share or to any, and what, other share in Rajapore.

The 17th April 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Pottah—Construction.

*On Appeal from the High Court at Calcutta.**

Robert Watson and Co.

versus

Mohesh Narain Roy.

In order to determine the question whether a pottah granted by a zemindar conveyed an estate for life only or an estate of inheritance: HELD that it was necessary to arrive as well as could be done, at the real intention of the parties, to be collected chiefly from the terms of the instrument, but to a certain extent also from the circumstances existing at the time, and further by the conduct of the parties since its execution.

This was a suit to recover possession of lands as upon the determination of a subtenure. The plaintiffs were the zemindars, and the real question between them and the defendant was, whether a pottah granted in 1854, nominally to one Subhodra Burmonya, but really, as it manifestly appears, to one Ramdhun Roy, conveyed an estate for life only or an estate of inheritance. In order to determine this question, their Lordships must arrive as well as they can at the real intention of the parties, to be collected chiefly, no doubt, from the terms of the instrument itself, but to a certain extent also from the circumstances existing at the time of its execution, and further by the conduct of the parties since its execution.

It is contended on behalf of the plaintiffs that this document conveyed an estate *pur autre vie*, that is, for the life of Subhodra. Their Lordships may observe upon that that an estate *pur autre vie* is very unusual, and they might almost say, scarcely known in India, and there appears to be some antecedent improbability that such an estate was meant to be created.

The circumstances existing at the time of the document being entered into, so far as they are material to the present enquiry, were these:—Ramdhun Roy, who was a brother-in-law of Subhodra, in whose name the lease was granted, had been together with other members of his family the holder of a jote within the zemindaree of considerable extent, and including the lands in question. It was a patrimonial property held before him by his ancestors for some generations. The zemindar brought an action against Ramdhun Roy and the other jotedars for enhancement of rent, and succeeded in establishing the right to enhance the rent to such an

* From the judgment of Sir Richard Couch, C.J., and Jackson and Glover, JJ., decided on 16th January 1872.

extent that the jotedar declined to hold the property on those terms, and accordingly relinquished it. This is stated in the pottah. Their Lordships have not, however, the deed of relinquishment before them, nor a precise statement of the terms under which the relinquishment was made. It would seem by the recitals in the pottah that upon this relinquishment a re-settlement was made with Ramdhun Roy, contracting in the name of Subhodra, of a portion of the property which had been relinquished, and at a much lower rent than the enhanced rent; and then the pottah proceeds in these terms:—"When I caused notice to be given for the settlement of the above land and jumma you appeared through your mookhtar, and applied for a pottah of the land and jumma. Your application is approved; and after deducting" certain quantities, a portion of land amounting to 1,785 beegahs is granted "at a settled rent"—that is the expression—of Rs. 618. There is a further provision that if any loss arises from inundation and so forth the tenant shall continue to pay the rent; and then follows a provision not immaterial to consider:—"Over and above the said rate at which I have fixed the rent and granted this pottah neither I nor my heirs shall upon any account enhance the rent of the said land and jumma, or allow it to be enhanced."

Undoubtedly it may be said that it is not very probable this land should have been granted at a comparatively low rent never to be enhanced; but it may be that the rent had been enhanced to such an amount that no tenant could be found to pay it, and it may have suited the landlord's convenience to accept this tenant at a permanent tenure upon a moderate fixed rent, which the tenant himself should never be able to diminish, whatever loss by inundation or otherwise he might sustain. But some light is thrown upon this matter by subsequent occurrences. We have not the precise date of Ramdhun Roy's death, but it appears beyond all question that upon his death he was succeeded in the possession of the property by his widow Rebati Burmonya as guardian of his minor son, and that the son upon attaining his majority took possession himself. It is also abundantly clear that the Watsons recognised this possession, for on the 14th January 1862, they filed a petition to this effect:—"Petition of objection by Mr. Robert Watson. The representation is this:—My zemindaree within Turruf Boira in Toke Chaudpore in Pergunnah Rokunpore is the jote land of *the late* Subhodra Burmonya." Therefore it would appear that they were under the impression at this time that Subhodra was dead. It would appear also that they were under a wrong impression; but when we come to enquire into the state of their mind, it is immaterial whether their impression was right or wrong provided they entertained it. They supposed Subhodra was dead. They then say:—"A suit under s. 4 Act IV of 1840 having been instituted in respect of the lands of that jote jumma comprised within the boundaries specified below, between Rebati Burmonya, guardian of the minor Mohesh Narain, successor of the late Ramdhun Roy and others, and Ramdhun Tewari defendant, the 25th January has been fixed as the day for hearing the case. Consequently, it being necessary to put in an objection in this case, it is prayed that as the said disputed lands comprised within my zemindaree are in the possession of the aforesaid Burmonya;" that is, of Rebati Burmonya in her capacity as guardian of Mohesh Narain. They assert and confirm the legality of the possession of the widow on behalf of the minor as succeeding to Ramdhun Roy, and they further, on several other occasions more especially referred to, in 1865, when it would appear that Subhodra really was dead, bring suits for rent against Rebati Burmonya and the son of Ramdhun Roy, treating the son as succeeding to the father, a contention wholly inconsistent with the view which has been put forward that they considered the pottah conferred an estate *pur autre vie* merely during the life of Subhodra Burmonya.

That being so, upon the best judgment their Lordships are able to come to, it seems to them that the intention of the parties was to create a permanent tenure, and that the plaintiffs have failed to establish their right to eject the defendant. It

follows that the judgments of the two Courts, both of whom have found in favor of the defendants, are right; and it becomes unnecessary for their Lordships to refer to another question on their determination of which undoubtedly those Courts do to a great degree, though not altogether, base their judgments, namely, whether or not it was satisfactorily proved, as was attempted on the part of the defendant, that the kubooleut which was not produced by the plaintiffs contained words of inheritance of a more clear and definite character than those contained in the pottah: or what would have been the legal effect of that evidence if it had been believed. Undoubtedly some difficulties have been raised with regard to this latter question which it now becomes unnecessary to discuss.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

The 20th April 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Practice (Privy Council)—Concurrent Findings—Partnership Accounts—
Evidence (of Native Gomashtas).*

On Appeal from the High Court at Calcutta.

Monmohini Dasi

versus

Itchamoyi Dasi.

If there is any case in which more than another their Lordships think that it is wise and right to adhere to the rule they have laid down as to the concurrent findings of two Courts, it is one like the present, in which the question relates to an item in a partnership account, the proof of which depends upon the testimony of native gomashtas, supported by native books which are not produced before their Lordships.

Mr. Leith, Q.C., and Mr. Doyme for Appellant.

No one for Respondent.

Sir James Colville gave judgment as follows :—

The respondent in this case was plaintiff in the suit, and was the widow and representative of one Nobodeep Chunder Shaha. It is an admitted fact in the case, that Nobodeep Chunder Shaha and his uterine brother, Poolin Chunder Shaha, had, being joint in estate, opened a shop and carried on business at a place called Nawabgunge, which appears to be in the district of Dinagapore. Poolin Chunder Shaha died in the lifetime of his brother Nobodeep, leaving two sons, Gooroodoss Shaha and Bepin Behary Shaha, who of course became entitled to his estate, including his share in this business. Nobodeep Chunder Shaha died in the year 1863, and a few months afterwards Gooroodoss Shaha also died, leaving the appellant, his widow and representative, she being then an infant. Bepin Behary Shaha survived his brother. He afterwards died and his share passed to a cousin, who was made a defendant in the Court below, but who does not make any claim in this suit, nor in fact is concerned except as a *pro forma* defendant with the litigation. In 1869, the plaintiff having been excluded from the partnership, brought her suit against Jogeswar Shaha as father and guardian of Monmohini Dasi, the present appellant, and also against Jogeswar Shaha in his own capacity, describing him as gomashta, and against another person, Nilcomul Shaha, also a gomashta, they having all taken part in the exclusion: Monmohini whether a minor or not

when the plaint was filed became of age before the 23rd September 1863 when she put in a written statement. The two other defendants also put in written statements, and all three raised the same defence. They first alleged that the suit was not the plaintiff's but was brought in her name by another party, but that issue was afterwards conclusively found against them. They also set up a case that Nobodeep shortly before his death had made a gift of his estate to Gooroodoss, that accordingly the right of the widow was reduced to a right to receive maintenance, and that her exclusion dated from the death of her husband. They further alleged that the two gomashas were not gomashas, but were partners having an eight annas share in the business.

It is now conceded that all the issues thus raised have been correctly found in favor of the plaintiff, and therefore it is unnecessary to advert to the nature of the defence, except for the purpose of showing its inequitable character, which cannot but materially affect the credit to be given to the defendants personally respecting the matters still in dispute in the cause. Jogeswar Shaha, the father of Monmohini, who has, unfortunately as their Lordships think, contrived to slip out of the liability with which some of the judgments affected him, was probably the author of this defence; but Monmohini having when of full age adopted it and gone through all the Courts in endeavoring to establish it, must be taken to be, as between her and the respondent, responsible for all that has been put forward on her behalf.

Of the issues settled in the suit the first, and now the only material one was this: "What is the extent of plaintiff's right in the disputed moveable and immovable properties; and what is the amount of the goods, cash, and outstanding balances? And is it true that the defendants have dispossessed the plaintiff?" The last part may be disregarded because that has been conclusively found in favor of the plaintiff. Now the plaint had carefully set forth the different classes of property claimed by the plaintiff and the alleged amount and value of them. As to the first three classes there is now no dispute. They consisted of what may be called the real property of the partnership, one moiety of which has been awarded to the plaintiff. The contest now turns upon No. 4, being half the estimated value of the goods in the shop, No. 5, being half the assumed value of the outstanding balances, and No. 6, being "half of the ready money alleged to have been in the (tahvil)." The last item was Rs. 2,750, the half value of outstanding balances Rs. 15,000, and the half estimated value of the goods specified in the schedule to the plaint, Rs. 22,712. The Judge of first instance in dealing with the issues which related to the title of the plaintiff found them all in her favor. In dealing with the first part of the issue, namely, the extent of the plaintiff's right in the disputed property and the amount of the goods, cash, and outstanding balances, he had before him evidence no doubt of a slight character on the part of the plaintiff, but still *prima facie* some proof of the amounts claimed. He found upon the evidence of the plaintiff's own witnesses that the item No. 4, the value of the goods in the shop, ought to be slightly reduced, and he accordingly reduced it to Rs. 21,950. But he found that she had made out her claim both to the sum claimed by her as her share of the outstanding balances and to the sum claimed by her as half the cash in the shop. And the *prima facie* evidence which she had given in support of her claim though slight stood really uncontradicted. The only evidence that was then given on the part of the defendants was that of a witness whose testimony was directed to establish the alleged deed of gift, as to which he was disbelieved by the Judge, and also to prove a debt due from him to the shop. Therefore, there was really nothing brought forward on that occasion by the defendants which could show that the evidence given by the plaintiff, such as it was, of the value of the goods in the shop, and the amount of the cash in the shop, was erroneous. In that state of things the Judge found, with the modification already mentioned, in favor of the plaintiff. The defendants appealed to the High Court against the decree generally,

but on the hearing they abandoned their appeal as to all the issues relating to the plaintiff's title, which was thus established by the original decree. With respect to the first issue in the cause, the learned Judges of the High Court, in their judgment dated the 6th April 1871, said : " We think that the decree of the Lower Court, as it stands, must be modified as regards items 4, 5, and 6 ; namely, 4, goods and stock-in-trade ; 5, outstanding balances ; and 6, amount in cash. This is, in fact, the only point urged in appeal, all other points being given up by Mr. Cowie. It is said that this is in fact a suit in the nature of a suit for dissolution of partnership, and therefore the decree should have been made either after the adjustment of the account or subject to the taking of an account. In regard to item No. 4, it is urged that there is a finding by the Lower Court that Rs. 22,712, 8 annas was on account of goods, and that it was not in the power of the plaintiffs to obtain accounts as they had been dispossessed from the place of business ; but we still think that the decree should be subject to taking an account, the finding of the Lower Court, however, being otherwise undisturbed. The finding of the Lower Court as to the cash amount should also stand ; but, before the decree issues, it must be subject to anything that may be shown after adjustment of accounts as far as the accounts can be made available. As to item 5, we think the decree is wrong. An absolute decree for a specific sum of outstanding balances without anything to guide the Court in fixing that amount is incorrect. It must be shown how far the outstanding balances are realisable, and no amount ought to be decreed against the defendants until its realisation and misappropriation by them is satisfactorily proved. We reverse the decree of the Lower Court and remand the case to that Court for the purpose of passing a new decree on the principle above stated. The appellants must pay the costs of this appeal." There is no appeal before their Lordships against this decree. It finally determined certain questions in the cause, and it prescribed the course to be pursued with respect to those which it did not finally determine. The proper construction of it is, therefore, very material. The construction which their Lordships are disposed to put upon it is that which was put by the High Court in the judgment under appeal ; namely, that as regards items Nos. 4 and 5, the amounts found due in respect of them were intended to stand as items of charge *prima facie* established by the plaintiff, but subject to be cut down by anything which the defendants upon the further taking of the accounts could establish by way of discharge. The outstanding balances stand on wholly different ground, and must be separately considered.

Upon this remand the cause went back to the Court of the Principal Sudder Ameen, but the Judge of that Court was not the same as he who had decided it in the first instance. This new Judge does not seem to have taken a very accurate view of what he had to do, but his judgment is in some respects material. He held upon the question which had to be afterwards considered as to the possession of the khata books, that those khatas were or ought to be in the possession of the defendants. But his findings as to items No. 4 and No. 6, left the questions relating to those items very much as they had been sent to him, inasmuch as he found that they were to stand as *prima facie* found, but were to be subject to reconsideration upon the taking of accounts within the time allowed by the Statute of Limitations. When, how, or by whom those accounts were to be taken his decree did not state. As to the outstanding balances, he came to a very singular conclusion, namely, that although it had appeared upon evidence before him that certain of those outstanding balances had been got in, yet as they were outstanding when the suit was brought, the plaintiff could not have the benefit of those payments in that suit, but must make the whole question of the outstanding balances the subject of another and a separate suit. There was of course an appeal against this decree to the High Court, which pronounced the decree against which the present appeal is brought. Their Lordships have already intimated that they adopt the construction which was then put by the High Court on the order of

remand, and the only question therefore which remains for decision in respect of Nos. 4 and 6 is, whether the High Court was right in holding that there had been no evidence given sufficient to cut down the amounts for which the defendant was *prima facie* liable.

Now the points that have been principally insisted upon are these. First, it is said that the judgments of the Lower Court and of the High Court proceed upon the improper assumption that the means of meeting the plaintiff's claim by showing the true state of the accounts of the house of business were with the defendants—in short, that the defendants were in possession of the khata books. Upon the remand a considerable amount of the evidence given related to the question, what had become of the khata books? The case of the defendants was, that immediately on the filing of the plaint there was an order for a receiver, that the receiver had taken possession of these khata books, and must be taken to be still in possession of them; and that therefore the Judges were wrong in holding that it lay upon the defendants to produce them. Now the Judge who tried the cause in the first instance seems to have considered that the khata books were with the defendants, and that they ought to have produced them; the Judge who tried the cause on remand was of a similar opinion, and the High Court, consisting of three Judges, has confirmed that opinion. Therefore there are the concurrent judgments of six Judges to that effect, and in their Lordships view of the evidence it seems to them that the presumption or finding is correct. The receiver was an officer of the Court, he was not in the interest of the plaintiff. It is shown that he made a complaint against a person whom he represented to be the plaintiff's manager, and complained of the plaintiff not giving him proper assistance or paying the proper expenses for keeping the property while it was in his custody in a proper state. The direct evidence does not amount to more than this: that no formal possession was taken by the receiver of the khata books, that no list of them was signed by him, that they or some of them, may have been in a particular room in the shop, but that when he was discharged in the month of February 1870 and the defendants resumed the possession of the shop, the khata books may still have been there. Therefore their Lordships think that the defendants must be taken to have kept back the khata books, knowing that, if produced, they would not cut down the plaintiff's claim, or establish any items of discharge in favor of the defendants.

It has, however, been argued that a large sum of money, being a debt due from the shop, has by independent evidence been proved to have been paid to one Ameer Chand Baboo, and that the defendants, in taking the account, are entitled to credit for that payment. No doubt some evidence was given of such a payment before the Judge who tried the case on the remand, which evidence was also before the High Court on the final appeal, but both these Courts have held that the case was not established. Their Lordships think that if there is any case in which more than another it is wise and right to adhere to the rule they have laid down as to the concurrent findings of two Courts, it is one like this, in which the question relates to an item in a partnership account, the proof of which depends upon the testimony of native gomashtras supported by native books, which are not produced before their Lordships. It is easy to suppose that when the unrighteous defence set up by the defendants had failed in all other points, the case of a large payment of this kind might be fraudulently set up. That this was so in the present instance their Lordships do not positively affirm; but they do say that the two Courts having found that the payment was not established to their satisfaction, they do not feel justified in interfering with that finding.

Therefore, on the whole case, their Lordships are of opinion that no ground has been laid before them for reversing or qualifying the decision of the High Court as to the items Nos. 4 and 6; that the final provision which the High Court has made for the outstanding balances is clearly in accordance with justice, and for the

interest of both parties; and their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal.

The 7th May 1875.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Disclaimer (Ladawinamah)—Maintenance—Contract—Heirs.
On Appeal from the High Court at Calcutta.**

Oomrao Begum and another
versus
The Nawab Nazim of Bengal.

Where M executed on behalf of N a *ladawinamah*, or deed of disclaimer, disclaiming all right to an estate to which he was one of the heirs-at-law, upon consideration of receiving a monthly allowance for maintenance, and accepted a *perwannah* securing that allowance to himself and his heirs:

HELD that the *ladawinamah* and the *perwannah* amounted to a valid contract by which the parties were respectively bound; and that *ladawinamah* being founded on good consideration, was binding on the heirs, who could not set it aside except by returning the money which had been paid in advance on account of the maintenance allowance.

Mr. Doyne for Appellants.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Respondent.

This is an appeal from a decision of the High Court of Bengal in a suit in which the respondent, His Highness the Nawab Nazim of Bengal, was the plaintiff, and the appellants and others were the defendants. The suit was brought to recover possession of the zemindaree, Pergunnah Gopeenathpore, in the district of Moorshedabad, and to set aside an award made by the Deputy Magistrate of Jomooa Kandee, on the 2nd March 1865, under s. 318 of the Code of Criminal Procedure (Act XXV of 1861). The suit was against the widows, mother, and daughters of Sayud Mehdi Ally Khan, deceased. The defendants Nos. 1 and 2, Baooh Russolee and Dowlut-oon-nissa Khanam, are described in the plaint as alleging themselves to be widows of the late Sayud Mehdi Ally Khan; the defendant No. 3, Fuzelut-oon-nissa Khanam, as his mother; the defendant No. 4, Azeez-oon-nissa, as another widow; and the defendants Nos. 5 and 6, Oomrao Begum and Zuhoora Begum, as daughters of the said Sayud Mehdi Ally Khan. The last two defendants, Nos. 5 and 6, are the only appellants to Her Majesty in Council, and the defendants Nos. 3 and 4 are made co-respondents with the Nawab Nazim; but the Nawab alone has appeared on this appeal. The principal defendants, Nos. 1 and 2, are no parties to the appeal either as appellants or respondents.

The zemindaree to which the Nawab Nazim laid claim was purchased by Ameer-oon-nissa, *alias* Doolhin Begum, the widow of Nawab Ally Jah, deceased, a grand-uncle of the plaintiff, and who preceded him as Nawab Nazim. The estate was purchased by Ameer-oon-nissa benamee, in the name of the said Mehdi Ally, at a sale for arrears of revenue, and it must now be taken that it was her property at the time of her death, although one of the issues raised by the defendants Nos. 1 and 2 was, whether she had a right to it as against Mehdi Ally, the ostensible purchaser. The said Mehdi Ally was one of her half-brothers and heirs according to the Mahomedan law. Ameer-oon-nissa died on the 21st January 1858, and Mehdi Ally Khan on the 4th January 1865. The suit was commenced on the

* From the judgment of Loch and Mitter, JJ., dated 26th April 1869.

33 of the Record, Mehdi Ally acknowledged that neither he nor his heirs, except for his support and maintenance and that of his children and dependents, had any sort of claim to the property, goods, estate, or zemindarees of the said Ameer-oon-nissa, and prayed that proper orders might be passed for the support of himself and of his children and dependents. Upon that urzee an order was passed by the Nawab Nazim on the same day to the effect that out of the properties, mehals, and zemindarees of the late Begum, a monthly allowance of Rs. 600 should be fixed for the said Mehdi Ally, and that help in every way and at all times should be afforded to him.

The order was merely endorsed on the urzee, and was not drawn up as a separate formal instrument. The Rajah Prosonno Narain Deb, who was called as a witness for the defendant, as well as for the plaintiff, stated in his evidence that ten or twelve days after the presentation of the urzee, Mehdi Ally, in his presence and at his house, executed a *ladavee* ikrar in favor of His Highness the Nawab Nazim. He said :—"This was at my suggestion, and with the permission of the Nawab. The intention was to have what had been recited in the urzee executed in a proper legal manner, and to avoid any future misunderstanding or difficulty on account of the benamee nature of the transactions." He then described the mode in which the document was prepared, copied on stamped paper, and attested in his presence. (Record, pp. 785, 786.) He went on to say :—"The ikrar was brought to me by Sarib Ally Khan, Meer Bussunt, and Meer Yakoob. Shortly afterwards Mehdi Ally came to my house. He took the deed in his hand, and we went together to His Highness's *deoree*, and presented it to His Highness. Then His Highness ordered a *perwannah* to be delivered to Mehdi Ally, of the same nature as the order passed on the urzee. The *perwannah* had been prepared beforehand, and was brought by the Moonshes who were sent for. It was delivered to Mehdi Ally. The *perwannah* declared that His Highness should grant to Mehdi Ally and his heirs, from generation to generation, Rs. 600 per month, upon condition that he should always remain submissive to the Nazim, and never depart from his arrangement (*gahek na burzau*). On the day that the *ladavee* was executed, either Rs. 1,000 or 1,500 were paid in my presence, there and then, and Rs. 500 were paid on the following day, and a receipt taken from Mehdi Ally for Rs. 2,000." Further on he says :—"The receipt mentions the payment as an advance of Rs. 2,000 on account of the monthly allowance of the Rs. 600 granted. On account of the immediate emergency the advance was made from the Bekla Treasury, but was deposited in the Mehalot account, in accordance with the order that the allowance of Rs. 600 should be given from the profits of Doolhin Begum's zemindaree."—A copy of the receipt was produced, and is set out at p. 41 of the Record. The *perwannah* is set out at p. 731 of the Record, and in their Lordships' opinion amounts to a grant by the Nawab by which he was bound.

Their Lordships see no reason to doubt that both Mehdi Ally and the Nawab, at the time of the execution of the *ladawinamah*, and of the *perwannah bonâ fide*, believed that the Nawab had a right to succeed to the property of Ameer-oon-nissa.

They are of opinion that the object of the *ladawinamah* and of the *perwannah* was to carry out in a formal legal manner the arrangement contained in the urzee and order of the 12th February 1858, so as legally to bind both parties to it. By the *perwannah*, however, an additional grant was made by the Nawab to provide for Mehdi Ally's expenses of the Mohurram. It is to be observed that the order endorsed upon the urzee was not acted upon until after the *ladawinamah* was executed. That document having been executed on the 24th February 1858, the rights of Mehdi Ally were not left to depend upon the order endorsed on the urzee, but on the following day, *viz.*, on the 25th February 1858, the *perwannah* was executed (p. 731), and on the same day Mehdi Ally received Rs. 2,000 as an advance on account of the allowance granted to him.

Their Lordships are of opinion that the *ladawinamah* and the perwannah amounted to a valid contract by which the Nawab and Mehdi Ally were respectively bound. It is not necessary to decide whether upon the death of the Begum her property went over to the Nizamut according to usage, as stated in the *ladawinamah*; for even assuming it did not, and that Mehdi Ally executed the *ladawinamah* in ignorance of his strict rights, still if the Nawab acted *bonâ fide* under the belief that he had succeeded to the property of the Begum (and the evidence appears to their Lordships at least to establish this), and executed the perwannah upon the faith of the *ladavee* disclaimer, the defendants would be bound by them. Even if the *ladawinamah* did not amount to a grant, it contained an agreement not to set up any claim to the property, and being founded upon a sufficient consideration, was binding upon the heirs of Mehdi Ally, and precluded them from setting up a claim to the property (*Goodtitle v. Barley*, Cowper's Reports, 597). In any view of the case, Mehdi Ally or his heirs could not assert any title to the property without setting aside the *ladawinamah*, and this they could not do, except upon the terms of returning the Rs. 2,000 which were paid upon the faith of the arrangement, and as a payment in advance on account of the allowance granted to him by the Nawab.

As to the plaintiff's not having acted upon the *ladawinamah* since the payment of the Rs. 2,000, it appears that Mehdi Ally and his representatives subsequently repudiated the arrangement, and the fact of the plaintiff's not having during that period continued to make the monthly allowance according to the terms of the perwannah, did not release Mehdi Ally and his heirs from the *ladawinamah*.

It was contended in the High Court on behalf of the appellants that the *ladawinamah* was extorted from the said Mehdi Ally by force and other unfair means; but that objection was so completely answered by Mr. Justice Dwarkanath Mitter in his judgment in the High Court (Record, pp. 844 and 35) that it is unnecessary for their Lordships to say more than that they entirely concur with the High Court with reference to that contention.

It was further urged before their Lordships on behalf of the appellants, that the only object of Rajah Prosonno Narain Deb in getting the *ladawinamah* executed was, according to his own evidence, to obtain an admission that the property, though in the name of Mehdi Ally, was held by him benamee for Ameer-oon-nissa. Probably that was the principal object, for at that time Mehdi Ally does not appear to have claimed as heir of Ameer-oon-nissa. The whole arrangement seems to have proceeded upon the assumption by all parties that the estates of Ameer-oon-nissa, upon her death, went over to the Nizam, or more properly speaking, to the Nizamut. That fact was admitted both in the urzee and in the *ladawinamah*, and it is clear that the Nawab could not have derived any benefit from the admission that the property was held benamee for Ameer-oon-nissa, unless he was entitled to succeed to her property. The urzee, as well as the *ladawinamah*, which was intended to give formal legal effect to it, both contained an admission of the Nawab's title. Upon the whole their Lordships are of opinion that Mehdi Ally and his heirs were bound by the *ladawinamah*, and that the decree of the first Court was correct, except so far as it decreed mesne profits to the plaintiff as against defendants Nos. 5 and 6.

The decree was general, and awarded mesne profits against all the defendants (Record, p. 814), whereas there was no evidence to prove that the present appellants, defendants Nos. 5 and 6, dispossessed the plaintiff or ever had possession of any part of the zemindarees in question.

Indeed, the defendants Nos. 5 and 6 were not parties to the proceedings before the Deputy Magistrate, whose award the plaintiff sought to set aside, nor did the Deputy Magistrate find that they were in possession. On the contrary, he considered that the second party in the proceedings before him, *viz.*, the 1st and 2nd defendants, who are not now appellants, were alone in possession, and his order was that their possession should not be interfered with. Furthermore, the plaintiff

did not in his plaint even allege that the appellants dispossessed him or show any grounds for making them parties to the suit, except for the purpose of binding them as to the title. He merely stated that he had been dispossessed by defendants Nos. 1 and 2 under the award of the Deputy Magistrate.

It appears to their Lordships to be extremely questionable whether even the Magistrate's finding as to the fact of the possession of defendants Nos. 1 and 2 was correct, and whether, on the contrary, the Nawab was not in possession at the date of the order. It is further to be observed that the defendants Nos. 1 and 2, by the 14th paragraph of their written statement, set up a title adverse to the appellants, and insisted that they were entitled to the property by virtue of a deed of gift from Mehdi Ally. This shows that defendants Nos. 1 and 2 were not holding for the benefit of Mehdi Ally's heirs, of whom Nos. 5 and 6 were two.

Upon the whole their Lordships are of opinion that the decree of the High Court ought to be reversed so far as it affirmed that part of the judgment of the Lower Court which awarded mesne profits against the appellants, defendants Nos. 5 and 6, and that it be affirmed as to the residue, and that it be ordered that that part of the judgment of the first Court which awarded mesne profits against the appellants, the defendants Nos. 5 and 6, be reversed.

Their Lordships will advise Her Majesty accordingly.

Under the circumstances they consider that each party ought to bear his own costs of this appeal.

The 13th May 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Registration—Act XX of 1866—Jurisdiction of High Court, North-West
Provinces, under s. 88—Limitation—Ss. 19, 21, 36.*

On Appeal from the High Court at Allahabad.

Sah Mukhun Lall Panday

versus

Sah Koondun Lall and another.

The High Court, North-West Provinces, having no ordinary original civil jurisdiction, is not competent, under Act XX of 1866 s. 88, to direct the registration of a deed, the registration of which has been refused by the Registrar and the Registrar-General.

Where a deed of sale is presented for registration within the period required by s. 22, and is accepted by the registering officer who, without the vendors appearing, registers it by a mistake, and the registration is declared by a competent Court to be invalid, the registering officer may, although the period of four months has expired, proceed to compel the appearance of the vendors, and, on their admission, register the deed.

Such registration may be effected by the registering officer voluntarily, and without an order from the District Court under s. 84, notwithstanding that an application by the parties concerned to have it registered, has been refused by the Registrar, and that the Registrar-General has deemed the first (invalid) registration to be due registration.

Semble.—Every registration of a deed is not null and void by reason of a non-compliance with the provisions of ss. 19, 21, or 36, or other similar provisions; such errors or defects should be classed under the general words "defect in procedure" in s. 88 of the Act.

Mr. Doyne for Appellant.

No one for Respondents.

Sir Barnes Peacock gave judgment as follows :—

The respondents in this appeal were plaintiffs in the suit. They sued to set aside the auction-sale of one-half of Mouzah Naila, which the defendant, the now

appellant, on the 20th March 1871, caused to be sold in execution of a decree which he had obtained on the 24th August 1868, against Gungha Singh and others, and which half of the mouzah he himself purchased at that sale for Rs. 11,025.

The claim was founded upon a deed of sale executed by the said Gungha Singh and others, by which they conveyed the property in dispute to the plaintiffs. It was at one time contended that the property was under attachment at the time of the execution of the deed of sale; that the deed was not proved to have been executed on the 10th July 1868 the day of its date, and that it was collusive. But those objections have been abandoned, and it must now be taken that the deed was executed *bond fide* and for a valuable consideration on the said 10th July 1868 before the property was under attachment.

The principal question to be determined is whether the plaintiffs are entitled to avail themselves of the deed. It was contended on the part of the present defendant that the deed was not admissible in evidence, and that it could not be acted upon or held to have conveyed to the plaintiffs the property comprised therein, and the ground upon which he relied was that the deed had not been registered in accordance with the provisions of Act XX of 1866. It is not disputed that the deed was presented for registration to the proper officer in due time, viz., on the 22nd October 1868, within the period of four months from the date of its execution; but the vendors did not appear before him. They were consequently summoned under the provisions of a 37, but did not appear on the day fixed for their attendance, whereupon the registering officer having satisfied himself by the depositions of witnesses, and otherwise, that the deed had been executed by the vendors, registered it.

After the execution of the deed, viz., on the 12th November 1868, the property was attached in execution by the present defendant, under his decree against the vendors, whereupon the present plaintiffs intervened and objected, under s. 246 of the Code of Civil Procedure (Act VIII of 1859) that the property had, before attachment, been conveyed to them by the deed of the 10th July. It was at that time admitted by all parties, including the present defendant, that the plaintiffs were in possession of the property, and that the deed of sale had been registered; and under those circumstances the property was, on the 15th December 1868, ordered by the Subordinate Judge to be released. (Record, p. 36.)

Subsequently a suit was brought by the appellant, the present defendant, against the respondents, the present plaintiffs, to set aside the deed of sale as collusive, and as having been executed whilst the mouzah was under attachment and been illegally registered. The Subordinate Judge, on the 29th May 1869, held that the mouzah was not under attachment at the time of the execution of the deed, but that, inasmuch as the deed had been registered in the absence of the vendors, it must be considered as an unregistered document and was not admissible in evidence, and consequently that it could not take effect in opposition to the rights of the decree-holder so as to preclude him from selling the property in execution of the decree. The case was appealed to the High Court, who, on the 10th November 1869, affirmed the decree. They said (page 41):—

“The law directs (s. 36) that no document shall be registered under the Act unless the persons executing such document, or their representatives, assigns, or duly authorised agents, appear before the registering officer. The Registrar was not authorised, therefore, to register this deed in the absence of the vendors and of their agents, merely because he was satisfied that there had been a sale pursuant to a previous agreement for purchase, and further, a power given to the vendors' agents authorising them to procure registration. The 40th Section of the Act contains powers for compelling the attendance before the Registrar of persons

whose presence is necessary for the due registration of deeds, but there is no provision enabling registering officers to proceed of their own authority to register in the absence of such persons.

"We are of opinion that the opinion of the Subordinate Judge is correct. It has been argued that the deed, having been, in fact, registered, is entitled to the privileges of a registered deed, notwithstanding any error on the part of the Registrar, but it is clear (s. 49) that, unless a deed has been registered in accordance with the provisions of this Act, it must be regarded as unregistered, notwithstanding that it may, in fact, have been improperly admitted to registration."

On the 29th August 1870, the plaintiffs again applied to the registering officer to have their deed registered, but the application was refused by the Registrar. (Record, p. 43.) His grounds for refusal were thus stated:—

"This deed has been declared to have been illegally registered and was to be treated as not having been registered. Application is now made for registration, but is refused as being presented beyond the proper period."

The refusal to register was not endorsed on the deed.

On appeal to the Registrar-General he refused to order the deed to be registered upon the ground that it must be deemed to have been duly registered on the 10th November 1868 (p. 42); whereupon the plaintiffs petitioned the High Court, who, on the 24th February 1871, held that the plaintiffs were entitled to have the deed registered and directed its registration in the proper manner after the usual enquiries. They said (p. 45):—

"The deed was duly presented for registration within four months from the date of execution, but it was not then duly registered in accordance with the provisions of the Act, as we have already determined. Having considered the reasons given by the Registrar and the Registrar-General for subsequently refusing registration, we think them insufficient. The deed is entitled to registration, no legal impediment appearing, and we direct its registration in the proper manner, after the usual enquiries."

On the 18th March 1871, the plaintiffs petitioned the Judge of Cawnpore, stating that the sale of the property under the defendant's execution had been fixed for the 20th of that month, and relying upon the order of the High Court, prayed that the sale of the property under the execution might be postponed; but the application was refused upon the ground that the deed had not then been registered. The sale accordingly took place on the 20th March 1871, when the property now in question was purchased by the defendant for Rs. 11,015, of which Rs. 10,081 were retained in satisfaction of decrees which he had obtained against the vendors and their representatives, including the decree of the 24th August 1868, and the remainder was paid by him in cash (p. 93).

On the 20th April 1871, more than thirty days after the order of the High Court, the plaintiffs petitioned the Registrar that the vendors and the heirs of the deceased vendors might be summoned, and the deed registered according to the requirements of the law (pp. 90, 91). Thereupon compulsory process was issued, and the deed was registered on the 16th and 25th May and 5th June 1871.

On the 20th April 1872 the present suit was commenced. The case was heard by the Subordinate Judge, who held that the deed had then been legally registered, but that the sale to the plaintiffs was collusive, and that the claim to set aside the auction-sale could not be maintained, inasmuch as in the former suit between the same parties it had been held that the defendant, the present respondent, was entitled as against the plaintiffs, the present appellants, to bring the property to sale under the execution; and he dismissed the plaintiff's suit.

Upon appeal the High Court held that the deed was not collusive; that it was executed *bond fide* for a valuable consideration; that it had then been

registered, and that the rights created by it must be held to have come into existence at the time the deed would have commenced to operate had no registration been required; and they reversed the decree of the Subordinate Judge, and decreed the claim of the plaintiffs for the establishment of their rights. They also held that the present suit was not barred by the decision in the former suit, as the point therein decided was not whether the appellants would have been entitled to resist the sale in execution if their deed had been duly registered, but whether or not the deed had at that time been duly registered.

The only questions now to be determined are—

1. Whether the subsequent registration of the deed was valid and effectual to render the deed admissible in evidence and operative; and

2. Whether the suit is barred by limitation under s. 246 Act VIII of 1859, in consequence of its not having been commenced within one year from the date of the order of the Subordinate Judge of the 18th March 1871, refusing to postpone the sale.

There can be no doubt that the registering officer acted in contravention of s. 36 in registering the deed without the vendors having appeared before him; but it is not necessary for their Lordships to determine whether the registration was a nullity, or whether the error was one of which a stranger to the deed could take advantage. It may, however, be observed that there are no words in s. 36 declaring that the registration of a deed shall be null and void if made without the appearance of the persons who executed it; and it is very doubtful whether the words of that Section are not merely directory to the registering officer for the benefit of the parties to the deed, and whether his acting without the appearance of the parties and upon evidence instead of the admission of the parties of the execution deed was more than a defect in procedure within the meaning of s. 88. Again, it is not clear that the words "unless it shall have been registered in accordance with the provisions of this Act" in s. 49, are not, especially as regards strangers to the deed, confined to the procedure on "admitting to registration" without reference to any matters of procedure prior to registration, or to the provisions of ss. 19, 21, or 36 of the Act, or other provisions of a similar nature. In considering the effect to be given to s. 49, that Section must be read in conjunction with s. 88, and with the words of the heading of part 10, "Of the effects of Registration and Non-Registration." Now, considering that the registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is, by the Act, rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of ss. 19, 21, or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words "defect in procedure" in s. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer, on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal under s. 83, or upon petition under s. 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled and may not discover, until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights. It is unnecessary, however, to express any opinion upon this point, as it has been decided between these parties that, notwithstanding the first registration, the deed must be considered as unregistered. Neither of the parties appealed from the decision, and, therefore, whether right or wrong, in point of law, they are both bound by it in this suit, and it must be assumed as against them in this appeal that the first registration was a nullity.

The plaintiffs do not rely upon the registration of the 10th November 1868, but on the registration of the 16th and 25th May and the 20th June 1871.

The defendant contends that those acts of registration were inoperative.

"1. Because in ordering the subsequent registration, the High Court acted without jurisdiction, and their order and all proceedings had thereunder are nullities, and the respondents' alleged deed is inadmissible in evidence.

"2. Because, irrespective of the question of jurisdiction, the High Court, in so ordering registration after the lapse of more than eight months from the alleged date of the deed, impugned the express provisions of the Registration Act; and their order is not binding upon this appellant, who was not a party before the High Court at that time.

"3. Because, assuming that the High Court had jurisdiction and that their order was in accordance with the provisions of the Registration Act, the respondent did not present his alleged deed within thirty days after the making of the said order."

As to the first of those reasons, their Lordships are of opinion that the High Court, in ordering the registration of the deed, acted without jurisdiction under s. 84. That Section authorizes a petition to the "District Court," which is defined to mean the "Principal Court of original jurisdiction in a district, and includes the High Court in its ordinary original civil jurisdiction." The High Court of the North-West Provinces, however, has no ordinary original civil jurisdiction, either in Cawnpore, or in any other district.

It was not, however, necessary to have an order from the District or other Court to authorize the re-registration. The deed had been presented for registration within the period required by s. 22, it had been accepted for registration; and it had been registered in fact. The vendors having neglected to appear before the registering officer on the 10th November 1868, that officer might have proceeded, under s. 40, to compel their attendance; but instead of doing that, he, by mistake, registered the deed, after satisfying himself that it had been executed. When it was declared by a competent Court that the registration was invalid, the registering officer might still have proceeded to compel the appearance of the vendors, and, upon their appearance and admission of the execution of the deed, to register it. Though the statute makes it imperative to present an instrument for registration within four months from the date of its execution, no time is fixed within which a deed presented and accepted for registration must be registered; and, indeed, from the nature of the requirements of the Act, the period within which the registration must be completed could not have been fixed.

It does not appear to their Lordships that the orders of the Registrar-General and of the Registrar of the 11th October and 20th September 1870 respectively, imposed upon the plaintiffs the necessity of petitioning the District Court under s. 84, to order the registration of the deed, or precluded the registering officer from voluntarily registering it, after the appearance of the vendors and their admission of its execution. Those orders, made whilst there was a *de facto* registration in existence, do not appear to amount to a refusal to register or to order registration within the meaning of the 82nd Section. The latter of those orders assumes that there was a registration. Indeed, it was not even stated as one of the reasons for this appeal that the registrations made on the 16th and 20th May and 5th June 1871, were invalid because they were made after those orders. If the registering officer was influenced by the order of the High Court to do that which he might have done without it, the fact that the High Court acted without jurisdiction did not invalidate the registration.

The High Court having acted without jurisdiction, the second and third objections to the registration fall to the ground.

As to the objection on the ground of limitation, their Lordships are of opinion that the refusal of the Subordinate Judge of the 20th March 1871 to postpone the

sale under the execution was not an order under s. 246, but was a mere refusal to order a postponement of the sale under s. 247.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal.

The 13th May 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Bond fide Purchaser—Sale of Government Paper—Transfer by Endorsement—
Seals of Native Ladies of Rank—Estoppel—Collusion—Acquiescence (Pre-
sumption of).*

On Appeal from the Court of the Judicial Commissioner of Oudh.

Mirza Ahmed Abbas Khan

versus

Sah Muthra Dass and another.

A purchaser, however *bond fide*, of Government papers transferred to him by endorsements purporting to bear the seals of a native lady of rank to whom the notes were made payable, but which seals were put on after her death, can gain no title by such unauthorized use of the seal.

A plaintiff, who was aware of the sale of the notes under the above circumstances by his brother, may be presumed (even in the absence of direct proof) to have acquiesced in what was done by his brother in the disposal of the notes, and therefore is, equally with him, precluded from impeaching the sale.

Mr. Leith, Q.C., and Mr. J. H. W. Arathoon, for Appellant.

Mr. Mackeson, Q.C., and Mr. John Edwards, for Respondent.

The appellant and the first respondent are the respective representatives of the plaintiff, Ikbalooddowlah, and of Benarsee Dass, defendant No. 1 in a suit brought in the Court of the Civil Judge of Lucknow against Benarsee Dass, and the plaintiff's brother Mokurumooddowlah, to recover nine Government promissory notes of the amount of Rs. 27,000, which the plaintiff alleged to have been wrongfully sold and transferred by the brother to Benarsee Dass.

Although these transactions took place some time between November 1857 and March 1858, the plaintiff in this suit was not filed until the 6th September 1864.

The Civil Judge dismissed the suit, and his decision was affirmed on appeal by the Judicial Commissioner. The plaintiff having appealed to Her Majesty in Council, these judgments were reversed, and a rehearing ordered, with liberty to the parties to amend their pleadings and evidence. Further written statements were accordingly filed, and further evidence given, and after several hearings, remands, and rehearings, the Courts in India have concurred, but for different reasons, in dismissing the suit.

Before adverting to the evidence bearing on the question upon which their Lordships' decision will turn, it will be convenient to refer to the general history of the case, which is shortly stated in the judgment of this Committee in the former appeal, and reported in 12 Moore I. A., p. 507, as follows:—

"The plaintiff was the eldest son of his mother (Sitara Begum), who died possessed of a considerable property, consisting of land, moveables, and certain promissory notes, of which those in question are part. It was a Mahomedan family. The family consisted of two sons and a married daughter. The eldest

son (the plaintiff) claimed the land under an alleged gift from his mother in her life-time, a gift the validity of which was disputed by his brother at least. The sister survived her mother but a few days [this is an error; she in fact survived her mother about three years]; the brother and sister were entitled to the mother's property as heirs under the Mahomedan law; the brothers taking equally each the double of their sister's share, and on their sister's death they took certain shares with her husband in the sister's share. Soon after the mother's death, the sons and daughter proceeded to make some division of the moveables; the elder son claimed the land, and that title was litigated by the younger brother, but it does not appear with what justice or success. The more valuable part of the moveable estate consisted of Government paper amounting to Rs. 59,100, in which each son's share would be of the value of Rs. 23,640, and the daughter's of Rs. 11,820. The daughter is stated to have received her share of this part of the property; the daughter's husband appears to have disclaimed.

"The plaintiff's right of suit in this action is founded upon an alleged illegal dealing by the younger brother with his elder brother's share of this property, and he seeks to extend his right and remedy against the first defendant by treating him as an illegal purchaser under and consequent upon his brother's alleged spoliation. The mode in which the plaintiff alleges this wrong to have been effected is this, viz., that the notes were secured under the separate seals of the heirs in a house belonging to the estate, in which the mother died, and her sister continued to reside; that the younger brother, about the commencement of the Mutiny, broke the seals, carried off the property, and alone sold and purported to transfer it."

The judgment proceeds thus :—

"If this statement be true, and reference be had to the nature of the property sought to be recovered in this suit, viz., Company's paper, and reference also be had to the first defendant's letter of the 30th July 1865 [the real date of this letter is the 19th December 1863], it follows that the first defendant would be under the legal obligation of showing title to the notes purchased. The law applicable to the acquisition of title to notes passing by indorsement, as these appear to have been capable of being passed, must not be confounded with that applicable to the acquisition of title in ordinary chattels."

The result of the proceedings in India, prior to the first appeal to Her Majesty, was as follows.

The Civil Judge of Lucknow had dismissed the suit on the grounds that it was barred by limitation, and that the plaintiff had recovered judgment against his brother in a former suit, in which a purchaser of other notes, named Sheonath, had been joined as a defendant. The Judge also found there was collusion between the brothers in bringing this and the former suit. The Judicial Commissioner had based his judgment on the short, and if taken alone, insufficient ground that Benarsee Dass was a *bond fide* purchaser for value of the notes.

This Committee recommended Her Majesty to reverse these judgments, because, in their opinion, the Courts in India had not sufficiently considered the nature of these Government notes, which required indorsement to pass the property, observing that there was no distinct evidence of the state of the indorsements on the paper, and that no evidence was given of any legal transfer of it. They held also that the claim was not barred by limitation, nor by the decree in the former suit. The judgment pointed out the requisites of a legal transfer by indorsement, but added the following remarks, which have an important bearing upon the present appeal :—

"An invalid transfer might still confer a valid equitable title, either in part or in entirety; but such a transfer being exceptional and dependent on special circumstances, cannot be raised by legal intentment or presumption. Consequently

the plaintiff's case requires an answer, unless met on other grounds; those on which the Court proceeded, of suspected collusion between the brothers, would, if alleged and proved, have constituted a valid defence."

It is added—

"A plaintiff, however, ought not to have a defence of this sort urged against him at the hearing, without due notice by the pleadings and issues of a case of fraud."

In conclusion, their Lordships were of opinion that the facts ought to be inquired into on proper pleadings and evidence, and that if the plaintiff should prove a *prima facie* title to the notes, "the defendant ought to be called on to show if he can title in himself, or some grounds displacing the plaintiff's right to complain of his acts."

Upon a review of the evidence and judgments in the Record now sent up, their Lordships are clearly of opinion that the plaintiff has failed to prove such indorsement of the notes as would be sufficient in itself to transfer the legal property in them. Whether the indorsements were open or special does not appear, but, whichever they were, they were made by affixing the seal of the mother, to whom it seems the notes were made payable. This act was done after her death, by the hand of the plaintiff's brother, under the circumstances hereafter mentioned, and it is nowhere suggested that the indorsement purported to be other than the mother's.

Much evidence has been given with a view to show that ladies of rank commonly indorsed Government notes by putting their seals on them, and that it was not unusual for purchasers to buy notes, bearing such seals, from members of their families in the confidence that the seals were properly affixed. The Courts below have found that Benarsee Dass bought these notes in the *bond fide* belief that the seal had been properly affixed, and their Lordships are not disposed to dissent from that finding; but this alone cannot avail, for it is obvious that a purchaser, however *bond fide*, can gain no title by an unauthorized use of the seal.

The defence, therefore, must rest upon the ground which was principally relied on at the bar, viz., that special circumstances are shown which in equity preclude the plaintiff from defeating the sale. It is clear that the plaintiff's brother who sold, or took part in the sale of the notes, as papers bearing genuine indorsements, is precluded from asserting that such indorsements are not genuine; and the contention for the defendant is that, as between the brothers, the plaintiff has acquiesced in what was done with the notes, and that both are now acting in collusion to set up a false case with a view to obtain their value from the defendant. If this is made out, it cannot be disputed that it would be inequitable to allow the plaintiff to succeed in the suit. And the question, which is mainly one of fact, is, whether such a case has been established.

It would be difficult to arrive at a satisfactory conclusion on this defence from the conflicting and obscure evidence of the witnesses who were examined on different occasions and in various stages of the cause, without the light to be obtained from a review of the acts and conduct of the brothers.

The case of the plaintiff, made by the plaintiff and other proceedings, was that just before the battle of Chinbut (in one proceeding it is said two days before) the brother broke open the lock and seals of the box in the family house in which the notes were kept, took away the notes with the mother's seal, and afterwards sold the notes. The motive suggested for this trespass was the claim made by the plaintiff to the immoveable property under an alleged gift from the mother.

This case, which, in effect, represents that the brother, taking advantage of a time of anarchy, seized the notes with the intention of appropriating them to his own use, is not supported by the evidence. What really appears to have happened

is very different. The rebellion was breaking out, and the family house, being near the Residency, was in a position in which it was likely to be exposed to military occupation. The notes would obviously have been unsafe in this house, and it appears that the brother removed them to his own. He gave the married sister her share of the notes, about Rs. 12,000. On the next day both brothers appeared before the High Priest, and, so far from the plaintiff's brother then desiring to appropriate the notes to himself, he offered to place them in the hands of the High Priest. He, however, declined to take charge of them, and they remained in the brother's possession.

What next followed is the subject of much conflicting evidence. A few general facts, however, distinctly appear. The rebel forces being in possession of the city, the leaders of the rebel Government required the native nobles to contribute money to its support. The plaintiff and his brother were related to the family of the ex-King of Oudh, and were called on for heavy contributions. It appears that the plaintiff was more reluctant than his brother to comply with these demands. A guard was placed at the door of his house, and he was for some time imprisoned, no doubt with the object of inducing him to submit to them. It appears, however, he must have been released before the notes were sold to Benarsee Dass, which, according to Gooroo Mull the broker, was only eight days before the British forces recaptured Lucknow.

There is no doubt that the notes got into the hands of the rebel leaders, and that they were sold, and the Begum's seal affixed to them by the brother at their instance, the proceeds finding their way to the rebel Treasury. It is also clear that other property of the plaintiff was attached and sold by the rebel Government, and the proceeds disposed of in the same way. These facts appear in the testimony of several witnesses, and especially of Wajid Ally, one of the leaders of the rebellion.

The notes were sold at a considerable discount; but the full price then attainable for them appears to have been paid. The sellers were those who believed in the probable success of the rebellion, whilst those only who had faith in the restoration of British rule were willing to become purchasers.

It appears that none of the nobles yielded very willingly to the demands of the rebel Government, and that the contributions were in some measure forced from them. Wajid Ally says:—

“All the ameers (nobles) had in fact to supply money to the State. I do not think they would have paid voluntarily. The money was demanded, and they made it good as best they could.”

He also says, with apparent truth:—

“There were three or four motives for this:—1st. If the party did not give voluntarily, the State would have used force; 2ndly. The party wished to propitiate the then existing Government; and, 3rdly. People were in hopes, if the rebellion was successful, that by assisting the State in its difficulties they would be recompensed afterwards.”

It is not satisfactorily shown that the plaintiff was personally concerned in delivering the notes to the rebel Government, or that he personally took part in the sale. Some witnesses examined before the Civil Judge after the last remand to prove his actual participation in the disposal of the notes do not give satisfactory evidence on the point.

Other witnesses were called to show that at all events the plaintiff knew of the sale to Benarsee Dass. The Collector of Mehsool, a tax of 5 per cent., which appears to have been levied by the rebel Government on the transfers of notes, proved that he applied to the plaintiff for the mehsool payable on the transfer of these notes, and was told by him that Benarsee Dass was responsible for it. Another witness corroborates this statement. Even if these witnesses are not altogether to be relied on, it is difficult to suppose, looking at the whole case, that

the plaintiff was really ignorant of the manner in which these notes were dealt with, and that they were sold at the instance and for the benefit of the rebel Government.

It may be that the notes were obtained and sold under such circumstances of duress on the part of the rebel Government that the plaintiff might have impeached the sale. But he has not put forward that case. If such a case had been made, questions would have arisen whether he, as well as his brother, had not yielded, however reluctantly, to the exactions of the rebel Government, and acquiesced from some of the motives referred to in Wajid Ally's evidence in the sale dictated by its leaders.

The conduct and proceedings of the plaintiff and his brother, after the restoration of British rule, are next to be considered. The first attempt to recover the notes sold to Benarsee Dass was made, not by the plaintiff, but by his brother. As early as October 1858 Mokurumoddowlah applied to the Assistant Commissioner of Lucknow in a summary proceeding to obtain possession of them from Dhunput Roy, one of the persons engaged in the sale. Dhunput's answer was, that Mokurumoddowlah sold the notes, through his agency, to Benarsee Dass. Wajid Ally was called as a witness for the defence, and at that early period stated that the sale took place as a contribution to the wants of the rebel Government. The Assistant Judge was of opinion that "the notes were apparently sold, and not stolen as plaintiff represents, and that the plaintiff was a principal in the matter," and he dismissed the claim as one fit for a civil tribunal. Although the plaintiff does not appear as a party in this proceeding, it may be properly used to show that his brother, with whom the plaintiff is now said to be colluding, and on whose evidence he relies, was the first to make an effort to recover the notes sold to Benarsee Dass, and that he did this on false grounds. This proceeding is also important as showing that the sale to Benarsee Dass was openly discussed, and could hardly have remained unknown to the plaintiff, and further that the British Courts were open as early, at least, as October 1858. Lord Clyde had re-captured Lucknow in March, Lord Canning's Proclamation had been issued in April, and the British rule had been restored throughout the province of Oudh in the early part of that year.

No step whatever appears to have been taken by the plaintiff until the 21st May 1860. He then applied to the Assistant Commissioner, stating that his brother had "got the notes as a plunder," and praying that, "after they are compared with the register, the purchasers of the stolen notes may be called for, and the notes restored;" and he prayed that "his brother may be dealt with according to law."

The Commissioner declined to interfere, saying that the dispute should be decided by a competent Court. The plaintiff was apparently conscious that the lateness of the application required explanation, and he therefore stated, as a reason for the delay, that, "shortly after the rebellion broke out, he was unable to take any step for their recovery, and was obliged to keep himself quiet." If this means that he was obliged to keep quiet during the rebellion, the necessity ceased upon the restoration of British rule; if, on the other hand, it means that he was afraid of the British Government, the excuse is obviously a pretence, for his brother, who was, apparently, a more pronounced partizan of the rebel Government than himself, did not fear to appeal to the British Commissioner as early as October 1858.

No further proceedings, either criminal or civil, were taken by the plaintiff at that time against his brother, nor, indeed, were any ever brought by him against his brother alone.

In November 1862, the brother, and in April 1863, the plaintiff, applied for a certificate of succession to the mother's estate. Both applications were refused, on the ground that the certificate could be granted to neither until their respective

claims had been decided in a regular suit. The Judge of the Civil Court, Mr. Fraser, in his first judgment in the present suit, describes these applications as "a sham fight" between the brothers. Whether this description be true, must depend on the inferences arising upon the rest of the case.

The suit to be now adverted to, and the proceedings in it, are strongly relied upon by the respondent's Counsel to prove collusion. It was a suit brought by the plaintiff against his brother and one Sheonath, a native banker, in March 1863, to recover the plaintiff's two-fifth shares of the notes, viz., Rs. 26,340 from his brother, and Rs. 2,500 from the other defendant, Sheonath, as the purchaser of notes of that value. It appears from the judgment of the Civil Judge, Mr. Fraser, that the brother made admissions which established the plaintiff's case. These admissions of the brother were to the effect that he had broken the seals, taken away the notes, and carried them to his own house, because of the plaintiff's claim to the immoveable estate, and that he was afterwards induced by the rebel Government to give them up, and affix the mother's seal. Sheonath made on defence. Accordingly the Judge, acting on the brother's admission, made a decree against him for Rs. 23,640, and ordered two notes of the value of Rs. 2,500, in Sheonath's hands to be sold, and the proceeds divided among Sitara Begum's heirs.

This decree is dated on the 24th April 1863, only six weeks after the plaint. The rapidity with which this decree was obtained, and the facts that it was passed upon admissions, that Sheonath made no defence, and allowed a decree to pass against him for the entire value of the notes in his hands without deducting Mokurumooddowlah's share, and that no execution was taken out by the plaintiff against his brother, are relied on as circumstances showing the suit to have been collusive.

This Committee, in adverting on the first appeal to this suit, alluded to the fact that the plaintiff had taken no steps to enforce this judgment against his brother, observing, "There is no proof that the brother is insolvent, or incapable of satisfying that judgment." Notwithstanding this intimation, no attempt was made by the plaintiff upon the remand to show the inability of his brother to satisfy the judgment, or to account for his not enforcing it against him.

To add weight to the inference arising from this circumstance, it has been proved on the remand that whilst the above suit was going on, another was pending in which the brother sued the present plaintiff for Rs. 15,000 as the value of his share of the mother's immoveable property. It appears that this suit was compromised on the 13th May 1863, upon the terms that the present plaintiff should pay his brother Rs. 3,000, viz., Rs. 1,700 in cash, and Rs. 1,300 when the present plaintiff got all the mother's notes, which had been lost. A strong inference arises from this compromise that the judgment obtained by the plaintiff against his brother for Rs. 23,640 on the 24th April was, as between themselves, collusive and illusory, when it is found that the plaintiff instead of issuing execution, or otherwise enforcing it, compromised the other suit by making a present payment to his brother of Rs. 1,700. The other part of the compromise, viz., the agreement of the plaintiff to pay a further sum when he got the notes which had been sold, is a still stronger indication that the brothers were then acting in concert to get back the notes, or their value, from the purchasers, since this further payment is made to depend on the attainment of that object.

Another circumstance in this suit against the brother and Sheonath bears directly on the present. On the 22nd October 1863, the plaintiff petitioned the Court that the notes for Rs. 27,000 which Benarsee Dass had bought should be attached and sold in execution of the decree against his brother. And on the 11th December, an officer of the Court issued an injunction to Benarsee Dass not to part with the notes until further order, and to bring forward any objections he might have. In answer to this order Benarsee Dass wrote, on the 19th December,

stating that the notes (a list of which he enclosed) had been purchased by him during the rebellion, and afterwards resold in Calcutta.

This irregular injunction appears to have been issued without the sanction of the Judge. It was undoubtedly an attempt to obtain by indirect means possession of the notes in the hands of Benarsee Dass, and it is said by the respondent that this was the main end and object of the suit.

The present suit was then brought in September 1864. The first hearing was before Mr. Fraser, the Judge who had decided, in the plaintiff's favor, the suit brought against the brother and Sheonath. He came to the conclusion that the brothers were acting in collusion. Referring to the former suit, he intimated that he had been imposed upon in it; and that he was satisfied that it had been collusively brought to assist the attack intended to be made on Benarsee Dass, who was the largest purchaser of the notes, and not to obtain satisfaction from his brother.

Although the Civil Judge having heard both suits was certainly in a favorable position to form a correct opinion on the conduct of the parties, it was thought by this Committee that his decision was based on an issue not sufficiently raised, and upon evidence insufficiently developed.

On the first hearing upon the remand, and after an issued raised, and further evidence taken, the then Civil Judge, Mr. Lincoln, after an elaborate review of the history of the suit, came to a distinct finding that there was collusion between the brothers.

On appeal the Judicial Commissioner (Mr. Capper) thought further evidence was necessary and remanded the cause. His opinion appeared to be that the gist of the case was, whether the mother's estate had been completely divided.

Mr. Lincoln, having taken the evidence of Dhunput Roy, again found that, in his opinion, collusion was conclusively proved. Another appeal led to a further remand by the then Judicial Commissioner (Mr. Couper) who thought the question should be tried, whether the plaintiff sanctioned or was aware of the sale.

Mr. Lincoln again took further evidence, and reported thus :—

"The evidence now adduced conclusively proves that if the plaintiff was not a party, he was fully aware of the sale of the notes by his brother."

He further reported—

"There is reason to believe the proceeds were appropriated by the rebel Government as the contribution of the brothers towards the support of the *de facto* Government, of which they were members, and in the maintenance of which they were equally interested."

On a third appeal to the then Judicial Commissioner (Mr. Currie), the decree of the Civil Judge was affirmed, but upon the ground that as the Lower Court had found that a division of the notes had taken place, and that it had not been proved that the notes in question fell to the plaintiff's share, and as that finding had not been traversed on appeal, it must be taken to be admitted by the plaintiff. Their Lordships are constrained to say that the ground on which Mr. Currie bases his decision cannot be supported. It was clearly open to the plaintiff to question this finding upon appeal, though it may not have been distinctly traversed, and in their view the finding, when looked at, is not supported by the evidence.

But their Lordships, after considering the inferences arising from the evidence, and the conduct of the parties, to which they have already adverted in some detail, see no sufficient grounds for overruling the finding of Mr. Lincoln that the plaintiff was aware, during the rebellion, of the sale of the notes, and of the circumstances under which they were sold, and that the brothers have since been acting in collusion to recover the notes or their value from the defendant.

Collusion of this kind, with knowledge of the facts, being found, it ought to be presumed against the plaintiff, even if it were not directly proved, that he

acquiesced in what was done by his brother in the disposal of the notes, and therefore is, equally with him, precluded from impeaching the sale. Consequently this suit, in which, moreover, he has put forward a case not resting on the real facts, but in which he has treated his brother as a delinquent, in his dealings with the notes, cannot, in their Lordships' opinion, be sustained. They have, therefore, to state that their advice to Her Majesty will be to dismiss this appeal with costs.

The 4th June 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Mahomedan Law—Prompt Dower—Limitation—Application for Leave to sue for Dower “in formâ pauperis,” Effect of, as a Demand.

Cases Nos. 22 and 45 of 1870.

*On Appeal from the High Court at Calcutta.**

Ranee Khajooroonissa

versus

Ranee Ryeesoornissa,

and

Ranee Ryeesoornissa

versus

Ranee Khajooroonissa.

Held, reversing the decision of the High Court of Calcutta, that when a Mahomedan lady applied for leave to sue her husband *in formâ pauperis* for her dower, and the application was rejected, it did not constitute a demand for prompt dower sufficient to set the period of limitation running.

This was an appeal by a defendant, and a cross-appeal by the representative of a deceased plaintiff, from a judgment of the High Court of Calcutta of the 23rd April 1870, which in part affirmed, and in part reversed, a decree of the Subordinate Judge of Purneah, dated the 4th September 1869. The suit was instituted by the plaintiff, one of the widows of Rajah Enayet Hossein, against the defendant, the other widow of the said Rajah, to recover the sum of Rs. 91,875, being, as the plaintiff alleged, the amount due to her for dower. The plaintiff's case was that her dower was fixed by a kabeennamah at a lakh of rupees, of which one-fourth was prompt, and three-fourths was deferred; and that she had received Rs. 2000 in the lifetime of her husband. She also erroneously gave credit for Rs. 6,125 as her contribution, as one of the heirs of her deceased husband. The defendant denied the genuineness of the kabeennamah, and stated, which was admitted by the plaintiff, that she had voluntarily separated from her husband in 1851, sixteen years before the death of the latter, which took place in 1867, and that such separation amounted to a constructive divorce; and that on the plaintiff's refusing to return to her husband, the latter made a vow, which amounted to a divorce by aila. The defendant also pleaded a petition by the plaintiff for leave to sue the Rajah *in formâ pauperis* for her entire dower, prompt as well as deferred, in the year 1861, and the proceedings consequent thereupon; which are mentioned in the judgment of the High Court, culminating in the rejection of the application, and contended that the plaintiff's claim was barred by limitation. The Subordinate Judge held that the kabeennamah was

* From the judgment of Loch and Hobhouse, JJ., decided on the 23rd April 1870.

genuine; that there had been no divorce by aila; and that this plaintiff's claim for her dower prompt, as well as deferred, was not barred by limitation. The defendant having appealed, the High Court affirmed the judgment of the Lower Court in other respects, but held that the plaintiff's claim for prompt dower was barred by limitation, the period running from the petition for leave to sue *in forma pauperis*.

Mr. Justice Loch, in delivering judgment, said:—"But it is said that no demand has been made; that plaintiff's application in 1861 to sue as a pauper can at best be looked upon as a notice, but not as a demand. On 3rd May 1861 the plaintiff filed a petition of plaint in the Court of the Principal Sudder Ameen, setting forth that, on the occasion of her marriage with Rajah Enayet Hossein, a kabeennamah, by which a lakh of rupees had been settled upon her, was executed by her husband; that of this, part or one-fourth was prompt, and part or three-fourths deferred; that of the prompt dower her husband had, on various occasions, paid her Rs. 2,000, and she now sued to recover the balance; but being devoid of means, and unable to pay the stamp fees, she prayed that she might be allowed to file her suit as a pauper. On the 1st July following a petition on the part of Rajah Enayet Hossein was put in by his authorized vakeels, Nafzool Ali, Charles Chapman, and Moulvi Furzund Ali, to the effect that the plaintiff was not a pauper, the Rajah at the time of her marriage having given her jewels and cash to the value of Rs. 10,000; that the kabeennamah produced by the plaintiff was a forgery, and that plaintiff's dower was never fixed at a lakh of rupees, nor was a deed of any kind drawn up and executed; but according to the custom of the family, the plaintiff's dower was verbally fixed at Rs. 5,000. Further objections are taken to the deed, that it does not bear the Rajah's seal; that the Cazeer's seal thereon was obtained by collusion between him and members of the plaintiff's family; that the claim for the prompt portion of the dower was barred by limitation, not having been sued for within twelve years of the marriage; and the suit for the remainder of the dower was premature. He denies having ever paid any part of the prompt dower, and urges that if any such payment had been made, it would have been entered in the back of the deed, had that deed been a genuine document; and he adds that the allegation of payment is made to avoid the effect of the law of limitation.

On 7th January 1862, Rajah Enayet Hossein was examined by the Principal Sudder Ameen, and the first question put to him was,—"*You have stated in your answer that ornaments to the value of Rs. 10,000 were given by you to the petitioner Raneer Ryeesoonnissa, that some of these ornaments to the value of Rs. 6,000 were pledged by the petitioner for a sum of Rs. 3,000 to a mahajun, which were afterwards redeemed, and sent by you to the Raneer, the plaintiff. When were they sent, and are they now with the plaintiff, or have they been disposed of?*" In reply to this question the Rajah gives the same details as are given in his petition of 1st July 1861, regarding those ornaments, and adds, what was also stated in that petition, that the plaintiff was in receipt of an allowance of Rs. 25 a month from her brother Saifoollah. After this examination a proceeding, dated 27th January 1862, was drawn up by the Principal Sudder Ameen, in which he states the plaintiff had filed a suit to recover the amount of her dower under a deed bearing date 8th Rubee-oos-sanee 1254 H.—18th Assar 1246 Moolkee; that she prayed for permission to sue as a pauper; that the case came on before Moonshee Ahmud, pleader for the plaintiff, and Moulvi Afzul Ali, Moulvi Furzund Ali, and Mr. Chapman, pleaders for the defendant, and after reading the record and hearing argument, the application of the petitioner to be allowed to sue as a pauper be rejected with costs. These proceedings appear to have been conducted under the provisions of s. 305 Act VIII of 1859, and related only to the question whether plaintiff was or was not a pauper, and this was decided against her; but this much may be gathered from these proceedings, that Rajah Enayet

Hossein adopted the petition of 1st July 1861 put in by his vakeels in his name as his own, and must be considered to have accepted the statements made in it. He does not repudiate any part of it, but when the question is put, You said in your answer, *i.e.*, 1st July 1861, he replies by repeating statements found in that answer or petition, which also contains a direct and distinct repudiation of plaintiff's demand for dower. But still it is said that as the application to sue as a pauper was rejected, there was no demand, but only a notice of a claim. I cannot consider the application in that light. It was drawn up as a plaint in a regular suit, and had the application for permission to sue as a pauper, which is written at the foot of the plaint, been allowed, the petition would, under the provisions of s. 308 Act VIII of 1859, have been numbered and registered, and been deemed the plaint to the suit. By a ruling of the High Court, reported in 1 Hay's Reports, p. 378, it was held in the case of *Goluck Nath Dutt*, that the suit was commenced when the application to sue *in formâ pauperis* was filed; and in another case, reported in 4 Bombay High Court Reports, A. C., p. 39, it was held that a pauper suit commences for the purpose of limitation on the day when the petition to sue *in formâ pauperis* is presented to the Court, and not on the day when the application being granted, it is numbered and registered. It cannot be said that Rajah Enayet Hossein was ignorant of this demand, or that the petition of 1st July 1861, in which he distinctly denied the plaintiff's claim to dower, was not written with his knowledge and consent, seeing that it was presented by his authorized pleaders, who were also present and argued the case, when the application was rejected, and he himself, when examined by the Principal Sudder Ameen, admitted it to be his answer, though he did not speak to all its details. Looking, therefore, upon the Ranees application to be permitted to sue as a pauper to be a clear, distinct, and positive demand made in a public Court to recover a dower, a demand which was as distinctly rejected by the Rajah, I think her claim for so much of the dower as is prompt must be held to be barred by the law of limitation (s. 1 cl. 9 Act XIV of 1859), the suit not having been brought within three years from the date of the cause of action, *viz.*, the refusal on the Rajah's part to pay the demand then made.

The defendant appealed from such portions of the judgment of the High Court as affirmed the judgment of the Lower Court, and the representative of the plaintiff preferred a cross-appeal from that portion of the judgment of the High Court which reversed the judgment of the Lower Court.

Mr. Leith, Q.C., and *Mr. C. W. Arathoon*, for the appellants in the appeal, and respondents in the cross-appeal, gave up their appeal, whereupon their Lordships called upon *Mr. Doyne* and *Mr. John Cutler*, who appeared for the appellants in the cross-appeal, cited *Ameer-oon-Nissa v. Moorad-oon-Nissa* (6 Moore's Indian Appeals, p. 211)* and *Mussamut Mulleeka v. Mussamut Jumeela* (11 B. L. R., p. 375),† and contended that the latter case, establishing the rule that the period of limitation for prompt dower runs from the dissolution of the marriage or demand by the wife, the petition for leave to sue *in formâ pauperis* was not a demand within the meaning of such rule.

Sir Montague E. Smith delivered the judgment of their Lordships. After stating the main facts of the case, and that the Lower Courts had given judgment for the whole of the claim, and that the High Court had affirmed such judgment so far as it related to the deferred dower, but reversed it as far as it related to prompt dower, because there had been a demand for such dower, and it was barred by limitation, he said:—The Ranees *Khajooroonissa* appealed upon the ground that the *kabeennamah* itself, which was the foundation of the Ranees plaintiff's claim, was not a genuine document, and also upon the ground that the deferred dower was barred by the Statute of Limitations. The ground upon which the deferred dower was alleged to be barred was that there had been a

* 2 Suth. P. C. R. App. I.

† 2 Suth. P. C. R. 766.

divorce between the parties, and that the deferred dower then became payable. It was also said that the Rajah had made an aila or vow that he would have no further intercourse with his wife, and that that also made the dower payable at a period which would render the Statute of Limitations a bar.

On the opening of the appeal for the Ranee Khajooroonissa by Mr. Leith, it clearly appeared that the facts entirely failed the appellant, and that no question really arose for their Lordships' decision. The genuineness of the deed was entirely a question of fact, which had been decided by both the Courts below in favor of the Ranee the plaintiff. With regard to the divorce and the aila, these also were questions of fact which had, in like manner, been decided against the Ranee defendant. Her appeal therefore must be dismissed, and dismissed with costs.

The only question in the cross-appeal, and it is a question of some importance, is whether the prompt dower is barred by reason of there having been, as alleged on the part of the defendant Ranee, a demand and a refusal of that dower in the lifetime of the Rajah, beyond the period prescribed by the Statute of Limitations.

It is not necessary to decide whether the limitation to be applied is that in the 9th Clause of the 1st Section of the Act XIV of 1859, or that in the 16th, because whether the term be the three years mentioned in the one, or the six years mentioned in the other, the interval between the alleged breach or cause of action and the commencement of the suit has been longer than either. For the present purpose, the terms used in the two Sections, although differing in language, are the same in substance. The limitation in one runs from the breach of the contract, in the other from the cause of action. If there had been a breach, there would be a cause of action; therefore the terms may be regarded as identical so far as the decision of the present appeal is concerned.

The question is, whether certain proceedings, which were taken by the Ranee Rycsoonnissa in Court with a view to obtain leave to sue her husband for this dower *in formâ pauperis*, amount to such a demand as would be sufficient to constitute a cause of action within the meaning of the Statute. It is unnecessary to say what would have been the effect of an abortive suit brought at that time, because their Lordships are disposed to come to the conclusion that these proceedings did not arrive at the stage when they became a suit. The object of the Ranee was to place herself in a position to maintain a suit as a pauper, without incurring the expense, which she alleged she was unable to pay, of a regular suit. Her application to the Court was for that purpose; but in making it she was obliged to conform to "The Civil Procedure Code," Act VIII of 1859. The portion of the Act which relates to pauper suits requires that the application when made shall be by petition, containing the particulars required in regard to plaints, the object being that if the application be ultimately successful, the petition is to be deemed the plaint in the suit. But the application to the Court is really only for permission to sue *in formâ pauperis*. S. 299 says:—"The application to the Court for permission to sue *in formâ pauperis* shall be by petition which shall be written on a stamp paper of eight annas." Then s. 308 enacts:—"If the application of the petitioner be granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as an ordinary suit, except that the plaintiff shall not be liable to any further stamp duty in respect of any petition, appointment of a pleader, or other proceeding connected with the suit, or with the execution of any decree passed on it." Therefore, if the application of the Ranee had been successful, the petition would have been turned into and would have become a plaint. But it was unsuccessful. The Principal Sudder Ameen was of opinion that she had sufficient means to pay the expenses of the Court, and ordered that the petition "of pauperism be rejected." Her application, therefore, fell to the ground, and the petition never became a plaint.

Since the decisions which have taken place at their Lordships' Board, there

is really no doubt as to what is the nature of prompt or exigible dower, and under what circumstances the Statute of Limitations will run. Prompt or exigible dower may be considered a debt always due and demandable, and certainly payable upon demand, and therefore, upon a clear and unambiguous demand and refusal, a cause of action would accrue, and the Statute would begin to run. The question here is, whether the proceedings to which reference has been made really do amount to such a demand. No doubt the form of the proceedings takes the shape of a demand in a plaint, but their Lordships think that, with a view to ascertain the intention of the Ranee, and the force to be attributed to her application, they must look at the substance and nature of the proceedings, and consider that the form is that prescribed by the law, and is not the voluntary choice of the parties. So regarding them, what the Ranee says to the Court is no more than this:—"I desire to make a demand against my husband in the form of a suit, if you will enable me effectually to do so by allowing me to sue *in forma pauperis*." The Court rejects her application, and says:—"We will not allow you to make a demand in that way." The petition of the Ranee seems to their Lordships to be an expression, and a strong expression, of an intention to sue the husband in that form if she is permitted to do so, but it does not appear to them to amount to a demand by way of action until she has that permission. The application she makes to the Court to be allowed to bring an action is made conditionally only upon her obtaining leave to do it as a pauper.

It is said that the husband, by his counter-petition, denied his liability to pay the dower, raising several objections both to the deed and to the amount claimed; but their Lordships think that his opposition does not alter the character of the proceedings. No amount of opposition on his part would be sufficient to constitute a cause of action, unless the wife had made a previous demand. The option lay with her to demand the dower or not. It was for her to elect the time at which she would do it, and if she has not done it, his opposition, however strongly expressed, would be immaterial.

It is to be observed that there is no evidence of any demand other than the proceedings referred to.

Under these circumstances, their Lordships think that the ground upon which the Court held that the Statute of Limitations applied fails, and that the appeal on the part of the plaintiff Ryeesoonnissa ought to succeed. In the result, therefore, they will humbly advise Her Majesty to dismiss the appeal of the Ranee Khajooroonissa, and to allow the appeal of the Ranee Ryeesoonnissa, and to direct that the judgment of the High Court be reversed, and the decree of the Principal Sudder Ameen affirmed. Their Lordships are also of opinion that the Ranee Ryeesoonnissa should have the costs incurred in India, and the costs of these appeals.

The 5th June 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Hindoo Widow—Reversioners—Vested Remainder—Contingent Remainder.

*On Appeal from the High Court at Calcutta.**

Mussamut Bhagbutti Dace

versus

Chowdry Bholanath Thakoor and others.

* From the judgment of L. S. Jackson and Ainslie, JJ., decided on the 17th January 1871.

Where a document, executed by a Hindoo, construed in its plain ordinary meaning, appeared to be in the nature of a family settlement, giving to his widow C an estate for life, with a power to appropriate the profits, and to his adopted son, what would be termed in the phraseology of English law, a vested remainder on her death: HELD, that she would have the power of making whatever use she chose of the proceeds of her estates; and that if she bought land or personal property with them, that land and that property would be hers, and would devolve on her representatives.

In the absence of any understanding, expressed or implied, in favor of a different construction of the document, their Lordships did not feel justified in interpreting it so as to change the nature of the estate, and regard it as taken by C in her character as a Hindoo widow. In this character, while, on the one hand, whatever she purchased out of the profits would be an increment to the husband's estate of which the reversioners would be entitled to recover possession, on the other hand, she would have certain rights as a Hindoo widow, *e.g.*, that of alienating the estate altogether if insufficient to defray funeral expenses or her maintenance, and the reversioner would not be possessed of a vested remainder but of a contingent one. She would also completely represent the estate, and limitation might run against the heirs. Their Lordships saw no sufficient reason to import into the document words carrying these consequences.

Mr. Cowie, Q.C., and Mr. J. D. Bell for Appellant.

Mr. Leith, Q.C., and Mr. Doyme for Respondent.

Sir Robert Collier gave judgment as follows:—

In order to make this case intelligible the following facts require to be stated:—Odan Thakoor was one of three brothers. Shortly before his death, which occurred in February 1827, he had adopted a son of the name of Girdhari Thakoor, who was a son of his brother. At that time he had a wife, Mussamut Chunderbutti, and he had a daughter, Mussamut Suntbody. He shortly before his death, on the 21st January 1827, executed a document, which will have to be referred to hereafter, upon which the question in this case arises, and a document of a similar character and very similar in terms was also executed by Girdhari. Under these documents, the present defendant, Mussamut Bhagbutti Dae, who is the grand-daughter of Odan Thakoor and of Mussamut Chunderbutti, claimed all the land in question, being thirty-four lots. The plaintiffs, who are nephews or grand-nephews of Odan Thakoor, brought their suit to obtain possession of these lots, and they have succeeded with respect to the first 12 of them in both Courts. As far as the lots up to No. 12 are concerned there is now no dispute. Those lots were, in fact, lots of real property which belonged to Odan Thakoor in his lifetime, and which, it is now agreed, upon the death of Mussamut Chunderbutti, reverted to the plaintiffs as the heirs of Odan Thakoor, or at all events of Girdhari, his adopted son; nor is there now any dispute as to lots Nos. 15, 16, and 17, which both Courts have given to defendants.

With regard to the greater part of the other lots the plaintiffs contend that the Mussamut held the property out of the proceeds of which these lots were purchased as a Hindoo widow, and that they were an increment to that property, and did not descend to her heir.

The question arises upon the construction of these documents. The first is that executed by Odan Thakoor himself on the 21st January 1827, and is in these terms:—"I am Odan Thakoor, proprietor of one-third share of the whole 16 annas" of certain mouzahs "which I inherited from my forefathers," and so on. "Whereas no son is born to me except one daughter, by name Mussamut Suntbody, whom I have reared up like my son, and have still got in my house, and not allowed to go to her husband's house, and as on account of my dotage I have given up all hopes of my existence, consequently, in order to evade all future disputes I have made a partition in this wise: that a one-third share out of the whole 16 annas of Mouzah Munkowli, usli with dakhili, Rs. 1,100 in cash, and Bhichuck slave with his children, I have granted to Mussamut Suntbody, my daughter, for her maintenance, in order that she may enjoy possession of the same with her children, as proprietress, and thus pass her days," giving to Suntbody an estate of inheritance in this particular property,—“that the remaining 'milkiut' and 'minhai' estates together with the amount of ready

money, articles, slaves, and all household furniture I have placed in the possession of Mussamut Chunderbutti Thakoorain, my wife, to be enjoyed during her lifetime, in order that she may hold possession of all the properties and milkiut possessed by me, the declarant, during her lifetime, and by the payment of the Government revenue, appropriate the profits derived therefrom, but that she should not by any means transfer the milkiut estates and the slaves; that after the death of my aforesaid wife the milkiut and household furniture shall devolve on Girdhari Thakoor, my *kurta* (adopted son) and that no objection thereto raised by any one shall be ever held valid." On the same day a similar document, no doubt slightly differing in terms, but in their Lordships judgment in no material particular, was executed by Girdhari, the adopted son. It does not appear to their Lordships necessary to enter into the question as to the effect of the particular form of adoption; it is enough to say that it gave him a right to the inheritance.

The Subordinate Judge has construed this document in what would certainly appear to be its plain ordinary meaning, namely, that it was in the nature of a family settlement, giving to Chunderbutti an estate for life, with a power to appropriate the profits; and to Girdhari what would be termed in the phraseology of English law a vested remainder on her death. According to this construction, she would have the power of making whatever use she chose of the proceeds of her estates; and if she bought land or personal property with them, that land and that property would be hers, and would devolve on the defendant who represents her. Applying this principle he gave the plaintiffs a decree for the first 12 lots of the 34 lots claimed, affirming the title of the defendant to the remainder. The view of the High Court was different; they indeed agreed with the finding of the Subordinate Judge with respect to the first 12 lots, in which he was manifestly right, for the documents referred to certainly gave to Chunderbutti no more than a life-estate. They also affirmed, but on different and special grounds, his judgment as to lots 15, 16, 17. But they differed from him upon the construction of these instruments, expressing their opinion in these terms:—"Shortly, the effect of the two *ikrarnamas* which have been read to us appears to be this, that by an understanding between Odan Thakoor and his adopted son, carried out in those instruments, it was agreed that, notwithstanding the adoption, Chunderbutti should take and enjoy the estate of her husband, whose death was then apprehended, and which did shortly afterwards occur, in the same mode as she would have taken and enjoyed it if no adoption had taken place," that is, in her character as a Hindoo widow.

Their Lordships, on considering this instrument, together with the surrounding circumstances which no doubt are proper to be regarded, have come to the conclusion that there is no sufficient reason for departing from what appears to be the plain and obvious construction of its language. There is no evidence whatever, extraneous to it, of any such understanding as that supposed by the Court to have been come to between Odan Thakoor and his adopted son. If there had been, it would have been easy to express it; but as no such understanding is expressed, or is in their Lordships' judgment to be inferred by necessary or even reasonable implication from the language of the instrument, they do not feel justified, upon mere conjecture of what might probably have been intended, in so interpreting it as materially to change the nature of the estate taken by Chunderbutti. If she took the estate only of a Hindoo widow, one consequence, no doubt, would be that she would be unable to alienate the profits, or that at all events, whatever she purchased out of them would be an increment to her husband's estate, and the plaintiffs would be entitled to recover possession of all such property, real and personal. But, on the other hand, she would have certain rights as a Hindoo widow; for example, she would have the right under certain circumstances, if the estate were insufficient to defray the funeral expenses or her

maintenance, to alienate it altogether. She certainly would have the power of selling her own estate; and it would further follow that Girdhari would not be possessed in any sense of a vested remainder, but merely of a contingent one. It would also follow that she would completely represent the estate, and under certain circumstances the Statute of Limitations might run against the heirs to the estate, whoever they might be.

Their Lordships see no sufficient reason for importing into this document words which would carry with them all these consequences, and they agree with the Subordinate Judge in construing it according to its plain meaning.

A case has indeed been called to the attention of their Lordships in which a somewhat limited construction was put by this Board upon words in a deed whereby a Hindoo widow was given an estate for her sole and absolute use and benefit (*Sreemutty Rabutty Dossee v. Sibchunder Mullick*, 6 Moore's Indian Appeals, p. 1). The circumstances of that case were these, as far as they are material to the present purpose. A deed of arrangement and release had been entered into between members of a Hindoo family in respect of a joint estate which was claimed by a childless Hindoo widow, in the character of heiress and legal personal representative of her deceased husband, and that being so, and her claim in that character being recited in the deed, their Lordships thought that the terms "her sole absolute use and benefit" must be construed with respect to the character in which she claimed, in which she sued, and in which she was described in the deed. That case does not appear to their Lordships to have any material bearing on the present. This is not a case in which the widow claimed any right as a widow—in fact she had none: nor is she any party to the deeds, nor are they drawn under circumstances at all similar to those in that case.

Under these circumstances, their Lordships have come to the conclusion that whatever property, real or personal, was bought by Chunderbutti out of the proceeds of her husband's estate, belongs to her, and consequently to the defendant.

This view of the case disposes of all the items in the cause, except No. 20, and from Nos. 30 to 34; all the items subsequent to No. 12, except these, comprise either real or personal property which has been found by the Subordinate Judge to have been bought by Chunderbutti with the proceeds of her husband's estate, and which finding their Lordships uphold. No. 20 comprises the house in which Odan Thakoor lived, and must, in their Lordships' opinion, be recovered by the plaintiffs on the same principle on which they established their claim to lots 1 to 12. As to the last four items, the Subordinate Judge finds that the plaintiffs gave no evidence of their right to them. The defendant must therefore retain them.

Their Lordships will, therefore, humbly advise Her Majesty that the decrees of both the Lower Courts be discharged, and in lieu thereof that it be ordered that the plaintiffs recover the mouzahs numbered in the plaint from 1 to 12, both numbers inclusive, and the property numbered 20, and that as to the residue of the properties mentioned in the plaint the suit ought to be dismissed. Their Lordships will further direct that the costs of the plaintiffs in the Court of the Subordinate Judge, in proportion to the amount decreed by Her Majesty in Council, be paid by all the defendants, and that the costs of each of the defendants in the said Court of Subordinate Judge, in proportion to the claim disallowed by Her Majesty in Council, be paid by the plaintiffs, and that the costs in the High Court be borne by the plaintiffs and the defendant Mussamut Bhagbutti Dasee, respectively, in proportion to the value of the property decreed and disallowed by Her Majesty in Council. The costs awarded as above-mentioned are to carry interest at the rate of 6 per cent. per annum from the date of the decrees of the Lower Courts, respectively, to the dates of realisation. There will be no costs of this appeal.

The 22nd June 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Act XXIII of 1861 s. 11—Mesne Profits—Interest—Execution Proceedings—
Undertaking contrary to the Cursus Curiae—Substituted Defendants—
Liabilities.*

On Appeal from the High Court at Madras.

Sadasiva Pillai

versus

Ramalinga Pillai.

Their Lordships of the Privy Council accept as settled law the following construction of the Indian Courts put upon Act XXIII of 1861 s. 11, being a *consensus* of opinion established by a long course of decision, to wit that where a decree is silent touching interest or mesne profits, subsequent to the institution of the suit, the Court executing the decree cannot, under the clause in question, assess or give execution for such interest or mesne profits; but the plaintiff is still at liberty to assert his right to such mesne profits in a separate suit.

Where, in the course of the continued litigation as to such subsequent interest or mesne profits, the judgment-debtor executes an undertaking, not by a mere written agreement between the parties, but by an act of the Court, that in consideration of his being allowed to remain in possession pending appeal, he will, if the appeal goes against him, account in that suit and before that Court for the mesne profits in question, he cannot escape from the obligation, because when he contracted it, the course and practice of the Courts proceeded upon a construction of the Statute which has since been pronounced to be erroneous.

Where a respondent, by reviving an appeal, substitutes himself for his father as a defendant in the suit, he assumes not merely liability as heir in the ordinary way, but the position of defendant with all the rights and liabilities which had previously attached to it.

Mr. Leith, Q.C., and Mr. Grady for Appellant.

Mr. Norton and Mr. Mayne for Respondent.

Sir James Colville delivered judgment as follows:—

Shunmooga Pillai and Chiddunbrun Pillai were cousins, and the only members of a joint and undivided Hindoo family. Shunmooga died first, and in 1858 the appellant, claiming to be his adopted son, brought a suit to enforce his rights against Chiddunbrun, who denied the validity of the alleged adoption. The suit was in its nature one to establish the plaintiff's title as the heir of his adoptive father, and to obtain a partition of the joint family estate. It specifically claimed the mesne profits of the landed property from the date of the alleged exclusion,—that is to say, from the Fusli year 1267, corresponding with 1857-58, but did not claim mesne profits for the subsequent years.

On the 11th June 1859, the Civil Judge of Cuddalore made a decree in the plaintiff's favor, which affirmed his title as adopted son of Shunmooga, awarded to him a moiety of the joint estate, including certain lands, and the sum of Rs. 4,395-6-7½ as his share of the mesne profits of such lands for the Fusli year 1267, but was silent as to the mesne profits which had accrued since the institution of the suit. Both parties appealed against this decree to the High Court of Madras, which, by its decree dated the 24th September 1860, dismissed the defendant's appeal and modified the decree of the Civil Court by awarding to the plaintiff a further sum of Rs. 3,494-4-1 as the value of his share in certain jewels and other moveable property. It left the decree of the Civil Court untouched in respect of the mesne profits of the immoveable property.

The defendant appealed against the decree of the High Court to Her Majesty in Council. His appeal abated on his death in 1862, but was revived by his son

the present defendant, and was finally dismissed by an order in Council in February 1864. This antecedent litigation, therefore, has conclusively established the title of the plaintiff to whatever he can claim under the decree of the 11th June 1859, as varied by that of the 24th September 1860.

In September 1864, the plaintiff commenced the proceedings out of which this appeal has arisen, in order to obtain execution of the decree made in his favor. By his petition he prayed to be put into possession of his share of the lands; to have execution for the ascertained sums awarded to him by the decree, including the mesne profits for the Fusli year 1267, with the interest thereon; and also to have execution for the two further sums of Rs. 48,075-14-1, and Rs. 15,890-15-7, the first being the alleged amount of mesne profits for the six years from Fusli 1268 to Fusli 1273; and the latter the estimated amount of interest due on such mesne profits. He has been put into possession of his share of the lands, and may be assumed, subject to what may be said hereafter touching his share of the outstanding debts due to the joint estate, to have obtained all to which he can be entitled under the decree except the two last mentioned items; or such other sums, if any, as may be due to him for the mesne profits for the years in question, and interest thereon. His claim to such subsequent profits and interest was litigated between him and the respondent in the proceedings which will be hereafter more particularly considered. The result of these was an order of the Civil Court dated the 31st January 1872, which awarded to the plaintiff the sum of Rs. 36,223-6-2 for mesne profits, but rejected his claim for interest thereon.

Against that order both parties appealed, the plaintiff insisting that he was entitled to more than had been awarded to him for mesne profits, and also to interest on such profits; the respondent for the first time contending that, inasmuch as the mesne profits in question were neither asked for in the plaint, nor awarded to the plaintiff in the decree, the Civil Judge had no jurisdiction to award them under s. 11 of Act XXIII of 1861, the enactment under which he had proceeded, and taking other objections to the order.

On the 28th June 1872, the High Court of Madras disposed of these appeals by reversing the order of the Civil Court on the ground that under the decree in the original suit, mesne profits subsequent to 1858 were not recoverable. The present appeal is against the last mentioned order.

The first question to be considered is the construction to be put upon the 11th Section of Act XXIII of 1861, of which the material portion is in the following words:—"All questions regarding the amount of any mesne profits which, by the terms of the decree, may have been reserved for adjustment in the execution of the decree or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit, between the date of the suit and the execution of the decree, . . . and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal."

It is contended on behalf of the appellant that the words "all questions regarding the amount of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the suit and the execution of the decree," are wide enough to embrace, and ought to be taken to embrace the claims now under consideration. On the other hand, the learned Counsel for the respondent insist that the word "payable" is to be read as "payable under the decree," and have cited numerous cases to show that, notwithstanding some earlier decisions to the contrary, all the High Courts of India have now accepted as settled law these propositions: 1st, that where the decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot, under the clause in question, assess or give execution for such interest or mesne profits; and 2nd, that the

plaintiff is still at liberty to assert his right to such mesne profits in a separate suit. That this construction has now for several years prevailed in the High Court of Calcutta is shown by the Full Bench Ruling of the 13th September 1866, 6 W. R., 109, the decision of the 18th June 1868, 1 B. L. R., 138,* and numerous other cases. That it has been adopted by the other High Courts is shown; as to that of the North-West Provinces, by the decision of the 10th November 1869, cited by Mr. J. Kemp, in the 22 W. R. 160; as to that of Madras, by the Full Bench Ruling of the 10th December 1867, 4 Madras H. C. R. 257; and as to that of Bombay, by the Full Bench Ruling of the 10th December 1867, 4 Bomb. H. C. R. 181, followed by the decision of the 15th June 1869, 6 Bomb. H. C. R. 109.

The alleged *consensus* of the Indian Courts being thus established, their Lordships, whatever their opinion upon the construction of this clause might have been, had the question been *res integra*, do not think it would be right to run counter to so long a course of decision upon what is, in fact, merely, a question of procedure,—it being admitted that the plaintiff may assert rights of this nature, if they exist, in a separate suit. They, therefore, accept the construction of the Indian Courts as settled law; and that acceptance, as was admitted at the bar, suffices to dispose of the claim to interest on the subsequent mesne profits which is raised by the present appeal.

It was, however, contended, as to the principal of the mesne profits in question, that the special circumstances of this case take the plaintiff's claim out of the general rule; and are sufficient to support the order of the Civil Court of the 31st January 1872. And their Lordships will now proceed to consider what those circumstances are, and the legal effect of them.

The decree of the 11th June 1859 conclusively established the right of the plaintiff as against the defendant to a share in the lands forming part of the joint estate, and to the meane profits attributable to that share for the Fusli year 1267, being the year next preceding the institution of the suit. His title, therefore, to the lands of which he has obtained possession, and to meane profits on those lands from a certain date, cannot be impugned. Had there been no appeal, and the decree had been followed by immediate execution, the plaintiff would have been put into possession of his lands, and would ever since have received the rents and profits of them. The only mesne profits touching which any question could have arisen, would have been those for the year which elapsed between the date of the institution of the suit and that of the decree. Execution was suspended, but not necessarily suspended by the appeals, and the defendant could only remain in possession on the terms of giving security for the execution of the decree, should it be affirmed against him.

Such being the legal position of the parties, the plaintiff, on the 8th December 1869, presented a petition (p. 78) to the Civil Judge of Cuddalore, claiming, in addition to the mesne profits specifically given by the decree, a certain sum as the then ascertained mesne profits for the Fusli year 1268 (being that which immediately followed the institution of the suit), and a further sum for the meane profits not yet ascertained for the Fusli year 1269; and praying that should the defendant fail to give security for the subsequent profits, security to abide the event of the appeals should be taken from the plaintiff, and that he should be allowed to take out immediate execution. A counter petition was filed; and other proceedings had; but ultimately an order of the Court was made, under which the defendant executed the instrument of the 26th January 1860, which is set out at p. 81 of the record.

The High Court made its decree disposing of the appeals in August 1860; and on the 11th December in that year the plaintiff, contemplating the possibility of the appeal to Her Majesty in Council, which was afterwards preferred, made a second application to the Civil Court of Cuddalore, praying that the defendant

might give further security to cover both the additional sum awarded to the plaintiff by the decree of the High Court, and the mesne profits of the lands for the current Fusli year 1270; and that in default of his doing so security to abide the event of the appeal might be taken from the plaintiff, and he be allowed to execute the decree. Upon this second application an order of the Court was made, under which, on the 19th March 1861, the defendant executed the further security, which is set out at p. 85 of the record.

The original defendant died, and the appeal was revived by the respondent as his son and heir some time in 1862.

On the 29th January 1863, the plaintiff applied again to the Civil Court of Cuddalore, praying that the respondent, as the heir of the original defendant, should give security for the mesne profits for the Fusli years 1271 and 1272, with the usual alternative that, if he should fail to do so, security to abide the event of the appeal should be taken from the plaintiff, and he be allowed to have execution. On this application an order of the Court was made, under which, on the 25th April 1863, the respondent executed the document at p. 87 of the record.

That instrument is addressed to the Civil Court of Cuddalore, is entitled "A Ready Money Security Bond respectively executed by the respondent as son and heir of the original defendant," and is in these words:—

"Pursuant to the order passed by the Court requiring me to furnish security for the two Fuslies 1271 and 1272, the probable amount whereof has been put down at Rs. 9,880-12-11 for both the Fuslies, in original suit (O. S.) No. 1 of 1858 of the said Civil Court, I agree to pay up the same when the original decree comes to be executed. Failing to do so, I consent to my property hereunder mentioned being proceeded against, and the amount recovered. Deducting, therefore, from the said amount of Rs. 9,880-12-11 Rs. 4,616-15-11, which is the surplus in the security furnished in 1270, the remainder is Rs. 5,264-13-0; for this amount I give you a security lien upon the property hereunder mentioned, and indisputably belonging to my share." Then follows a list of property.

The two former instruments executed by the original defendant are substantially to the same effect. They are also addressed to the Civil Court; they contain an obligation to pay subsequent mesne profits for the years which they respectively cover, and point even more plainly to the ascertainment of the amount of such profits when the decree should come to be executed, and to their realization, if not then paid, by the Court. The effect then of each document seems to be an undertaking on the part of the person executing it, and that not by a mere written agreement between the parties, but by an act of the Court, that in consideration of his being allowed to remain in possession pending the appeal, he will, if the appeal goes against him, account in that suit, and before that Court, for the mesne profits of the year in question. That such was the understanding of the parties is shown by the earlier proceedings in execution, and in particular by the respondent's counter petitions of the 13th October 1864, and the 25th April 1868. (Record, pp. 9 and 31.) By the first of these the respondent, not disputing his liability for the six years' mesne profits claimed, though he did dispute his liability for interest thereon, offered terms of compromise, and only suggested that the account, by reason of its complexity, would be better taken in a regular suit. The second contains this statement:—"The plaintiff now claims mesne profits for the years subsequent to the decree. Though this petitioner is bound to pay the same, still the amount asked by the plaintiff is excessive, and has been fixed by him at his pleasure;" and then follows a plea *ad misericordiam*. The objection now taken to the recovery of these subsequent mesne profits by proceedings in execution was first taken by the respondent in the grounds of appeal filed by him in May 1872. That the respondent should have come under the obligation supposed; that the plaintiff should have failed to apply either to the Civil Court or to the Appellate Court for the amendment of the original

decree by making it a decree for mesne profits subsequent to the institution of the suit; and that the respondent should have omitted whilst the proceedings in execution were pending in the Civil Court to take the objection now taken to them, are all circumstances which the fact, that up to December 1867 the wider construction for which the appellant contends was put upon the 11th Section of the Act of 1861 by the Courts of the Presidency of Madras, and regulated their practice, goes far to explain. But if the respondent has contracted an obligation to account in this suit for the subsequent profits claimed, he cannot escape from it, because when he contracted it, the course and practice of the Courts proceeded upon a construction of a Statute which has since been pronounced to be erroneous.

Their Lordships will now consider some of the objections which have been taken to the conclusion that the respondent has, by the proceedings in question, incurred the obligation supposed.

It was said that the last (so-called) "security bond" was alone the act of the respondent, and a distinction was taken between his obligation under that, and those incurred by his father under the two other instruments. Their Lordships, however, observe that these are not mere bonds of the father, in respect of which the respondent, as heir, might be liable in the ordinary way. They are proceedings in Court importing a certain liability to be enforced in the suit against the defendant to that suit. By reviving the appeal the respondent substituted himself for his father as defendant in the suit; and assumed the position of defendant, with all the rights and liabilities which had previously attached to it. And that he intended to do so is further shown by the claim in his security bond to take credit for a sum which he alleged to be surplus security given by the preceding bond.

Again, it was suggested that the proceedings in the Lower Court, which resulted in these security bonds, were irregular; that after the appeal to the High Court the power to allow or to suspend execution, and, in the latter case, to fix the terms on which execution should be suspended, belonged solely to the Appellate Court. Their Lordships are by no means clear that this objection is well founded; but, whether it be so or not, it comes too late. It was never taken in the Lower Court where the proceedings were had. There was no appeal from the orders of that Court which directed security to be given. It would be in the highest degree unjust to allow such an objection now to prevail against the appellant.

Again, Mr. Norton argued that the proceedings of the Civil Court of Cuddalore in the appointment of the commission and the assessment of the mesne profits were irregular, because its powers were spent, at all events as to the mesne profits, by the execution issued by Mr. Ellis, the then Judge, in January 1865. Their Lordships can see no ground for this objection. It would seem that the intention of the Court, whether under Mr. Ellis, or his successor, Mr. Hodgson, was to give the plaintiff execution as prayed by his petition, but to give it piecemeal, and as it could conveniently be given. The order in question gave him execution for the ascertained sums to which he was entitled under the decree. In December 1865, he was under a later order put into possession of the land. The amount of the subsequent mesne profits could only be ascertained by enquiry. The same proceedings would probably have been had if the decree had expressly given the mesne profits subsequent to the institution of the suit under s. 196 of the Code of Procedure.

Upon the whole, their Lordships are of opinion that the respondent, by the proceedings in question, did come under an obligation to account in this suit for the subsequent mesne profits of the appellant's land, which was capable of being enforced by proceedings in execution, notwithstanding the construction of s. 11 of the Act of 1861, which now prevails in Madras. They conceive that this

liability made the accounting "a question relating to the execution of the decree," within the meaning of the latter clause of the Section. But even if it did not, they think that upon the ordinary principles of estoppel, the respondent cannot now be heard to say that the mesne profits in question are not payable under the decree. Nor do they feel pressed by the observations made by Mr. Justice Markby in the case reported in the 4 B. L. R., p. 113.*

The Court here had a general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani v. The Attorney General of Gibraltar*, 5 L. R. P. C. 516, in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*.

From what has been said it follows that, in their Lordships' opinion, the order of the High Court, which is under appeal, ought to be reversed. Their Lordships would have felt great regret in coming to the contrary conclusion. That proceedings begun in 1864, and for several years carried on without objection, should in 1875 be pronounced infructuous on the ground of irregularity, and the party relegated to a fresh suit in order to assert an indisputable right, would be a result discreditable to the administration of justice. In such a suit the plaintiff would probably find himself, either successfully or unsuccessfully, opposed by a plea of limitation. If such a plea were successful, great injustice would be done to the plaintiff; if it were unsuccessful, the respondent would probably find himself in a worse position than that in which he will be placed by the allowance of this appeal; since in such a suit the plaintiff might recover interest.

With the claim for interest made by the present appeal their Lordships have already dealt. They can see no grounds for the other objections taken by the appellant to the order of the Civil Court. They are of opinion, in particular, that, in the circumstances of the case, that Court could not have dealt otherwise than it has dealt with the plaintiff's share in the outstanding debts. On the other hand, the respondent has not insisted on any of the objections taken in his grounds of appeal to the High Court other than that on which the High Court made its order. Their Lordships, therefore, will humbly advise Her Majesty to reverse the order of the High Court of the 28th June 1872, and in lieu thereof to order that the appeal against the order of the Civil Court of Cuddalore of the 31st January 1872, do stand dismissed, and the said order affirmed, and that each party do pay his own costs, both of the appeal to the High Court and of this appeal.

The 25th June 1875.

Present.

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Mortgage—Usufruct—Interest.

On Appeal from the Court of the Judicial Commissioner of Oudh.

Rajah Ameer Hussun Khan

versus

Mukhdoom Singh and others.

* 13 W. R., Civ. Rel., p. 11.

Where a mortgagee is in possession it would require very clear words to induce their Lordships to put such a construction upon the mortgage deed, that it was the intention of the parties that the mortgagee should both have the usufruct of the property and be paid interest at the stipulated rate from the time of the mortgage down to the period of redemption.

Mr. Cowie, Q.C., for Appellant.
Mr. C. W. Arathoon for Respondents.

This is an appeal from a decision of the Judicial Commissioner of Oudh, which affirmed the judgments of the Assistant Commissioner, and of the officiating Commissioner who heard the case on appeal from the Assistant Commissioner.

The suit was brought by Mukhdoom Singh, Mohun Singh, and Esree Singh against the Rajah Ameer Hussun Khan to redeem talooka Rawapoor, which they alleged had been mortgaged to one Oomrao Singh for Rs. 3,067, and after his death had got into the possession of the Rajah Nawab Ali Khan, in consequence of a sub-mortgage from the widow of Oomrao Singh. The defendant (the present appellant) is the son of the Rajah Nawab Ali Khan, and his case appears to be that the Rajah was in possession from a period prior to the settlement in 1858; that in that year he was admitted as talookdar to the talook, and he claims to hold it free of any claim on the part of the original mortgagors.

That the respondent, Mohun Singh, was entitled to the talook, and mortgaged it to Oomrao Singh, is not disputed in the present appeal, nor was it disputed in the Courts below. The mortgage made to Oomrao Singh is of the English date of July 1846. It is a usufructuary mortgage of a very formal and precise kind; and states that Mohun Singh, the son of Purtab Singh, mortgaged the talook to Thakoor Oomrao Singh for the sum of Rs. 3,067, and fixes the amount of interest at "rupees three and two annas per cent. per month." The mortgage also states that possession had been delivered to the mortgagee, and it contains this clause:—"I moreover agree that whenever I be disposed to redeem I engage to repay every fraction of a pie of the principal and interest in a lump sum, at the time when crops are not standing on the ground at the end (fallow portion of the agricultural year) of the month of Jeith, and then have the estate redeemed."

It appears to be clear that the mortgagee, Oomrao Singh, was put into possession. It is admitted that as against Oomrao Singh the right to redeem has been in no way foreclosed or barred, and the question, and the only question in this case, upon the merits, is whether the Rajah Nawab Ali Khan came in under the mortgagee's title, or whether he came in as a stranger to it, so that he can hold the estate by virtue of title or possession against both the mortgagor and the original mortgagee. The Assistant Commissioner and the officiating Commissioner have found as a fact that there was a sub-mortgage from the widow of Oomrao Singh to Rajah Nawab Ali. It is said that they have found this fact upon insufficient evidence. Undoubtedly the evidence is slight, but upon a review of it, and giving full weight to the considerations which have been presented by the learned Counsel for the appellant, their Lordships think that there is enough, in the absence of the proof which might have been expected from the defendant, to show that he did obtain possession in some way under the original mortgagee, either by a sub-mortgage, or by some arrangement with the widow of Oomrao Singh.

That the claim to treat the Rajah as a mortgagee was not put forward for the first time after the settlement is clear from a petition, dated the 12th June 1856, of Mohun Singh. "After the usual petitionary address the petitioner states that the estate of Rawapoor, etc., the petitioner's ancestral landed property, was mortgaged to Rajah Nawab Ali Khan, and at the time the settlement was in progress"—that is, the settlement before the mutiny—"the Court ordered the petitioner to arrange for the payment of the redemption money." That, of course, is no evidence that there was such a mortgage; but it is proof that the case upon which the plaintiffs now rely was put forward at this early period. The petition, no doubt, does not state that the mortgage was to Oomrao Singh, and that by sub-mortgage the land

got into the possession of Nawab Ali Khan ; but it sufficiently shows that it was then contended that in some way the Rajah held as mortgagee.

In the present suit the evidence consisted of two depositions of witnesses given at the time of the settlement, and of the evidence of one of the plaintiffs. The deposition of Amjud Ali, who was the vakeel of the Rajah Nawab Ali Khan at the settlement, has been mainly relied on by the Courts below. It seems that the Rajah was at that time a minor, and that his estate was under the care of the Commissioner. This deposition has the character of a statement of claim on the part of the minor Rajah ; and treating it in that way it certainly affords evidence that at that time the claim of the Rajah to a settlement was put on the ground that he was mortgagee. The statement in the deposition is this :—" The villages of Koomhurya and Mahurya were mortgaged by Hoolas and Moonno Singh to Oomrao Singh, talookdar of Rihar, whose widow, after his death either in 1254 or 1255 Fuslee, re-mortgaged them, along with the talooka of Rawapoor, to my master. The deed of mortgage is in my possession, and the amount is therein mentioned. I do not remember the exact amount ; and ever since the re-mortgage we have continued in possession." The Rajah was in possession. The vakeel had to account for his possession, and this is the statement which he gives, and upon which it appears that action was taken ; for in 1264 Fuslee, according to this man's statement, the lease was executed in favor of the Rajah. There is a deposition of Duryao Singh, Canoongoe of Tehsil Biswan, to the same effect, but that cannot be regarded as legitimate evidence, because it is not shown that the man was dead, and he certainly did not stand in the relation of agent to the Rajah.

Then there is the positive evidence of one of the plaintiffs who was examined in the present suit, Esree Singh, who is the grandson of Mohun Singh. He says :—" In 1254 Fuslee Mohun Singh mortgaged the estate in question to Oomrao Singh for Rs. 3,067. One year after the date of the mortgage he died. He was talookdar of Rihar. His widow mortgaged it to Rajah Nawab Ali Khan for Rs. 5,200 in 1256 Fuslee. Ever since up to the annexation he held. No term for redemption was fixed."

The original mortgage being beyond dispute, and there being this evidence that the Rajah held under a sub-mortgage, an answer was certainly called for on the part of the Rajah ; and the answer he gives appears to be entirely unsatisfactory. He does not rely upon mere possession and say, I got in as a trespasser, and am entitled to hold the talook by virtue of possession and protected by the Statute of Limitations ; but he sets up an affirmative title that the chuckladar leased it to him, and he has entirely failed to prove that title. He has asserted, but has not proved it. Their Lordships think therefore that, under the circumstances, they cannot say that the two Commissioners, who found the facts, were wrong in coming to the conclusion that the Rajah did hold the talook, by some title derived from the original mortgagee ; and, that being so, they think that the judgment of the Judicial Commissioner upon the main question should be supported. Mr. Capper, the Judicial Commissioner, who first heard the special appeal, differed from the Commissioners below, thinking the evidence was insufficient, but upon review Mr. Currie came to the opposite conclusion. Therefore three Commissioners in Oudh have thought that this evidence was sufficient.

What has just been said disposes of the main question in the case.

Then another question arises, whether the decree of the Judicial Commissioner should stand with respect to the interest. It is immaterial to enquire whether the Judicial Commissioner had power to vary the decree of the officiating Commissioner in the way he has done, since their Lordships have the whole record before them upon general appeal, and may direct the right order, if this be not the right one.

Upon the construction of the original mortgage to Oomrao Singh, which must govern this question, it appears to them that the usufruct was to be set against the interest, and that it was not the intention of the parties that the mortgagee should

have both the usufruct of the property and be paid interest at the stipulated rate of 43 per cent. from the time of the mortgage down to the period of redemption. It would require very clear words to induce their Lordships to put such a construction upon the deed. (See on this point a judgment of this tribunal, *Seth Seetaram and another against Argoon Singh*, delivered on the 19th February 1874.)* If it had been shown that the usufruct would not have amounted to the stipulated interest, other questions would have arisen, and possibly an account might have been decreed ; but Mr. Cowie, on the part of the appellant, has exercised a wise discretion in desiring that the matter should remain, if their Lordships were of opinion that he was not entitled both to the interest and the usufruct, where the Judicial Commissioner has placed it, so far as this claim to interest is concerned.

In the result their Lordships will humbly advise Her Majesty to affirm the decree appealed from and to dismiss this appeal, with costs.

The 26th June 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Usufructuary Mortgage—Payment of Balance before fixed Day—Power of Sale
—Mortgage by Conditional Sale—Redemption—Foreclosure.*

On Appeal from the High Court at Madras.

Thumbasawmy Mudelly and another
versus

Mahomed Hossain Rowthen and others.

Where a mortgage deed, under which the mortgagee was in possession, provided for the payment of the balance before a day fixed, but not until that balance should have been ascertained by an account by the mortgagee ; and the consequence of the breach of this obligation to pay the balance was a power to the mortgagee to become the purchaser of the property at a certain valuation ; it was held that this case (the security not being a mortgage by conditional sale) stood clear of the decision of the Judicial Committee in the case of *Pattabhiramier v. Venkatow Naicken*, and that there was no reason for presuming, at this distance of time, that the very special agreement contained in the deed was carried out between the parties according to its terms, the contemplated settlement of accounts being a necessary preliminary to the performance of that contract.

Referring to the modern course of decision in the Madras and Bombay High Courts, applying to mortgages by conditional sale, the practice of the English Courts of Equity of recognizing in the mortgagor a right of redemption notwithstanding that the time stipulated for foreclosure may have passed by, as being in contrast with the mode of proceeding followed in Bengal, and contrary to the exposition of the law contained in the above-mentioned decision of the Judicial Committee, their Lordships observed that this state of the law was eminently unsatisfactory, and one which seemed to call for the interposition of the Legislature.

Mr. Mayne for Appellant.

Mr. Leith, Q.U., and Mr. J. B. Norton for Respondents.

Sir James Colville delivered the following judgment, in which the facts of the case are sufficiently stated :—

In the year 1815 certain persons described as the Mirasi proprietors of eight shares in Rajagiri executed the deed of the 2nd July of that year, which is set out at page 35 of the Record. It purports on the face of it to be a deed of usufructuary mortgage of certain lands in the hamlet of Manmoda, which is attached to Rajagiri, and to be made in favor of one Appavoo Modaliar, for

* See p. 15 ante.

the purpose of securing the repayment of 2,500 pons in the manner therein specified.

The name of Appavoo was, however, used for that of Saminadha Modaliar, who was the real mortgagee, and is now represented by the appellants. The respondents are the representatives of the mortgagors. This deed must now be taken to comprise all the terms of the contract; and the only question is whether by force, and according to the tenor, of its provisions the mortgagees became in 1820 the absolute proprietors of the property; or whether they continued to hold it as mortgagees, subject to the right of redemption, in which case the mortgage debt is admitted to have been liquidated by the usufruct at the close of the year 1866-67. The Civil Court at Tanjore, and the High Court of Madras, have taken the latter view of the transaction, and have given the respondents, the plaintiffs in the suit, a decree for the lands with mesne profits from the above-mentioned date.

In impugning this decree the appellants have chiefly relied upon the law as laid down by this Committee in the case of *Pattabhiramier v. Vencatow Naicken and another*, 13 Moore's I. A., p. 560.* And the contention before us has raised two questions, first, whether that case, if assumed to contain a correct exposition of the law prevailing in the Presidency of Fort St. George, governs the present; and, secondly, how far that exposition is to be taken to be of binding authority, regard being had to one passage in their Lordships' judgment, and to the course of decision in the Courts of Madras.

Their Lordships will in the first instance proceed to determine the first of these questions.

Now, what was really decided by the case in the 13th Moore I. A.? It was that the contract of mortgage by conditional sale is a form of security known under various names throughout India; that according to the ancient law of India it was enforceable according to its letter; and that, whether it was embodied in one instrument or in two separate instruments, and whether or not the transaction appeared on the face of the instrument to be in its inception a mortgage; and further that this law must be taken to prevail in every part of India in which it had not been modified either by actual legislation or by established practice.

The subject matter of the decision, therefore, is the contract of mortgage by conditional sale.

Mr. Justice Macpherson, in his work upon mortgages, thus defines, and, as their Lordships think, accurately defines, this form of security. He says: "The mortgage by conditional sale, 'kut-kubala,' or 'bye-bil-wufa,' is that in which the borrower, not making himself personally liable for the repayment of the loan, covenants that, on default of payment of principal and interest on a certain date, the land pledged shall pass to the mortgagee." Such a mortgage might or might not be usufructuary. If usufructuary, it usually contained a stipulation that the usufruct should be in lieu of interest. The effect of such a stipulation was modified by legislation in consequence of the laws against usury, but has, by Act XXVIII of 1855, been restored in its integrity as to all contracts made subsequent to the passing of that Act. The essential characteristic of a mortgage by conditional sale was that, on the breach of the condition, the contract executed itself, and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them. That it still has this effect in the Presidency of Madras was what was decided by the case in the 13th Moore I. A.

Such a security, however, seems to be very distinguishable from that which is in question in this suit. By the deed of the 2nd July 1815, the mortgagors stated that, by reason of urgent need, they had mortgaged to the mortgagee and put him in possession of the lands in question; and that they had agreed to pay

* 15 W. R. P. C. 35; 2 Suth. P. C. R. 410.

the principal sum of 2,500 pons (which was made up of 1,000 pons borrowed in cash, and a debt which they had undertaken to pay) with interest at 1 fanam per 10 pons per mensem; they then stipulated that the rents should be applied first in payment of the Government revenue; next, in payment of the salary of a manager; and afterwards, in reduction of the debt. So far the security does not differ from a simple usufructuary mortgage. Then follows this clause: "The instalments for this money are as follows:—To be paid on the 30th Panguni of Yuva (corresponding to 9th April 1816), 500 pons; on the 30th Panguni of Dhata (corresponding to the 10th April 1817), 500 pons; on the 30th Panguni of Iswara (corresponding to), 500 pons; on the 30th Panguni of Bahudhanian (corresponding to), 500 pons." These payments, if made, would reduce the debt by 2,000 pons.

The satisfaction of the balance which might include 500 pons of principal money, was left to be made by an adjustment of accounts. The deed goes on thus: "and in the year Pramadhi, corresponding to 1819-20, a settlement of the accounts of the receipts and disbursements shall be made, and any amount that may be due after deducting payments out of the principal and interest as aforesaid, we undertake to pay in cash in full on the 30th Panguni of the said year (corresponding to the), and to redeem the mortgage." The obligation, therefore, to pay the balance before a day fixed, was not to attach until that balance should have been ascertained by an account, in which the mortgagee was necessarily to be the accounting party. And what was to be the consequence of the breach of this obligation if it did attach? Not that thereupon that which was a mortgage in its inception was to become an absolute sale as from the beginning, finally closing the transaction between the parties, as in the case of an ordinary mortgage by conditional sale; but that the land should be valued at so much per veli; that the mortgagee should become the purchaser at that rate of so much of it as would satisfy the balance due to him, taking the whole if such balance amounted to 1,269 pons and 3½ fanams, but retaining his right to sue the mortgagors personally for any final balance of the original debt and interest that might remain due after the completion of that purchase.

It is admitted that the mortgagors never paid any of the several instalments of 500 pons, and Mr. Mayne called upon their Lordships therefore to presume that on the 9th April 1820, at least the sum of 1,269 pons remained due. But, on the other hand, it has been found by the Lower Court, and it is admitted in the appellants' case, that no settlement of accounts took place in 1820, or subsequently thereto. Their Lordships are therefore of opinion that this case (the security not being a mortgage by conditional sale) stands clear of the decision in the 13th Moore's I. A.; and, further, that there is no reason for presuming, even at this distance of time, that the very special agreement contained in the deed of the 2nd July for the purchase of the property in certain events was carried out between the parties according to its terms, the contemplated settlement of accounts being a necessary preliminary to the performance of that contract. Indeed, the appellants have not distinctly rested their case on any such presumption.

The conclusion at which their Lordships have thus arrived being of itself sufficient to determine this appeal, it is not absolutely necessary for them to consider the second of the questions raised concerning the decision in the 13th Moore's I. A. The great importance, however, of the principles involved in that question induces them to notice it.

The passage of the judgment in the case of *Pattabhiramier v. Venkatow Naicken*, which seems to have led the Courts of India, in some of the cases which will be afterwards cited, to the belief that it had not that binding force upon them which an unqualified ruling of this tribunal of ultimate resort would unquestionably possess, is in these words: "It must not then be supposed that, in allowing

this appeal, their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the law of the forum, wherever such may prevail, or to affect any title founded thereon." In order, then, to see how far this reservation, taken in its fullest sense, can qualify the effect of the judgment, it is necessary to consider what has been the course of decision upon mortgages by conditional sale in the Courts of Madras.

Mr. Mayne has shown that up to 1858 the decisions of the late Sudder Court of Madras, were, with one exception, perfectly consistent with that of this Board in Pattabhiramier's case. Indeed, this is almost admitted in the judgment of the High Court of Madras of the 11th December 1871, which will be afterwards referred to. But in 1858 the current of decision seems suddenly to have turned. In the Case No. 49 of 1858, decided on the 28th August in that year (Madras Sudder Adawlut Decisions for 1858, p. 142), the Judges said: "The Court observes that the transaction was a loan of money on the security of certain property, and that the established practice of the Courts of Equity in England is to recognize in the mortgagor a right of redemption, notwithstanding that the time stipulated for foreclosure may have passed by, and they do so on the ground that the repayment to the mortgagee of the money lent by him, with interest, is an equitable discharge of his claims. The Court of Sudder Adawlut recognizes the justice of this principle. They remark that there is an obvious distinction between a conditional sale with power to redeem and a mortgage. The parties in the first instance fix a value on the property, and the transaction is a true arrangement for the sale thereof for such consideration: In the latter instance, a sum is borrowed not representing the value of the property, and it may be far within such value, the only care being that the property shall be of such value as will cover the loan by way of security. It is therefore strictly equitable that, on the failure to pay off the loan by the time stipulated, the lender should fall back upon the security, not to absorb the whole, but to take his money out of it. The clause of forfeiture in a mortgage deed the Court view as introduced *in terrorem*, by way of a penalty, and it is not the practice of the Court of Equity to enforce penalties. They merely accord to the several parties their just and equitable rights, ascertained on consideration of the value that has passed from the one to the other, and which has to be recovered back."

It appears, then, that the Judges of the late Sudder Court in 1858, took upon themselves, in contravention of the law of India, as declared and enforced by the decisions of their predecessors, to apply to this class of security for the first time the principles which the English Courts of Equity have for centuries applied to mortgagees in this country. It would seem, however, that they did not adopt those principles in their integrity, since they treated the stipulation in favor of the mortgagee as a mere penalty, and made no provision for his getting the benefit of it by the machinery of a foreclosure suit. They apparently contemplated no remedy against the mortgaged property but that of sale.

This case was followed by the late Sudder Court, notwithstanding the vigorous and well reasoned protest of one of its Judges (Mr. Morehead), which is to be found at page 160 of the S. A. D. for 1859, in three cases decided in 1859, and in three more, of which one was the very case of Pattabhiramier, decided in 1860. And so the course of decision in the Courts of Madras stood when special leave to appeal was granted in Pattabhiramier's case by this Board in April 1861. Now, if that appeal had been prosecuted without delay, and those who constituted the Committee that heard it had had before them all the cases in favor of the decree which had then been decided in the Madras Court, their Lordships believe that the Committee would nevertheless have allowed the appeal, and, so far from treating those cases as establishing a course of practice inconsistent with that which had previously prevailed, would have overruled them as decided on erroneous principles.

It unfortunately happened, however, that the appeal slept for nine years, and

that in the interval the Sudder Court, and afterwards the High Court which succeeded it, continued the course of decision which the former had begun in 1858. This appears by the judgments of the High Court in 1 M. H. C. R., p. 460; 2 M. H. C. R., p. 420; and 7 M. H. C. R., p. 6. In the first of these cases Chief Justice Scotland recognized the mortgagee's right to a decree for foreclosure, which does not seem to have been admitted by the earlier decrees. In the second the Judges treated the law as settled in almost absolute conformity with that administered by the Court of Chancery; observing, however, that in India, as in England, there may be sales with a condition for re-purchase within a fixed time, against the breach of which Equity will not relieve. On this point they said, "It is the intention of the parties which governs, and that intention may be shown by the deed itself, by other instruments, or even by oral evidence." In the last case the Judges held that the security in question was one of the latter class, and accordingly gave effect to it according to its strict tenor. But in giving their judgment, which was delivered late in December 1871, they took occasion to say, of the case in 13 Moore's I. A. :—

"If we were bound by a case recently decided in the Privy Council, the appellant must necessarily succeed, for the Judicial Committee observe that there has been no course of decision in Madras admitting of relief after the time. They base their judgment upon this, and intimate that it would have been the other way if the fact were otherwise. It is otherwise, for the decisions of the late Sudder Court since 1858 have carried the doctrine so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule which the Sudder Court intended to follow, and have held the question to be one of construction, admitting, however, for the purposes of the construction, other documents, and oral evidence."

A similar alteration by judicial decisions of the antecedent law seems to have been effected at Bombay, though at a later period. In the case No. 608 of 1871, reported 9 Bomb. H. C. R., p. 69, Westropp, *C.J.*, reviews the law and its changes both at Madras and Bombay. He states that the change in the latter Presidency dates only from 1864, when the case of *Ranji v. Chinto*, 1 Bomb. H. C. R., 199, was decided. And the Chief Justice observes: "The recognition of the right to redeem was, having regard to the previous decisions of the Sudder Adawlut, perhaps somewhat a strong measure. It had, however, for a long time previously, been considered a desirable course to adopt, and eminent Judges of the High Court, who had formerly been Judges of the S. A., regretted that their predecessors had, for the most part, enforced the conditions for purchase in *gahan lahan* mortgages, as such a course had been found to promote most oppressive and grasping conduct on the part of money-lenders in the Mofussil." It would be difficult to have a more candid admission of the assumption by the Courts of the functions of the Legislature. This case also shows that the Bombay as well as the Madras Court has come to the conclusion that the modern course of decision is to prevail against that of this Committee in Pattabhiramier's case.

The next case reported in this volume, No. 85 of 1871, rules that the right of redemption subsists, and will be enforced, although any number of years may have elapsed since the mortgagee's title, under the terms of the deed, would have become absolute, unless the right to redemption is barred by cl. 15 s. 1 of the Limitation Act XIV of 1859.

It appears to their Lordships that this action of the Courts of the Minor Presidencies is open to grave objection; not only because in so altering the existing law they usurped the functions of the Legislature, but also because the change, as effected, involved very mischievous consequences. Under the law as laid down by them, persons who fifty years ago had acquired, as the law then stood, an indefeasible title in lands, which they had ever since held and enjoyed *in optima fide*, became liable to be dispossessed, and compelled to account for mesne profits at

the suit of the representatives of a mortgagor against whom the sixty years' rule of limitation had not yet run. Nor is this an imaginary case. In the latest decision cited at the Bar (No. 551 of 1874, 7 Madras H. C. R. 395), the mortgage deed was executed in 1811, the title of the mortgagee became absolute in 1816; there had been since 1811 uninterrupted possession by him, or by a purchaser from him; and the suit to redeem must have been brought but just within the sixty years period of limitation. The Reports show that other instances of similar disturbance of title have occurred, and more may occur.

Again, the distinction between sales with a condition for repurchase, and mortgages by conditional sale, is made to depend upon the intention of the parties to the original transaction proveable, if need be, by oral evidence. This seems to open a wide field of litigation, and to leave much to the discretion of the Judge in each particular case; and the enquiry is embarrassed by the circumstance that the parties whose intention is to be ascertained cannot, in the case of an ancient transaction, have contracted with reference to a state of law which the Courts of Madras have decided no longer exists.

In Bengal, where the possible mischiefs that might result from leaving mortgages by conditional sale to take effect according to their tenor early became apparent, the Legislature proceeded on sound principles to apply a remedy. By Reg. I of 1798 it gave the mortgagor the means of avoiding any dispute as to tender, and of keeping alive his right of redemption by a payment into Court.

By Reg. XVII of 1806, it made provision for redemption and judicial foreclosure by the procedure still in use. But this Regulation, as was properly decided in the case of *Sureefoonissa v. Shaikh Enayet Hossein*, 5 W. Rep. 88, had not a retrospective operation upon titles which had become absolute before it came into force. The contrast between this mode of proceeding and that followed by the Courts in Madras and Bombay, is obvious.

The state of the authorities being such as has been described, it may obviously become a question with this Committee in future cases, whether they will follow the decision in the 13th Moore, which appears to them based upon sound principles, or the new course of decision that has sprung up at Madras and Bombay, which appears to them to have been, in its origin, radically unsound.

On a stale claim to redeem a mortgage, and dispossess a mortgagee who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course. In the case of a security, executed since 1858, there would be strong reasons for recognizing and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted. Their Lordships abstain from expressing any opinion upon this question until the necessity for determining it shall arise. They deem it right, however, to observe that this state of the law is eminently unsatisfactory, and one which seems to call for the interposition of the Legislature.

An Act affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such a foreclosure, with a reservation in favor of mortgages whose titles, under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law, without injustice to any party.

In the present case, their Lordships can only recommend Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

The 1st July 1875,

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier,

*Ancestral Property—Primogeniture—Hindoo Law (Mitakshara)—Joint Family
—Separate Succession.*

On Appeal from the High Court at Calcutta,

Chowdhry Chintamun Singh

versus

Mussamut Nowluckho Konwari.

Where ancestral property has been held according to the rule of primogeniture, and the family is governed by the law of the Mitakshara, that law, in the event of a holder dying without male issue, would, if the family were undivided, give the succession to the next collateral male heir in preference of the widow or daughters of the last possessor.

Though a family might be undivided, the separate property of any member would go according to the law of succession to separate estate. Whether the general status be joint or undivided, property which is joint will follow one, and property which is separate will follow another, course of succession.

Mr. Leith, Q.C., and Mr. J. D. Bell for Appellant.

Mr. Cowie, Q.C., and Mr. Doyne for Respondent.

Sir James Colvile gave judgment as follows :—

The only question raised by this appeal is whether the appellant, the plaintiff in the Courts below, or the respondent, was entitled to succeed to the property called talooka Gungore, the appellant claiming as the nearest collateral male heir of the last possessor, and the respondent claiming as the widow of the last possessor.

It was admitted on the opening of the case, and seems to have been admitted throughout the proceedings below, that the enjoyment of this talooka has long been by a single member of the family, and that it has passed from father to son according to the rule of primogeniture for several generations. The existence of this family custom has moreover been litigated at various times from a very early period, and has been affirmed by repeated decisions.

By that of the 17th May 1809 it was held that the talooka was one which by custom descended according to the law of primogeniture; that it was one of those estates which were in the contemplation of the Legislature when it passed Reg. II of 1793; and that the rights of all parties under the custom were saved to them by the fifth Section of that Regulation. It seems to their Lordships too late to question what is affirmed by many reported cases that a custom of descent according to the law of primogeniture may exist by kolachar or family custom, although the estate may not be what is technically known either as a raj in the north of India, or as a polliam in the south of India.

That being so, it is necessary next to consider what are the limits of the custom as established, and what would have been the course of descent of this property had the family remained wholly undivided.

There is some evidence in the taksimnamas of 1832 of what the family understood to be the custom. To that reference will afterwards be made. It is to be observed, however, that if the evidence were wholly silent as to that point, the general law as laid down in decided cases seems to be that where the family to which ancestral property, held in this peculiar manner, belongs, is governed by the law of the Mitakshara, that law, in the event of a holder dying without male

issue, would, if the family be undivided, give the succession to the next collateral male heir in preference of the widow or daughters of the last possessor.

The cases upon this point are collected and reviewed in the judgment of Chief Justice Couch in the 9th volume of the Bengal Law Reports.* In the last of them, which was decided here as late as the 2nd February 1870, viz., the case of *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora*, and is reported in the 13th Moore's Indian Appeals, p. 333,† the point which has been taken in the present case by the learned Counsel for the respondent appears to have been taken by Sir Roundell Palmer and Mr. Leith, who argued for the appellants in that case. The judgment however says :— "Accordingly, the strength of the argument of the learned Counsel for the appellant has been directed to show that this case should be governed by *Katama Natchiar v. The Rajah of Shivagunga*, in the 9th volume of Moore's Indian Appeal Cases, p. 539,‡ which is generally known as the 'Shivagunga case.' They have gone so far as to argue that the estate in question in this case being impartible, must, from its very nature, be taken to be separate estate, and consequently that, according to the decision in the 'Shivagunga case,' the succession to it is determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided. The authority invoked, however, affords no ground for this argument. The decision in the 'Shivagunga case' will be found to proceed solely and expressly on the finding of the Court that the zemindaree in question was proved to be the self-acquired and separate property of Gowary Vallaba Taver. It assumes that if this had not been so, the decision would have been the other way." In that case the estate was held to pass to a very remote collateral male heir in preference of the widow of the last possessor.

This authority seems to dispose of the arguments of the learned Counsel for the respondent, which went to show that even while the family remained a joint and undivided family in the full sense of the term, this property would have been treated as separate property, and therefore governed by the law of the Mitakshara as to separate succession.

It is however found as a fact and cannot be denied that there has been to some extent a separation of this family, and the question, therefore, is whether this particular property after that separation lost the character which it before possessed, and became subject to a different rule of succession. According to the rule laid down by Sir William Macnaghten (*Principles of Hindoo Law*, title Partitions, Vol. I., p. 53), "if at a general partition any part of the property is left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother." That authority was in fact one of those upon which this Board in the Shivagunga case decided the converse of the proposition, viz., that though a family might be undivided, the separate property of any member would nevertheless go according to the law of succession to separate estate. It in fact goes to support the proposition that, whether the general status of the family be joint or divided, property which is joint will follow one, and property which is separate will follow another course of succession. The question, therefore, really seems to be whether by reason of the acts of the parties on the several occasions of the partial partition in 1832, and of the compromise of the suit of 1852, the plaintiff's father waived his rights of succession, or whether the parties by their joint action have impressed upon this talooka the character of separate property, which must now pass according to the laws of separate succession.

As to the transaction of 1832, it appears to their Lordships that the partition then made was clearly intended to be confined to the property which was then admitted to be partible; that although the talooka of Gungore is mentioned in

* 22 W. R. 496.

† 13 W. R. P. C. 21; 2 Suth. P. C. R. 302.

‡ 2 W. R. P. C. 81; 1 Suth. P. C. R. 520.

the *tuksimnamas*, it is mentioned only for the purpose of declaring that it is impartible, and that the clear intention of the parties was to leave that particular property in the condition in which they found it, and to set it aside out of the mass of the family estate. Being impartible in its nature, it could not be the subject of partition, and the object of the transaction is declared at the foot of the deed, where it is said :—"These few words in the way of a deed of partition of a 4-anna share of mouzah *Purmeswurpore* have, therefore, been written that they may be of use when needed." There is nothing in the transaction which evinces any intention on the part of the junior members of the family to part with or transfer any right or contingent right of property which they might have; they only admitted that they had no claim to share in talooka *Gungore* as coparceners. This their Lordships think is made more clear from the special manner in which the nature of the family custom is referred to. The deed of *Ramdial* and of *Soman* says :—"Talooka *Gungore*, *Pergunnah Pharkya*, comprising five mouzahs, both *uslee* and *dakhilee*, an ancestral estate, has been, in accordance with family custom from time immemorial, held by one person, the eldest son and the registered proprietor, from generation to generation, and in case the registered proprietor dies without issue, the younger brother of the deceased or his eldest son becomes the rightful proprietor of talooka *Gungore*." If it had been intended to make this property which had been joint, separate property, it would not have been necessary to enter into so detailed an account of the family custom, or of the manner in which it had previously passed. The statement of the family custom their Lordships are disposed to construe very much as it was construed by the Subordinate Judge, who decided this cause in the first instance. In a document between *Hindoos*, and indeed in the *Mitakshara* itself, it is by no means unusual to find that the leading member of a class is alone mentioned when it is intended to comprehend the whole class. And their Lordships think that, in the above statement of the family custom, it was not intended to confine the passing over of the whole, in the event of the proprietor dying without issue, to a younger brother of the deceased or his eldest son, and further that the words "without issue" are to be taken to import "issue in the male line." Accordingly, the real effect of that definition of the family custom was that the property was ancestral property; that though ancestral property, it was held by special custom by one person at the time, according to the rule of primogeniture, with a provision that, where the direct male line failed, it should then go over to the collateral lines. It has already been shown that this course of devolution was consistent with the general law. Their Lordships conceive that the partition which took place in 1852 of the other property cannot be held to have affected the character or the mode of descent of this property as thus defined.

It however appears that, in the year 1852, *Ramdial* was so ill-advised, and it may be said so dishonest, as to seek to re-open the question of this family custom, and to bring a suit by which he claimed possession of the moiety of the talooka and certain other property. The mother and guardian of *Tilukdaree Singh*, the elder brother of *Runjeet Singh*, who was then the person next in succession to *Gurdyal Singh*, filed her answer, setting up, amongst other things, that *Gurdyal Singh* was "proprietor of the entire ancestral estate, in consequence of his being the eldest son in accordance with family custom; and that the plaintiff was not entitled to receive a share." She either included in that defence the whole of the property claimed in the suit, or the proceedings set out in the record fail to show what specific defence she made in respect of the property other than *Gungore* which was claimed. The result of the suit was a compromise between the parties, which resulted in a decree that "the plaintiff do obtain possession of the 3 annas 12 gundahs and a fraction above 4 cowries of mouzah *Purmeswurpore*, *Purgunnah Chye*, including his former share,"—meaning the

share specifically given him on the partition,—“and 100 beegahs of kamut land long held by him in mouzahs Gungore, Oolapore, and Jehangira, and 7 beegahs of land, together with the orchard situate in Ismaelpore, talooka Gungore, in accordance with the petitions of the parties; and that after Runjeet Singh attains his majority, he shall have his name enrolled in respect of the share of Purmeswurpore.” The decree, therefore, is upon the face of it merely one made to give effect to a compromise whereby the plaintiff receded from his claim to any share as coparcener with a present right of possession in talooka Gungore. No doubt, the words of the petition of compromise, if taken by themselves, are considerably stronger, and are capable of being read as if he were giving up all rights whatever in talooka Gungore. But looking to the position of the parties, and to what was done upon the petition, and to the absence of any evidence to show that there was any negotiation for a compromise, or any terms of compromise arranged between the parties whereby the character of this estate and the mode in which it was to descend was to be changed, or that Ramdyal undertook to transfer any contingent rights of succession, which he possessed, their Lordships cannot but think that this transaction really amounted to no more than an agreement to waive the claim to a share in, and to the consequent right to a partition of, the talooka Gungore. They think that this construction is confirmed by the reference which the petition itself contains to the partition and arrangement of 1832. At p. 103, line 37, it says :—“The said Runjeet Singh will continue in possession under the said guardian, and on his attaining his majority, he and his heirs will remain in possession according to the deeds of partition dated the 31st January 1832, one executed by me, Ramdyal Singh, and the other executed by Gurdyal Singh, in accordance with which the name of Gurdyal Singh was enrolled in the Government records, in respect of the entire 16 annas of talooka Gungore.”

If this be so, their Lordships are further of opinion that the written statement of Chintamun Singh, which was filed in the suit afterwards brought in 1863 by Rowshur Singh, can be taken only to be a disclaimer of any interest in the talooka as claimed by Rowshur Singh in that suit, which of course, if Rowshur Singh had succeeded in establishing his claim, would have brought in Chintamun Singh as a coparcener entitled to a partition. It cannot carry the case further than the act of his father, and it seems only to be an admission that he was content to abide by whatever his father had agreed to in the earlier suit of 1852.

This being so, it seems to their Lordships that the decision of the High Court cannot be supported, and they will humbly advise Her Majesty to reverse that decision, and in lieu thereof to decree that the decree of the Subordinate Judge be confirmed, and that the appeal to the High Court be dismissed with costs. The appellant must also have his costs of this appeal.

The 3rd July 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Decree against Hindoo Widow—Execution Sale of her Interest—Reversioner's Rights.

On Appeal from the High Court at Calcutta.

Baijun Doobey and others

versus

Brij Bhookun Lall Awusti.

The mother of a deceased Hindoo having brought a suit against his widow for arrears of maintenance obtained a decree against the defendant for the amount with interest. Accordingly the judgment-debtor's rights and interests in her husband's estate were sold in execution :

Held that as the widow's liability was personal, her property only was liable to be sold; and that the purchaser did not obtain the absolute estate, but only the widow's interest in it which continued only so long as the widow lived. On her death the estate would descend to her husband's reversionary heir.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Appellants.

Mr. Cowie, Q.C., and Mr. J. Bigland Wood for Respondent.

Sir Barnes Peacock gave judgment as follows :—

This is a suit brought by Brij Bhookun Lall against Baijun Doobey to declare his right to the inheritance of lot Mowrawan and to obtain possession of that estate. The plaintiff claims the estate by right of inheritance from Chintamun as reversionary heir after the death of Doorga Kouwar, the widow of Chintamun. The defendant claims by purchase under an execution of a decree against Doorga, the widow, and the question is, whether, under that decree, only the widow's interest or the absolute estate was sold. If only the widow's interest, then upon the death of the widow the plaintiff succeeded to the estate as reversionary heir of Chintamun, and is entitled to recover; if, on the other hand, the whole interest passed under the sale, then the plaintiff as reversionary heir upon the death of the widow took no interest, but the estate passed to the defendant Baijun by reason of his purchase under the decree.

Now it appears that Sheo Churn and Muddun Mohun, two brothers, the sons of Deo Kishen, separated in estate. Muddun Mohun took one share of the estate and Sheo Churn the other. Muddun Mohun therefore obtained a separate estate. The lands are situate in the district of Gya, and are subject to the rules of the Mitakshara law. Muddun Mohun having got this separate estate died, leaving two sons, Balgobind and Chintamun; Balgobind died childless and the whole estate came to Chintamun. Chintamun consequently acquired the estate by inheritance, and it was ancestral estate derived from the father, Muddun Mohun. Chintamun died childless leaving two widows, Doorga Kouwar and Radha Kouwar. Muddun Mohun, the father, left a widow, who was the mother of Chintamun. The mother, Net Kouwar, the widow of Muddun Mohun, was entitled to be maintained out of the estate held by Chintamun. The maintenance of Net Kouwar, the widow of Muddun Mohun, was a charge upon the inheritance which came from Muddun Mohun. The liability to maintain the mother passed to Chintamun when he got the estate of his father, and when the estate passed from Chintamun to his widow the liability to maintain Net Kouwar still attached to the inheritance, and Doorga was bound to maintain her out of the inheritance. It appears that she allowed the maintenance of the mother, which had been fixed by the two brothers at Rs. 200 a year, to fall into arrear for about five years, making Rs. 1,000 for the five years. In consequence Net Kouwar brought a suit against her personally for the amount due for maintenance with interest.

The plaintiff obtained a decree whereby it was ordered that the plaintiff should recover from the defendant on account of her claim Sicca Rs. 1,033-5-6, which is equivalent to Company's Rs. 1,102-3-6. The plaintiff prayed that the defendant be ordered to pay that amount, and by the decree it was ordered that the plaintiff do get from the defendant that amount.

Now the decree being a personal decree against the widow, according to the case in the High Court cited from the 6th Weekly Reporter, page 304, all that would be sold under it was the interest of the widow. It was there held that where only the rights and interest of a Hindoo widow in the property left by her husband were sold in execution of a decree against her on account of a debt contracted by her, and neither the decree nor the sale-proceedings declared the property itself liable for the debt, the purchaser obtained an interest in the estate

only during the widow's lifetime. This was a personal debt of the widow, and there is nothing to show that the estate of Muddun Mohun was charged by the decree. The sale against her in discharge of her personal liability was of the interest which belonged to her, and not of the estate which belonged to her husband. It was the widow's property only that was liable to be sold, or was sold, in discharge of her personal debt.

The notification of the sale under the decree was that a sale would be held of whatever right and interest the judgment-debtor had in the estates. It does not say that it is to be levied by sale of the husband's assets, but that it is to be realized by the sale "of whatever right and interest the judgment-debtor had in the estates." Then it is specifically pointed out at page 25: "Besides the right and interest of the judgment-debtor, the right and interest of no other person will be sold at the said auction." The right and interest of the judgment-debtor which was to be sold was that to which she was entitled, that which was liable to make good her default in non-payment of the maintenance. The sale took place under that notification, and it is clear, if that is important, that Brij Bhokun, the plaintiff, understood that what was to be sold was the widow's estate, not his own reversionary interest as the heir of his uncle. He wanted to sell the widow's estate, not his own interest. The real question is what was liable to be sold under the decree, and what in fact was sold. The purchaser may have made a mistake. He may have thought that the Court was selling something which they did not sell, but he was informed distinctly by the notification that the Court was selling the interest of the defendant in the estate, and that besides that interest no other interest was being sold. The plaintiff having purchased the interest of the judgment-debtor obtained a certificate of the purchase, which stated that whatever right, title, and interest the judgment-debtor had in the said property had ceased from the date of the sale, and had become vested in the auction-purchaser.

It appears therefore to their Lordships that what was intended to be sold was the widow's interest only and not the absolute estate in the lot, and that consequently upon the death of the widow, the lot descended to the plaintiff as the reversionary heir of her husband, and that the purchaser did not obtain the absolute estate, but only the widow's interest in it, which continued only so long as the widow lived.

Several cases have been cited. The first case which was referred to was the case in Marshall (614). That case was fully gone into, and it was explained in the course of the argument that the suit was against the widow not in her own right as widow, but as representative of her son. In that case the widow had no estate at all to be sold, and when the decree and the order for sale are examined, it is clear that what was intended was the sale of the interest of the debtor, that was the interest of the son to whom the widow was the guardian; and when it was said that the interest of the defendant was sold, the widow's interest was not intended, but the interest of the person who was liable, and that was the son. That decision was affirmed on appeal (14 Moore's Indian Appeals, p. 605).* It appears to their Lordships that those cases are no authorities to show that, under the judgment and execution in this case, anything further passed to the purchaser than the widow's interest. Then two cases were cited, one from the 12th Weekly Reporter, page 504. That was a very different case from the present. It was there held, that "where a widow's estate is sold for arrears of rent, it is not merely the widow's life-interest that is transferred, and the reversionary heir cannot follow the estate after her death." There the widow was sued for rent under Act X of 1859. Section 105 of that Act enacts that, "if the decree be for an arrear of rent due in respect of an under-tenure which by the title-deeds or the custom of the country is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought

* 17 W. R. 459; 2 Suth. P. C. R. 579.

to sale in execution of the decree." The rent was due to the landlord. He recovered a decree, and under it the tenure, not the widow's interest, was sold.

The other case which was cited was from the 15th Weekly Reporter, page 264. That was the case of a suit brought for arrears of rent. It was there held, that "when neither the Hindoo widow who has succeeded by inheritance, nor the reversioner chooses to pay the arrears of rent which have fallen due upon a tenure, the tenure, if sold for such arrears, passes to the purchaser by the sale;" that is to say, if the rent is not paid the tenure is answerable, and the landlord has a right to look to the tenure. Those cases therefore are not at all applicable to the present, and are no authorities in favor of the defendants.

Then another case was cited which, in their Lordships' opinion, bears out the position already laid down. It is the 11th Moore's Indian Appeals, page 257.* It was there held that the decree in that case was not a decree against the land but a personal decree. It bears out the view which their Lordships have taken with regard to this decree, that it was a decree in a suit against the widow personally, that the decree was against her personally; that the attachment was to sell her property, that is, the interest which belonged to her in the estate, and which was liable to make good her default.

Looking therefore to the whole case, their Lordships are of opinion that the decision of the High Court was correct, and they will humbly recommend Her Majesty that that decree be affirmed with the costs of this appeal.

The 10th July 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Gift—Allegation of Trust for Idols—Evidence.

On Appeal from the High Court at Calcutta.

Kanai Lal Dutt and others

versus

Sreemutty Sudhamoni Dassya.

In a suit by appellants to compel defendant to account for certain Government securities alleged by plaintiffs to have been given to defendant by their grandfather impressed with a trust for certain idols, to remove defendant from the office of shevait to those idols, and to appoint one of the plaintiffs in her stead, the evidence by which plaintiffs endeavored to make out their case consisted (1) of entries in khata books not shown to have ever come to the knowledge of defendant, and which the Subordinate Judge has considered not proved to be genuine, but which, even if genuine, would afford no evidence against defendant unless used, under the Indian Evidence Act, to corroborate some other proof; (2) of a document of which too defendant was ignorant, which was not a testamentary disposition nor a conveyance or deed, but only an inventory of properties purporting to belong to defendant, and containing no indication of any trust whatever, but merely a statement of opinion that the notes in question were on account of those idols; and (3) pencil writings upon the notes (brought to light for the first time before the High Court on appeal notwithstanding that the Subordinate Judge had remarked upon the absence of any evidence of this description) indicating that defendant took the notes in trust as shevait for the idols. Assuming all these documents to be genuine, their Lordships nevertheless came to the conclusion that it had not been proved with the requisite certainty that these notes were endorsed by the grandfather to the defendant impressed with the trust described in the plaint.

Mr. Leith, Q.C., and Mr. J. D. Bell for Appellants.

Mr. Cowie, Q.C., and Mr. Doyme, for Respondent.

This was a suit brought by the appellants, who were the grandsons of one Madhub Chunder Dutt, against Sudhamoni Dassya, a lady with whom Madhub

* 8 W. R. P. C. 17; 2 Suth. P. C. R. 78.

Chunder Dutt had lived a great number of years though he had not married her, and by whom he had had many children, for the purpose of compelling the defendant to account for Government securities to the amount of Rs. 22,200, which were alleged by the plaintiff to have been given to her by Madhub Chunder impressed with a trust for certain idols, of removing her from the office of shevait to those idols, and appointing one of the plaintiffs in her stead.

This suit, it is to be observed, was brought by the grandsons of Madhub Chunder in the year 1871 ; the time of the gift of the notes to Sudhamoni having been the years 1852 and 1853, and Madhub Chunder having died in 1855. It is further to be observed that Guru Das, the father of the plaintiffs and the son of Madhub Chunder, made no such complaint of Sudhamoni as his sons now make—indeed he was made by the grandsons of Madhub Chunder a co-defendant in this very suit with Sudhamoni. Both Courts in India have held that the plaintiffs have not sufficiently made out that these Government notes, being four in number, and making up the sum which has been before mentioned, were given by Madhub Chunder to Sudhamoni impressed by the trust which is alleged in the plaint.

The evidence by which the plaintiffs endeavored to make out their case may be briefly stated. It consisted in the first place of entries in khata books, as they are called, kept by Madhub Chunder, one entry of the 14th April 1850, the other of the 9th January 1853. In the first of those entries two of these notes, in the second the other two notes are referred to as having been given or as being given to Sudhamoni for the service of the idols. These khata books it appears were kept in Calcutta, where Madhub Chunder had a family house, his ordinary residence, where Sudhamoni lived with him, being in Chinsurah. It is not shown that these khata books ever came to the knowledge of Sudhamoni ; indeed, there is her evidence that she knew nothing whatever about them. It is further to be observed that these documents were in the possession of the plaintiffs, at all events that they had access to them for a great number of years before they commenced their suit, and their delay in commencing it is not satisfactorily accounted for.

The Subordinate Judge has considered these khata books not proved to be genuine ; in fact he goes as far as to say that he thinks they have been prepared to suit the purpose of the case by the plaintiffs. Their Lordships think it enough to say that they are not prepared to find that the Subordinate Judge was wrong in treating them as not genuine, but assuming them to be genuine, they are of opinion that they afford no evidence against the defendant, unless they can be used, under the Indian Evidence Act, for the purpose of corroborating some other proof.

The next document relied upon by the plaintiffs is a document of the date of July 1854. It is a document which they say was discovered in the premises at Chinsurah which were occupied by the defendant. It is not shown that this document any more than the khatas was ever read by the defendant—indeed it would appear that she is not able to read or write—or that it was ever brought in any way to her notice. It is not a testamentary disposition ; it is not a conveyance ; it is not a deed ; but it appears to be a statement of properties more in the nature of an inventory than anything else. It is headed "Statement of Properties belonging to Sudhamoni Dassya," and it begins, "Statement of lands and houses, ghats and gardens, buildings, etc., and Company's paper, etc., belonging to Sudhamoni." Then there is this further statement, "When Sudhamoni Dassya dies, Baboos Radharomun, Krishna Lal, and Nitai Lal Dutt will succeed to the properties detailed below." So far as this general heading goes, there is no indication of any trust whatever ; on the contrary, there appears an indication that all the properties mentioned below were supposed by Madhub Chunder Dutt to belong to this lady and her children. There does follow subsequently a statement that the notes in question were on account of these idols, but it may after all be nothing more than a statement of the opinion of Madhub Chunder at the time that the proper service of the idols might be properly performed out of the proceeds of the notes.

But their Lordships are of opinion that this document, which bears date in July 1854, a considerable time after the notes had been endorsed to Sudhamoni (the notes having been all endorsed between the dates of October 1852 and April 1853), would not of itself have the effect of controlling those endorsements or of affixing a trust upon the notes.

The next piece of evidence relied upon by the plaintiffs is one of a somewhat extraordinary character, which did not come out in the Subordinate Court, but was for the first time brought to light before the High Court on appeal. It consists of writing in pencil upon these notes—upon the face of three of them, and on the back of one of them—indicating that Sudhamoni took the notes in trust as shevait for the idols. It is remarkable that the Subordinate Judge observes upon the absence of any evidence of this description. He says, "It appears that Madhub Dutt duly made over the disputed Government securities to the defendant with proper endorsements. Here it is to be observed that if in point of truth the said securities had been dedicated to the service of the deities, then the endorsements in question, with the addition of these few words, 'these papers are made over to the defendant for the performance of the service of these deities,' would have been sufficient for the purpose. In the absence of that, when Madhub Dutt made over the said Government securities to the defendant with endorsements in the ordinary form, the defendant's plea that he had made over the papers to her absolutely without any reservation seems sufficiently proved and worthy to be believed." It would therefore appear that the materiality of the discovery of a writing of this kind upon the notes was observed upon by the Judge in the Court below. These notes were handed to him; they were inspected by the attorneys or vakeels for the plaintiff; and no such writing was then discovered. But this very description of writing which was spoken of by the Judge below as so very material, and as absent, became present when the notes were examined in the Court above. This certainly does seem to their Lordships a very extraordinary circumstance; and it does occur to them as somewhat dangerous to affix a trust of this description, whereby property is permanently alienated from useful purposes to purposes of mortmain, upon such evidence. This further observation is to be made, that upon one of these notes the pencil writing creating the trust is to be found upon the back, just above or close to the signature in writing of Madhub Chunder; and it does appear very extraordinary that, even if pencil writings on the face of the notes were not discovered at the trial in the Court below, this writing upon the back of that note should not have been discovered when the signature undoubtedly was seen. Assuming, however, these pencil writings to be genuine, there is no proof in whose handwriting they are. The High Court observes upon this,—“These pencil memoranda are not in Madhub Dutt's handwriting;” and goes on to say: “Nor do we place much reliance on the evidence that the signature 'Madhub Dutt' in ink on one of them, or the initials 'M. D.' in pencil on another, are genuine.” The High Court, therefore, do not determine whether a portion of what is found upon these notes is or is not genuine.

Taking it at the highest, on the part of the plaintiffs, that these pencil writings were upon the notes when they were first produced at the original trial, yet, inasmuch as it appears that they were not in the handwriting of Madhub Dutt, and no evidence was given that they were written by any person authorized either by him or by the defendant, or when they were written, their Lordships have come to the conclusion that it would not be right to reverse the decision of the High Court, which is to the effect that, assuming all the documents relied upon by the plaintiffs to be genuine, nevertheless it has not been proved with the requisite certainty that these notes were endorsed by Madhub Chunder to Sudhamoni impressed with the trust described in the plaint.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the High Court be affirmed, and this appeal dismissed, with costs.

The 17th November 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Act VIII of 1859 s. 2—Cause of Action—Adjudicated Issues.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Krishna Behari Roy

versus

Bunwari Lall Roy (now Brojeswari Chowdhranee) and another.

The expression "cause of action" in Act VIII of 1859 s. 2 cannot be taken in its literal and most restricted sense. Where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot be again tried in another suit between them:

Sir Montague Smith delivered the following judgment:—

This was a suit brought by the appellant, claiming to be the heir of Goursoonder Roy, to set aside an adoption of the respondent Bunwari Lall, alleged to have been made by the widow of Goursoonder Roy. One of the defences set up by Bunwari Lall and by his mother, who was joined in the suit as defendant, was that the question of the validity of the adoption of Bunwari Lall had been already decided in a former suit, to which the present appellant Krishna Behari Roy was a party. An issue was raised upon that defence. Now, it appears that a former suit had occurred, which was of this nature: Bunwari Lall had brought an action against some putneedars who claimed under putnee leases granted by his adoptive mother. The ground on which he sought to set aside the leases was that she had exceeded her power in granting them, inasmuch as she had only a widow's estate. It is not necessary to state more respecting the object of that suit. An issue was raised in it upon the question whether Bunwari Lall had been validly adopted. The present appellant and plaintiff Krishna Behari Roy intervened in that suit, upon the ground that he was the heir of Goursoonder Roy, and, as the heir, had a right to intervene to dispute the title of Bunwari Lall as his adopted son. It does not appear very clearly at what period of the suit that issue was raised—whether before or after Krishna Behari Roy intervened—but undoubtedly it was raised, and is in substance the same as the issue raised in the present suit. The issue was tried, and the Principal Sudder Ameen found against the intervenor and in favor of the adoption. He also found in favor of the putneedar, that the putnee could not be set aside. The putneedar having a decision in his favor was, of course, satisfied with that decree, but Krishna Behari Roy being dissatisfied with the finding upon the issue as to the adoption, appealed to the Civil Judge. On this appeal, the decision of the Principal Sudder Ameen was affirmed. Again he appealed from the Civil Judge to the High Court, which, after fully hearing the case upon the issue of adoption, affirmed the decisions of the Courts below. There exists, therefore, a final and complete judgment upon the issue raised either at the instance of Krishna Behari Roy, or which he adopted, on the very question which he seeks again to raise in this suit.

Both the Courts below have held that the present suit is barred by reason of the judgment in the former one. The ground of the present appeal is that they are wrong, inasmuch as it is said that the case does not come within s. 2 of Act VIII of 1859. Now the Section is this:—"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined

* From the judgment of Kemp and Glover, JJ., decided on the 4th January 1873.

by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." Their Lordships are of opinion that the expression "cause of action" cannot be taken in its literal and most restricted sense. But however that may be, by the general law, where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them.

It is not necessary for their Lordships to go at length into the reasons for their decision, because those reasons appear in a recent judgment of this Board in the case of *Soorjomonee Dayee v. Suddanund Mohapatte*.* In that judgment it is said, after reference to the second Clause of Act VIII: "Their Lordships are of opinion that the term 'cause of action' is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this Clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata*, founded on the principle '*nemo debet bis vexari pro eadem causâ*.' This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to in the 3rd Volume of Atkyns, *Gregory v. Molesworth*, in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the Duchess of Kingston."

A decision of the High Court of Bengal has been referred to, the case of *Sheikh Rahmatulla v. Sheikh Sariutulla Kagchi*, in the 1st Bengal Law Reports, page 68,† as having a contrary tendency. All their Lordships desire to say of it is that, as reported, it does not appear to be consistent with their judgment in the former appeal to which I have referred, nor with their opinion in the present case. The decision is of so recent a date that they desire to say no more upon it.

On reference to some notes of Mr. Broughton on this Section of Act VIII of 1859, it appears that the decisions have not been uniform in the Courts in India. Several of them are opposed to that referred to.

It was suggested by Mr. Cave that the former judgment ought not to be binding, because certain witnesses having been examined before the present appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any miscarriage of that kind, the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals which were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that they cannot affect the operation of the final judgment, which must be taken to have been rightly given.

In the result, their Lordships will humbly advise Her Majesty to dismiss this appeal, and to affirm the judgment below with costs.

* 20 W. R. 377; 2 Suth. P.C.R. 899.

† 10 W. R. F. B. 51.

The 19th November 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Mistake in Settlement Papers—Tenants not concluded—Reg. XXV of
1802—Grants before Permanent Settlement—Objections.*

On Appeal from the High Court of Judicature at Madras.

Stri Raja Vyricherla Raz Bahadoor

versus

Nadiminti Bagavat Sastri.

Tenants are not concluded by a mistake in settlement papers, nor does Reg. XXV of 1802 provide for forfeiture of rights by parties who by carelessness or accident allow their land to be misdescribed in settlement proceedings.

Whether grants made by a zemindar before permanent settlement are, or are not, binding on his successors,—their Lordships' minds inclining strongly to the affirmative side of the alternative—as the question was not raised in the Courts below, it was not considered to be open to the appellants in the appeal to the Privy Council.

The question to be determined on this appeal is whether the appellant, the zemindar of Kurupan, is entitled to turn the respondents, who are certain Brahmins claiming to have an agharum tenure in the village of Turakanayuduvalasa, out of possession of that village, and to recover the mesne profits from the time specified in the plaint. The case of the plaintiff is thus stated in the 9th paragraph of the plaint. He there says:—"In the year 1857 I attained my majority, and took charge of the zemindary. The said village was, until then, enjoyed as a jeroyti portion of my zemindary for many years, and was severed therefrom only in the year 1857. It is therefore prayed that the Court may adjudge to me the jeroyti village of Turakanayuduvalasa (situated within the boundaries hereunder specified, and yielding at present an annual income of Rs. 1,000), together with the produce made over to the defendant by the Court, as also the produce subsequently enjoyed by him, with interest thereon, amounting to Rs. 39,577-13-4, as per schedule." The plaint therefore treats the restoration of possession to the defendants under a former decree, of which the execution was in 1855 directed by the Sudder Court to be made, as a species of trespass. It seeks to re-open the settlement of account made by or in conformity with that decree; and to recover back the sum then paid with subsequent mesne profits. The suit is brought not upon any notice to determine an alleged tenancy-at-will, but as upon an act of trespass giving a right of action from a particular time. It is difficult to reconcile such a claim with the admitted facts of the case; or to see how upon any view of the evidence in the cause the plaintiff could obtain the particular relief which he has prayed.

It is not their Lordships' intention to follow Mr. Mayne through that wilderness of litigation in which they have been very clearly guided by him; the history of which does not present by any means a favorable picture of the administration of justice in the Presidency of Madras (or at all events in the district of Vizagapatam), during the greater part of the present century. It may be necessary hereafter to refer to some of those proceedings which have a peculiar bearing upon the points raised by the present appeal. It is sufficient, however, for the present to observe that in 1861, when the former decree above referred to was finally executed, there was, as it were, a new point of departure.

The Brahmins were then reinstated, under the authority of the Court, in possession of their village, and recovered a certain portion of the mesne profits received by the zemindar after the estate had been made over to him upon the

taking off of the *zuft* or attachment. The zemindar, on the other hand, was left to assert what rights he had to impeach this *agraharum* tenure in a new and independent suit; and this suit, which was commenced in 1864, has been treated in the Courts below, and may here be treated, as one brought for that purpose. Nor again is it necessary to consider in detail the earlier stages of this new litigation, or in particular the proceedings in which his right, whatever it might be, was held to be barred by the decree obtained in 1807, because the High Court having rejected that view of the case, and also departed from the view which it had itself originally entertained, to the effect that the suit was barred by the statute of limitations, finally, by the order of the 26th March 1866, sent the parties back to trial on these two issues, *viz.*, 1st, "whether the defendant at the date of the suit held the village in question under the grant made to his ancestor, before the date of the permanent settlement?" and 2nd, "whether the defendants' holding under such grant was *kattubadi* or other tenure, subject to a fixed quit-rent which the plaintiff could not legally determine?"

Now, as the case comes before their Lordships, these two issues have been found by the two Indian Courts which last dealt with them in favor of the plaintiff. Therefore, so far as they are findings upon matters of fact, they are findings which this tribunal, in accordance with its ordinary rule, will not be disposed to question. As to the first issue, Mr. Mayne, in the course of his able argument, was almost constrained to admit that he could not impeach the correctness of it. The evidence upon which the Court came to its conclusion on the first issue depended in part upon two documents, of which the genuineness had been contested, but which both Courts have found to be genuine,—I mean the *dombala* of Mr. Webb on the 20th May 1800, which clearly treated the village as then held as an *agraharum* by the Brahmins, and directed that it should be relinquished to him on his paying the customary yearly *shrotrium* to the zemindar of Kurupam of Rs. 150. That was followed by a *putta*, also found to be genuine, whereby the then zemindar, or his guardian in his name, stated that, "as my ancestors have granted to you the *agraharum* of Turukanayuduvalasa, attached to our jagheir of Kurupam Taluk, I again grant it to you as *ekabhogam* (entirely) in the name of Shri Swami, fixing a *shrotrium* (revenue) of Rs. 150. Therefore you and your descendants may extensively improve and enjoy it, paying the *shrotrium* (revenue) every year, and bestowing blessings upon us. He who maintains what another gives, gains a virtue double that he gets by giving it himself."

It seems to their Lordships that the Court, finding those documents to be genuine, have rightly come to the conclusion that they establish the affirmative of the issue in favor of the plaintiff; that whatever may have been the original grant, of which the first seems to have been a grant absolutely rent-free to the Brahmins, it must be taken that in some way or another the rights of the Brahmins had become modified to that extent, that they were to hold this village only subject to the payment of the *shrotrium* or fixed rent of Rs. 150, and that that was the state of things in 1800, and before the completion of the perpetual settlement of the zemindary.

That being so, the only question that would remain would be whether the Court, finding that, was correct in coming, from that conclusion and upon the other evidence in the cause, to its finding on the second issue, "that the defendant's holding under that grant was *kattubadi*, or other tenure subject to a fixed quit-rent, which the plaintiff could not legally determine."

The principal ground upon which the correctness of that finding has been attacked is that it is conclusively shown by the lists of the zemindary property, upon which the perpetual settlement was made, that the village was entered in those lists, and must therefore have been treated in the settlement made upon them as a *jerayeti* village, and not as a *shrotrium* or *agraharum* village. That raises the question, what is the effect of a mistake in this description of the village upon the

second issue raised in this cause? That there was in the proper sense of the term a mistake, is reasonable to conclude from the dombala of Mr. Webb, because Mr. Webb appears to have been the Collector who was taking a large if not the sole part in making the permanent settlement, and if he in 1800 was satisfied that this was a shrotrium village and directed that as a shrotrium village it should be delivered over to the Brahmins, he would hardly proceed consciously or intentionally to enter it as a jerayeti village in the settlement. But however that may be, the question is, what is the effect of the entry upon the interest of the holders of an agraharum tenure? Their Lordships cannot find any authority for saying that it is conclusive against the rights of the tenants. They were not necessarily parties to the proceedings which resulted in the settlement between the zemindar and the Government. It may be conceived that the Brahmins, as they said they were in fact, though the evidence does not support their allegation, might have been absent whilst the proceedings were pending. There seems to be nothing in the Regulations, as their Lordships read them, which would so conclude them. No doubt if the village had been entered as a shrotrium village in the settlement papers, that would have been conclusive as to the rights of the Brahmins against the zemindar, against the Government, against any purchaser at a sale for arrears of revenue, and in fact against all the world. But the Settlement Regulation XXV of 1802 does not contain anything which says that if the parties by carelessness or by accident allow their village to be misdescribed they are to forfeit their rights. It does not even say that all the shrotrium grants which then existed, and which were to be protected against future enhancement, were to be registered; and, on the other hand, that Regulation is followed by a subsequent Regulation of 1822, which declares that the provisions of the former Regulation were not meant to define, limit, infringe, or destroy the actual rights of any description of landlords or tenants, but merely to point out in what way the tenants might be proceeded against in the event of their not paying the rents justly due from them, leaving them to recover their rights infringed, with full costs and damages, in the Courts of Justice. It cannot be said that as a matter of law and of right the parties have forfeited the interest which they would otherwise have in this tenure, by reason of the misdescription of the village in the settlement papers.

It has, however, been agreed by Mr. Mayne that the insertion of the village as a jerayeti village at least affords the strongest presumption that the parties then knew that they had not a good agraharum, and of their acquiescence in that description as correct; but that presumption seems to their Lordships to be rebutted by all that subsequently took place. They were first dispossessed some short time after the settlement in 1807. They immediately asserted their rights, and the decision of the Court, so far as it went, was in their favor. The effect of it was that the zemindar had taken possession of the village forcibly, or at all events not under a judicial decision; and that according to the law as laid down in the Regulations, the only way in which he could interfere with the right claimed by the Brahmins was by a regular suit. Accordingly, the Brahmins were again put into possession. The zemindars for the time being seem to have acquiesced for nearly 20 years in that decision; and but for the decisions in India, by which it has been ruled that questions between landlord and tenant, and particularly questions of enhancement of rent, are not within the operation of the Statute of Limitations, there would have been no answer whatever to the proposition that the right of re-entry of the zemindar, if it had ever existed, had been barred by lapse of time.

Their Lordships are therefore of opinion that both the issues have properly been found in favor of the defendant.

There remains to be noticed the further question which was raised by Mr. Mayne, viz., that these grants were, at most, grants by the zemindar which could take effect only during the life of the particular zemindar, and, unless affirmed by his successor, were voidable. Whether assuming that proposition to be correct the particular

suit as it is framed could have been supported may well be doubted. But their Lordships have already intimated their opinion that this point, which was not taken in the present suit in the Courts below, is not open to Mr. Mayne upon the present appeal. They will not therefore say more upon it, than that it would have required strong authority to convince them that grants made by a zemindar before the estate was permanently settled, and became subject to the rules which may have been laid down in the Madras Regulations as to subsequent alienations of this kind, were not binding upon the successors of the grantor.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court which is the subject of the present appeal, and to dismiss the appeal with costs.

The 27th November 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Possession—Title.

On Appeal from the High Court of Judicature at Madras.

Arumugam Chetty and others

versus

Perriyannan Servai and others.

A possession on the part of one party, which is not shown to have commenced in wrong, can only be disturbed by distinct proof of a superior title in another party.

The appellants, who were the plaintiffs in the action out of which this appeal has arisen, are or represent the Nattukottay Chetties who belong to the Nagaram of Velangudi, and have been throughout these proceedings, and in this judgment will be termed "the Nagarattars." The action was brought by them against certain persons of a different caste who represent a community that may be called and has been called throughout the proceedings "the Nattars." The plaintiffs the Nagarattars form part of the urban and trading population of this district of Velangudi. The Nattars belong to the rural population, and are probably cultivators of the soil. The object of the suit is to have it declared that the Nagarattars are entitled to the management of two pagodas, which for all practical purposes may be treated as one pagoda, devoted to the service of the Durga goddess, whose particular title is Periyannayaki. They also claim to have delivered over to them the possession of those pagodas, with the appurtenances consisting of ornaments and other articles relating to the worship of this idol. The Civil Judge found in favor of the Nagarattars. The High Court has reversed his decree, and made a decree dismissing the suit, against which the present appeal is brought.

Their Lordships cannot but regret that the learned Judges of the High Court have not stated in greater detail the reasons which induced them to come to a conclusion contrary to that which the Civil Judge had supported by a judgment, which, whether it be right or wrong, must be admitted to be one very carefully considered. The very nature of the dispute renders it peculiarly desirable that their Lordships should have all the light which the full expression of the opinions of Judges of local experience, dealing with conflicting evidence, would throw upon the case. Their Lordships, however, must deal with the case as it stands.

The case made by the Nagarattars was that these pagodas were mere dependencies of a larger pagoda dedicated to the worship of Siva, of which they are the admitted managers; that the three pagodas had been supported out of the same funds; that they, the Nagarattars, had the administration of those funds; that the worship and all the services of the pagodas were performed by servants appointed by them; and, feeling it necessary to account for a change in the possession of the pagodas, they distinctly alleged in their plaint that, "on the night of the 28th April 1871, the defendants forced open the doors of the said two Periyamayaki Amman's pagodas, and took possession of the said pagodas, and are keeping the sacred jewels and other property which they took therefrom." And further:—"That the defendants on that same night unlawfully carried away the idol of the village, Periyamayaki Amman, which, according to custom, had been brought to the Kanteswara Mudayar pagoda for the Sivaratri festival, and also the property mentioned below, even before the festival was over." Then they pointedly say:—"The cause of action is the fact of the defendants having unlawfully entered the said pagodas, and taken possession of the things therein. It arose on the 28th April 1871."

Now it is admitted that of this forcible entry and dispossession there is no evidence whatever, and therefore that the issue which had been framed upon that allegation in the plaint would of necessity have been found against the Nagarattars. On the other hand, it may be admitted that the case made by the Nattars is not altogether consistent with the evidence taken in the cause. They seem to have asserted that these pagodas were wholly distinct from the pagoda of Siva, and in no way connected, by worship or otherwise, with it; and they suggested that certain sacrifices involving the taking of animal life, which formed part of the worship of the Durga goddess, and were not permitted in the worship of Siva, rendered it impossible, in a Hindoo point of view, that the two institutions should be so connected. The evidence, no doubt, does not support these or some of the other allegations made by the defendants. There does seem to have been a certain community of management. It was admitted in the case that there was but one set of servants for the three pagodas up to the date of the Inam pottah of the 19th November 1869, and that up to that date all the incomes were enjoyed in common. It was admitted, or, if not admitted, proved, that the image of the Periyamayaki idol was occasionally taken to the pagoda of Siva, and there remained for a certain time; that the same dancing-girls attended the two pagodas; that the endowment being a common one, the granaries and other things were in common; and that certain daily allowances were, at all events until the dispute culminated in a rupture, made by the Nagarattars for the daily worship of the Periyamayaki Amman. But the failure of the defendants to make out wholly the case which they have pleaded in defence will not entitle the plaintiffs, if they have failed to make out their title, to disturb the existing possession, or to succeed in this suit.

Now, if the allegation of forcible dispossession had been made out, the case of the Nagarattars would, no doubt, be an extremely strong one. It would probably have been inferred from the evidence that their possession up to the date of that forcible act had been consistent with the title which they alleged. But since they have failed to prove the dispossession alleged, we have to deal with a possession on the part of the defendants which is not shown to have commenced in wrong, and the plaintiffs can only disturb that by proving distinctly a superior title. In the opinion of their Lordships they have failed to do so. There is, no doubt, a great deal of conflicting testimony; but the evidence on the whole, as to the ceremonies and the like, support several of the short observations which the learned Judges of the High Court have made in support of their decree. It certainly appears that the Nattars have been allowed precedence and peculiar honors in some ceremonies and points of worship; it also appears that they have

exercised some control over the transfer of the image and other matters into which their Lordships do not think it necessary to go at length. One very important circumstance is that the custodian of the jewels of this idol, which appear to be of very considerable value, is admitted to be a Nattar who is described as the hereditary jeweller of the village. His ancestors, therefore, may be inferred to have had the possession of these jewels, which the Civil Judge has by his decree preserved to him. The cars and all that were necessary for the movement of the idol are also found to have always been in the custody of the Nattars.

Upon the question of possession, Mr. Mayne, abandoning the forcible dis-possession alleged by the plaint, has fallen back upon a dispossession supposed to be consequent upon the delivery out of the pottah of 1869. This brings us to the consideration of that which is the most important piece of evidence in the cause, namely, the proceedings of the Inam Commission, which are set out at page 74a and the following pages. One, if not the principal, object of that Commission appears to have been to ascertain what lands had been effectually made subject to religious trusts, and, as such, had become either rent-free, or subject only to a small and fixed quit-rent. The enquiry seems to have been conducted locally, under the authority of the Inam Commissioner, by the Deputy Collectors of the different districts, and to have been carried on from village to village. It seems to their Lordships clearly to result from the Exhibit, No. 90T, at page 74a and the three following pages of the record, that the dispute as to the rights of the Nattars in these pagodas cannot have dated, as Mr. Mayne contends, from the delivery out of the pottah in 1869, because the proceedings to which those documents relate certainly took place in 1863. Now what is the effect of those documents? Those at pages 74b and 74c relate to the villages Pandiranendal and Ayakaranendal, which form part of what may be called the common endowments of the pagodas, and each gives the result of the enquiry of the Commission touching the particular village to which it relates. In each the village in question is described as a devasthanum village in the zemindaree of Sivagangai. It says:—"This was granted for the maintenance of the temple of Sri Khandeswara Swami in Velangudi; this is a permanent grant. No pottah." From this it may be inferred that the original grant of the lands was made by some ancient zemindar of Sivagangai. But there is no evidence of the date or of the terms of the grant. Each document says:—"The temple is efficiently kept up." In each there is afterwards a more particular statement of the trusts to which the proceeds of the village are applicable. In that relating to Pandinarendal it is said:—"The proceeds of the village are appropriated for the temple of Sri Khandeswara Swami, and for Nattukovil of Periyamayaki Amman." The latter are the temples in dispute. "Though the name of the goddess is not entered in the accounts of Fusli 1211 and 1223, in the zemindar's account of Fusli 1212 it is entered. Hence the village belongs to Nagara Kovil of Khandeswara Swami and Nattukovil of Periyamayaki Amman; these two temples are under the management of the trustees in column 16 since long." The corresponding note upon the other village is in greater detail, and makes it still more clear that there was then a distinct allegation, acquiesced in by the Collector, that the pagoda of the goddess belonged to the Nattars:—"The proceeds of this village are appropriated for the use of the temple of Khandeswara Swami, which belongs to Nagarattar or Nattukottay Chetties, and to the temple of Periyamayaki Amman, which belongs to Nattar." Again it appears that the persons originally treated as the trustees of the property were only the two Chetties whose names are entered in the 16th and 17th columns. But before the record was finally made up, the names of three Nattars were added; and that this was done upon the representation of the Nattars insisting upon some record of their rights, is admitted even by the Civil Judge in the explanation which he gives of the circumstance. That the addition was

subsequent to the first draft of the document appears from the note in the 20th column, which is dated June 1864; whereas the date of the preceding note is December 1863, or six months earlier. Their Lordships cannot admit the explanation of the alteration which is suggested by the Civil Judge, if by it he means to suggest that the alteration was made in consequence of some tumultuous representations of the Nattars, amounting to coercion. It may be true that a mob of Nattars tumultuously desired that the three Nattars should be registered as trustees. But their claim, though, in the first instance, tumultuously asserted, was obviously under consideration for a considerable time, and was finally confirmed by the officiating Inam Commissioner on the 22nd December 1864. These proceedings cannot have been had under pressure on the part of a mob; and it must be presumed that the authorities came advisedly to the conclusion that the claim was a just one.

This view is in some degree confirmed by what was done also in 1863 with regard to the small portion of land which was afterwards the subject of the pottah of 1869. The document at page 74a of the record treats the proceeds of that land as exclusively devoted to the support of the pagoda of Periyamayaki. The Inam ticket was not given, as in the other case, to the Nagarattars. They were not entered as trustees in the column of trustees; and though, on the other hand, no Nattar is entered, the ticket was made over to the gurukhal. He was treated as the worshipper entitled to the ticket. A distinction was therefore made, which would hardly have been made if the three pagodas had been really and undisputedly part of the same institution, and subject to the same management.

It was said that, notwithstanding these proceedings, everything went on as before; that the proceeds of the endowments were received by the Nagarattars; and that there was no dispute until the pottah of 1869 was issued, and, in conformity with the document at page 74a, was given out to the gurukhal, from whom it passed to the principal of the Nattars. It is suggested that this gurukhal played his employers, the Nagarattars, false, and made an improper transfer. But there is nothing to show that he was not right in so dealing with the pottah. It is perfectly clear that the pagoda had been described as a Nattar pagoda, and that the Nattars were as early as 1863 claiming some rights of management in it, or they would never have been entered in the documents relating to the common endowments as trustees. This particular parcel of land belonged exclusively to the pagoda of Periyamayaki Amman. The Nagarattars had ostensibly no concern with it. Again, the pottah which was granted of the other villages is not produced, and it is not satisfactorily accounted for. It is perfectly consistent with probability, and must be presumed, in the absence of any evidence to the contrary, that this pottah was in conformity with the records of the Inam Commission, and was a grant of these villages to the Nattars as well as the Nagarattars as trustees. The superior habits of business and life of the Chetties may account for their continuing to receive the profits of, and generally manage, the common endowment; but that is not a circumstance which establishes their right to recover the possession of these pagodas from the Nattars, who, as far as their Lordships can see on the evidence, have always to some extent been in possession. Certain it is that the dispossession of the Nagarattars, or the first claim of possession on the part of the Nattars, cannot be said to date only from the grant of that pottah, because it is proved in the cause that as early as 1867 the Nattars were resisting the removal of this image, when the Nagarattars wished to have it removed to the temple of Siva; and must, therefore, at that time at least, have been asserting dominion over the image in opposition to the Nagarattars.

Of the original foundation of the Siva temple, beyond what is to be gathered from the proceedings of the Inam Commission, there is no trace. One contention of the appellants was that wherever there is a temple devoted to Siva there will be found a dependent temple devoted to the worship of some Durga goddess in its

vicinity. It is, however, established that this state of things is universal, and it may well have happened that these temples may have been established by the Nattars or the Nattar community taking advantage of the vicinage of a Siva temple, and giving the managers of that temple the benefit of the new foundation. The inscription, which might have shown who was the founder of the pagodas in dispute, is unfortunately defaced in an important word. Again, it may have been arranged by the zemindar for the time being of Sivagangai that part of his endowment of the Siva temple should go to the sustentation of the other temples, though founded by Nattars. That is perfectly consistent with the theory that some right of possession and management is in the Nattars.

Upon the whole their Lordships are of opinion that the explanation which has been given by the Civil Judge of the proceedings of the Inam Commission, and of the addition made to them in favor of the Nattars, is unsatisfactory; that those documents turn the scale of the conflicting evidence, and that certainly the Nagarattars have not made out their right to disturb the possession which now exists. The necessary consequence of this is that the suit as framed is improper, and that the decree of the High Court is correct.

It has been alleged by Mr. Mayne that a decision to this effect leaves the parties in an unsatisfactory position. And this, no doubt, may be true. It may happen that, either by reason of the refusal of the Nagarattars to apply the funds in their hands to the sustentation of the smaller pagodas while they are in possession of the Nattars, or from some other cause, fresh difficulties and disputes may arise. It is much to be hoped that if this should be the case, the parties will contrive to have their differences determined by a native punchayet, a tribunal peculiarly adapted to determine disputes of this kind, which necessarily involve many nice considerations founded on Hindoo usage, Hindoo ritual, Hindoo belief, and Hindoo feeling. But, even if the parties have again to come to the Courts, they must so come in a suit properly framed for the purpose of having their disputes settled by what we should call a scheme for the administration of the endowment. Dealing with this suit, as it stands, their Lordships can but advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

The 17th December 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, and Sir Montague E. Smith.

Bond—Presumptions—Mortgage Bond—Limitation—Act XIV of 1859 s. 1 cl. 12.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Juneswar Dass

versus

Mahabeer Singh and others.

In the absence of satisfactory proof of fraud or mistake, every presumption ought to be made in favor of statements contained in a bond which was deliberately entered into and which has been acted upon for many years.

In an action brought upon a mortgage bond which combines a personal obligation with the pledge of property, where the claim is founded not upon the contract to pay the money, but upon the hypothecation of the land, and the object is to obtain a sale thereof as against purchasers under a subsequent mortgage bond, the law of limitation applicable to the suit is Act XIV of 1859 s. 1 cl. 12.

* From the judgment of Sir Richard Couch, *Kt.*, *C.J.*, and the Hon'ble F. A. Glover, *J.*, decided on the 21st May 1873.

This was an action on a security common in Bengal, called a mortgage bond, which appears to combine in one instrument two things, a personal obligation by the maker of the bond to pay the money, and a mortgage of property by way of pledge and security. The bond in question is dated the 21st June 1856, and was given by Baboo Ritbhunjun Singh, who is the defendant No. 1 in the suit, to Mussumut Agur Koonwar. The consideration for the bond consists of the amounts which are stated to have been due under five previous bonds given to the Mussumut by Baboo Dyal Singh, the father of Ritbhunjun Singh. The bond recites the former bonds, and proceeds thus:—"Hence I, the declarant, do of my own accord and consent make myself responsible for the sums of money covered by each of the five above-named bonds, principal with interest, as well as other loans, etc., in all for Company's Rs. 16,511, and bind myself for the payment of the said sum of money to the above said lady." This part of the bond contains a personal obligation on the part of the maker of the bond, the defendant No. 1, to pay the money. Then are inserted the terms of the loan:—"With the consent of both parties it has been agreed upon that the interest should be paid as per detail given below, that is, the principal with interest I will pay at the rate of eight annas per cent. from the date of the execution of this bond to the end of Jeyt 1269 F.S., and from 1270 F.S. to Jeyt 1274 F.S. at the rate of Re. 1 per cent. per mensem. Accordingly I hereby declare and give in writing that I will positively, without any objection whatever, liquidate the said sum of money, principal with interest, in the month of Jeyt 1274 F.S., to the aforesaid lady." As far, therefore, as we have hitherto gone in the bond, the ultimate period for payment would not accrue until Jeyt 1274. Now comes the part of the instrument which creates an hypothecation of land:—"For the satisfaction of the lady, and as security for the above sums of money, I pledge and mortgage Mouzahs Dhunpookhra and Bahocara original, with dependencies appertaining to Talooka Athur, Pergunnah Bhojepore, held and possessed by me. I and my heirs shall not, as long as the whole amount aforesaid remain unpaid, transfer them in any way." Then there is a clause to this effect:—"Should the mouzahs mortgaged be sold in execution of decree or for arrears of revenue, the said lady shall in that case be at liberty, without waiting for the expiration of the term of payment, to institute a regular suit, and to sell the moveable and immoveable properties of me the declarant and my heirs, and thereby realize the amount in question. This bond was registered on the 23rd June 1865."

The action is brought by Bhedi Singh and twelve other persons, who are the heirs of the Mussumut, the fourteenth plaintiff being a person called Turmundul Dass, who had purchased a fourth share in the bond. The defendants in the suit are, first, Ritbhunjun Singh, described in the heading of the suit as "the principal contractor of the loan;" and secondly, certain persons who are described in the same heading as "auction-purchasers of the pledged property;" and it may here be stated that they became such purchasers under a decree obtained upon another mortgage bond made by Ritbhunjun Singh subsequently to the bond in question, and of course subject to it. The date of the auction-sale, which is sought to be impeached, is the 18th May 1865.

After the discussion, which has taken place at the bar, there remain only two questions to be decided. The first is purely a question of fact which was raised in the following issue, the third issue:—"Whether or not the mortgagor has received the consideration-money?" It has been contended by Mr. Arathoon that the consideration stated in the bond is not truly stated. The principal amounts of the five bonds enumerated in the bond in question are not disputed, but it is said that an amount of interest equal to the aggregate amount of the principal sums—the principal being Rs. 8,000, and the interest Rs. 8,000 also,—found its way into the bond by some fraud or error, and that in point of fact that interest was not due, but had been previously paid. Both Courts below went very fully into

the evidence given on that issue, and came to the concurrent finding that the defendant has failed to establish it. Having executed this bond the onus is upon him to show that the consideration had not passed. Both Courts have come to the conclusion that he has failed to support that burden, and that he has shown no sufficient ground for the conclusion that that interest was not due. It is said that calculating only simple interest on the bond, the Rs. 8,000 could not be made up; but the High Court make a suggestion, which their Lordships regard as a reasonable supposition, that the parties before entering into the new bond may have come to an arrangement that rests should be made in the account, and compound interest paid. In the absence of satisfactory proof of fraud or mistake, every presumption in favor of the statements contained in the bond ought to be made, considering that it was deliberately entered into, and that for many years it has been acted upon, and payments made under it. Their Lordships, therefore, see no reason to be dissatisfied with the conclusion to which the Courts below have come upon the issue of fact, and the appeal so far as that issue is concerned fails.

The other question arises upon the period of limitation which is applicable to this case. As already observed, the instrument contains two distinct things: the obligation to pay the money, which binds the maker of it only, and the mortgage of the land; and the plaint in the present suit is properly framed upon the instrument in that aspect. It seeks to charge the first defendant, the maker of the bond, Ritbhunjun Singh, personally, and it also claims to recover the amount of the principal and interest by the sale of the mouzahs (naming them), which were the hypothecated property included in the mortgage. It is contended for the appellant that the limitation contained in cl. 16 s. 1 of the Act XIV of 1859 is the proper limitation to apply to the case. That is a sweeping Clause, which provides thus:—"That to all suits in which no other limitation is hereby expressly provided, a period of six years from the time the cause of action arose." It is said that this is a suit brought to recover money lent, and the interest on that money, and that it falls within cl. 16, because, although cl. 10 applies to suits for money lent, it does not apply to them in the cases where the instrument shall have been registered within six months from the date, and this bond, having been so registered, is not within that Section, and, not being otherwise provided for, falls within the limitation of six years in cl. 16. Their Lordships, however, are clearly of opinion that neither of these Clauses is applicable to this suit, which is brought, in substance, for the recovery of immoveable property, or of an interest in immoveable property, and falls therefore within cl. 12 of the first Section. The object of the suit is to obtain a sale of the land as against the defendants grouped as defendants No. 2 and No. 3, who had become purchasers under a subsequent mortgage bond. It is therefore, as against them, a claim founded, not upon the contract to pay the money, but upon the hypothecation of the land. Their Lordships would have been disposed so to apply the Statute of Limitations if the matter had been *res integra*, but it appears from the cases to which they have been referred by Mr. Cave that there has been a long and almost uniform current of decisions in the two provinces of Bengal and Madras, giving this construction to the Act. Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon that this suit would have been barred if the limitation of six years under cl. 16 had been applicable to it. They think, upon the construction of this bond, there would be good reason for holding that the cause of action arose within six years before the commencement of the suit. However, it is sufficient to say that their Lordships think the limitation applicable to the case is that under cl. 12 s. 1 of the Limitation Act.

In the result, their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss this appeal with costs.

The 17th December 1875.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Possession—Boundary—Previous Decision of Civil Court.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

The Court of Wards

versus

Raja Leelanund Sing.

In this suit, which is essentially one of boundary, which has formed the subject of litigation for many years, and on which an order had previously been made by Her Majesty in Council : **HELD**, that the first question to be now determined was what was decided by the judgment of the Judicial Committee of the Privy Council on the former appeal, and what was the order of Her Majesty in Council thereon ; and that neither any Court in India, nor the Judicial Committee itself, could go behind the above mentioned decision and order. **HELD** also, accordingly, that so much of the judgment of the Calcutta High Court as re-opened what had previously been decided, on fresh evidence must be set aside ; but that the evidence that had thus been brought to bear upon the case was entitled to consideration in so far as it bore upon those portions of the suit in respect of which the former decision of the Judicial Committee was not conclusive.

This appeal and cross-appeal are the close of a litigation in which the parties, or those whom they represent, have been engaged for more than twenty years concerning the ownership of a large tract of land lying between lands admitted to form part of their respective zemindaries, and consisting, for the most part, of hills and forests.

The dispute is essentially one of boundary. The facts out of which it arose, and the earlier history of the litigation which has been the consequence of it, are very fully stated in the report of the case on the former appeal to Her Majesty in Council, to be found in the 10th volume of Mr. Moore's Indian Appeals.† And their Lordships, to avoid an unnecessary recapitulation, will, whenever it is requisite to do so, refer to that statement as if it were incorporated in the present judgment.

The first, and not the least, material question to be now determined is what was decided by the judgment of the Judicial Committee on that former appeal, and the order of Her Majesty in Council made thereon ; and what issues were left open for the determination of the Indian Courts under that order, so far as it was one of remand.

The appeal was that of Raja Leelanund Sing, the plaintiff in the suit. By his plaint he had parcelled out the disputed land in definite areas, treating them as appurtenant to different mouzahs which had been recorded as forming part of the Nizamut or settled mehals, and claimed to recover them as lying within the boundaries of those mouzahs. He had never, as is now admitted, been in possession of any part of the land which is now in question. He adduced a considerable body of evidence in support of the case made by his plaint. The Judge of first instance, however, held that he had entirely failed to make out that case, or to establish a title to disturb the possession of the defendant, and dismissed the suit. On appeal, two of the Judges of the then Sudder Court affirmed that decree of dismissal. They, too, were clear that the plaintiff had failed to prove his title as alleged. On the other hand, they seem to have admitted that the defendant could have no title to anything that was not included in the settlement of Havelee. They considered, however, that that settlement did include something in excess of the lands comprised in Captain Ellis' map, and within the disputed territory ; that the extent of such

* From the judgment of Norman and E. Jackson, JJ., dated the 2nd March 1870.

† 3 W. R. P. C. 19 ; 1 Suth. P. C. R. 578.

excess was undetermined ; and that it lay on the plaintiff to show what he was entitled to recover, which he had failed to do. The third and dissentient Judge, Mr. Sconce, would have given a decree in favor of the plaintiff. But his *ratio decidendi* was not so much that the plaintiff had proved his case as alleged (though he seems to have thought that some of the specified mouzahs had been shown to have lain, if not still to exist, wholly or partially in the disputed territory), as that the plaintiff, as purchaser of the Nizamut Mehals, was presumably entitled to all that was not included in the settlement of the resumed Pergunnah Havelee ; and that no part of the disputed territory, nothing in fact beyond the confines of Ellis' map, had been included in that settlement. The Committee that determined the former appeal in 1864 clearly affirmed the findings of the two Indian Courts as to the insufficiency of the plaintiff's evidence to establish the case made by him. The judgment at page 111 of Mr. Moore's report says distinctly :—

“ We agree, indeed, with the majority of the Indian Judges, that the appellant has failed to prove that no part of the disputed territory was included in the settlement, and that he has failed to prove, by independent evidence, his right to recover the mouzahs as specified in the plaint.”

It is important to remark upon the concurrent judgments of the two Indian Courts, and of the Committee of 1864, on this particular point ; because the judgment of Mr. Justice Norman, which is now under appeal, whilst it admits (p. 644) that the new evidence taken on the remand did not carry the plaintiff's original case any further, proceeds almost entirely on the effect of the old evidence, and thus seems to re-open a question concluded by the former judgments.

If there is one thing more clearly expressed than another in the judgment of the Committee of 1864, it is that “ the decision of the suit depended on the question whether the land claimed, or any, and if any, what defined part of it was included in the Havelee settlement ” (10 Moore, pp. 87, 88).

Upon this question the Committee had to pronounce between the joint judgment of the two Judges of the Sudder Court and the conflicting judgment of Mr. Sconce. To that end it addressed itself to a careful examination of the settlement proceedings, particularly those of Mr. Piron. In the course of that, it found that two mouzahs, named the one Gormaha or Kormaha, the other Ghorakhore, which lay partially, if not wholly, within the disputed territory, had been advisedly relinquished by the revenue authorities pending the resumption proceedings, as part of the Nizamut Mehals ; and accordingly that so much of the disputed land as was appurtenant to these mouzahs belonged to, and ought to be adjudged to, the plaintiff. On the other hand, it came to the conclusion that the final settlement of Havelee, under the head of “ Bunkur and Boondee Mehals, besides the putwarrie's papers, whatever came to light by the depositions of farmers and persons informed, and by perusal of pottahs, etc., S. Rs. 1,116 ” did include “ the revenue arising from Ghauts Marug Kurrailee, and other ghauts ” (10 Moore, I. A., p. 103). The Committee next proceeded to consider “ what was this property, and whether the ownership of it implied the ownership of any land in excess of the measured area, and beyond the confines of Ellis' map.”

Upon this point they appear to have satisfied themselves that the ghauts in question, or some of them, were geographically beyond the confines of Ellis' map, and within the disputed territory ; but to have felt unable to come to a clear conclusion as to the nature and character of the Bunkur and Boondee Mehals, and of the revenue arising from the ghauts, and upon the question whether the rights included in the settlement involved the proprietorship in the soil of any, and what, part of the lands in dispute. It, accordingly, finally decided some of the questions in the cause, but leaving others open to further enquiry, recommended Her Majesty to make the order under which the subsequent proceedings have taken place.

That order declared, first, that the plaintiff was entitled to Mouzahs Kormaha and Ghorakhore and the lands comprised therein and belonging thereto, and to all such

other parts of any of the lands in question in the suit as were not included in the settlement of Havelee; secondly, that the settlement of Havelee comprised only the measured area of 123,207 beegahs, and so much of any of the land in dispute as upon the enquiries after directed might appear to belong, or be properly attributable, to the Bunkur and Boondée Mehals in the pleadings mentioned, or to the ghauts, of which the same in part consist; and that the rights of Havelee in respect of Bakum did not extend beyond a certain quantity of land there specified. It then directed an enquiry "what was the nature and character of the Bunkur and Boondée Mehals, and of the ghauts comprised therein respectively which were included in Piron's settlement, and were therein estimated at 1,116 sicca rupees; and whether the same or any and which of them included any and what part of, or any and what right or interest in, the land in question in the suit. And it finally declared that so much of the land in question as might upon such enquiry appear to be comprised in the said Bunkur and Boondée Mehals or ghauts belonged to Havelee, and that the plaintiff was entitled to recover the residue of the land in question."

It appears to their Lordships that the broad, if not the sole, issue which this order left to be determined between the parties was what portion of the land in dispute was comprised in Mr. Piron's settlement under the item already set forth. It has, however, been strenuously argued at the Bar that even if the terms of Mr. Piron's settlement import that he included therein some part of the disputed land, it was open to the parties under this order of remand to show that such inclusion was unintentional or improper; in other words, to question the propriety of the settlement and its binding force upon the plaintiff. Their Lordships cannot so construe the order. That it was not the intention of the Committee of 1864 to leave any such questions open plainly, as their Lordships think, appears from several passages in the judgment. It is said at p. 89 of Mr. Moore's Report, "In considering what was included in Havelee the Court below could only deal, as we upon this appeal must deal, with the Havelee settlement as it stands. For the purposes of this suit that settlement must be considered as valid and subsisting." Again, at p. 99, we think, indeed, that the settlement of 1844 affords the only safe criterion for determining what belongs to Havelee, and what to the Nizamut Mehals." And at p. 103 of the same report it is said, "It must be taken, then, that Mr. Piron not only included, but properly included, the revenue arising from Ghauts Marug, etc., in his settlement."

It is said that this conclusion of the Committee was, as a passage in the preceding page indicates, partially at least, founded on a misconception, arising from an error in printing the former record, to the effect that certain village papers, which were in fact part of the defendant's evidence, had been put in by the plaintiff. The judgment, however, seems to their Lordships to treat these documents rather as corroborative of the conclusion to which the Committee had come than as the foundation on which it rested.

Again, that the Committee of 1864 may reasonably have determined to conclude the question of the propriety and binding nature of the settlement appears from this consideration. The plaintiff, if entitled to impeach that settlement, could only do so by proving clearly that it covered lands included in the perpetual settlement of the Nizamut Mehals. He had failed to do this, because he had failed to establish his title to the lands in dispute. The Committee, however, said in ease of him,—“You shall not be concluded by your failure to prove the title alleged against the defendant in possession. He cannot be entitled to anything that is not included in the settlement of Havelee; and you shall have the benefit of the presumption that what is not so included belongs to the Nizamut Mehals.” The rights of the parties being thus stated, the issue between them necessarily becomes, “What was in fact included in the settlement of Havelee?” Their Lordships, however, do not rest upon expressions in the judgment of the Committee as conclusive. If there be any incon-

sistency between them and the terms of Her Majesty's order in Council, the latter, which is in the nature of a decree, ought to prevail. On the other hand, if that has concluded the question now under consideration, neither the Courts in India, nor their Lordships sitting here, can go behind it. And looking to the terms of the enquiry directed, which assumes that the Bunkur and Boondee Mehals and the ghauts are included in Piron's settlement, and seeks only to ascertain their character and nature, and what they covered ; and also to the final declaration that so much of the land as should be found to be comprised in these mehals and ghauts belongs to Havelee, their Lordships are clearly of opinion that the question of the propriety of Piron's settlement and of Piron's intention in making that settlement, are no longer open to the plaintiff in this suit ; and that the only question between the parties is what that settlement as it stands included in fact. This view of their Lordships necessarily disposes of a considerable portion of the argument addressed to them at the bar and of Mr. Justice Norman's judgment.

Under the order in Council, as construed by their Lordships, the task of the Indian Courts upon the remand was plainly limited. They had to ascertain, first, whether the Bunkur and Boondee Mehals and the ghauts included in Piron's settlement, or any and which of them lay beyond the confines of Ellis' map and within the disputed territory ; second, whether the rights so settled involved the proprietorship of the lands over which they were exercised ; and, if so, third, what portions of the disputed territory represent such lands, and are, therefore, to be taken to be included in the settlement. For the purposes of these enquiries, they were at liberty to direct such local investigations as they might consider desirable, and were bound to give due effect to what had been laid down by the Committee of 1864 concerning the general burden of proof.

Unfortunately, however, the Indian Courts have not thus restricted their action ; they have allowed the parties to enlarge the scope of the fresh litigation by re-opening questions that had been decided ; and it now becomes necessary to consider more particularly how the case stands on their conflicting judgments.

The cause was first heard on the remand by Mr. Craster, the Officiating Judge of Zillah Bhagulpore. In his judgment he states that the main questions for the consideration of the Court were, first, were the Bunkur and Boondee Mehals and Ghauts, which form the subject of the present suit, included in Mr. Piron's settlement of Pergunnah Havelee? and second, what was the nature of those mehals, and did they include any, and (if any) what portion of the lands now in dispute? The first issue does not precisely accord with the terms of the enquiry directed by the order in Council : but if we are to understand the term "mehals and ghauts which form the subject of the present suit," to import mehals and ghauts within the disputed territory, the enquiry was legitimate, because the order in Council had not conclusively determined the geographical positions of all the ghauts, of which the revenue made up the sum of S. Rs. 1,116 mentioned in Piron's settlement ; and, in fact, as will be shown hereafter, some of those ghauts now turn out to be within the confines of Ellis' map.

Upon these issues, however, the plaintiff seems to have succeeded in re-opening and re-arguing at great length upon the former as well as upon the fresh evidence, the original question of title. Mr. Craster's opinion on this part of the case was in favor of the defendant. But with that opinion, and the reasons on which it is founded, their Lordships, for the reasons above stated, have on the present occasion little concern. Mr. Craster next proceeded to dispose of the contention before him that Mr. Piron not only did not intend to include "the mehals and ghauts in question" (meaning it must be assumed mehals and ghauts in the disputed territory) in his settlement, but was apparently not even aware of their existence ; certainly had no knowledge of them as assets of Havelee.

On this point, again, he found in favor of the defendant that the ghauts mentioned in the proceedings were included, and rightly included, in the settlement

of Havelee, and that they were situated beyond the limits of Ellis' map, and within the disputed territory.

He then addressed himself to the enquiry as to the nature of the property, and whether the ownership of it implied the ownership of any land in excess of the measured area, and beyond the confines of Ellis' map. And for the reasons stated at pp. 608 and 609 of the new record, he came to the conclusion that the Bunkur and Boondée Mehals comprised in Piron's settlement included the full proprietary right and interest in the lands from which the revenues appertaining to those mehals were derived,—that is to say, of the lands situated within and about the ghauts comprised within those mehals. And applying this principle, he held that, inasmuch as the positions of the ghauts had been determined to be beyond the confines of Ellis' map, and within the disputed territory, it followed that "the lands within and about them were those in question in the suit."

A new element of confusion appears to have been introduced into the cause whilst it was before Mr. Craster by an understanding or arrangement between Counsel that, as to that portion of the disputed land which is south of the Karmeg Hill, there should then be no trial of title; the plaintiff intending to rely on his right to recover it as part of the village of Gormaha in the execution-proceedings to be taken in order to enforce that part of the order in Council which had adjudged to him that mouzah. Mr. Craster's decree dismissed the suit, so far as it sought to recover any of the property claimed, except that portion of it to which the plaintiff had been declared by the order in Council to be entitled.

The cause then went on appeal to a Division Bench of the High Court, consisting of Mr. Justice Norman and Mr. Elphinstone Jackson. Those learned Judges arrived at different conclusions; but, according to the course of practice, the judgment of the senior Judge prevailed, and the result was the decree which is under appeal.

In his long and elaborate judgment, Mr. Justice Norman appears to their Lordships to treat the case sometimes as open to him upon all the original issues; and at others, as partially concluded by the order in Council.

At page 631, line 34, he says, "And, first, I think it must be assumed that, notwithstanding anything Piron might have done, nothing can be said to have belonged to, or to have been properly attributable to, the Bunkur and Boondée Mehals settled with Maharanee Wuhjoonissa, which can be shown to have been comprised in the perpetual settlement of Pergunnah Purbutparah, and to have been held or enjoyed as part of such perpetually settled estate down to the time of the plaintiff's purchase.

"Secondly. That when bunkur and boondée rights are to be enjoyed over lands which would appear to have formed part of the lakheraj estate of Havelee, and not to have been comprised within Pergunnah Purbutparah, the settlement of bunkur rights would show, or assume the existence in the person with whom the settlement was made, of a title to possession of the soil itself, subject only to such rights as the Government may have had on the expiration of the settlement for twenty years, to demand an increased jumma in respect of the rights to the soil.

"Thirdly. That when the Bunkur and Boondée Mehals, mentioned in Piron's settlement, are found to exist in tracts in which there is nothing to show that the land was not part of Pergunnah Purbutparah, according to the decree of Her Majesty in Council, the property in the soil and the right to the rents and profits of any portions of it, cultivated, or to be cultivated, must be taken to belong to the plaintiff as appertaining to Pergunnah Purbutparah, and the bunkur and boondée as effectually settled with Havelee under Piron's settlement."

Having thus defined the *ratio decidendi* which he proposed to adopt, the learned Judge, after reviewing the whole of the evidence in the cause, and particularly that taken before the remand, came to the conclusion that the accounts and other documentary evidence produced by the defendant on the original hearing of the cause,

were false and fabricated (an opinion then for the first time expressed), and that, on the contrary, the evidence for the plaintiff was trustworthy, and established that from the time of the Decennial Settlement down to the time of the resumption of Havelee, there was within Pergunnah Purbutparah a Bunkur Mehal called the Bunkur of Morekbut and Tetroun; that the owner of this mehal was entitled to, and either personally received the profit, or leased out the right to take the jungle products over all the hill tracts lying to the east of the cultivated lands of Tuppeh Lodhweh; that the settlement of Purbutparah in 1790, amongst the assets of which the Bunkur Mehal was set down, included the right to the absolute property in the soil in the entirety of the hills in question; that the Government retained no right or interest in the land in question at the time of Piron's Settlement, and that no right or interest in this portion of the land in dispute passed, or could be passed, to Maharanee Wuhjoonissa under that settlement.

He found, moreover, secondly, that as regarded the land to the north and east of the road through the Amjhur Ghaut, the plaintiff was clearly, and in any view of the case, entitled to a decree, because neither the Bunkur Mehal of the Amjhur Ghaut, nor the Boondée Mehal of Bhorekund Chuckabore, were included in Peer Khan's pottah, and consequently could not be taken to be included in Piron's settlement. These findings were confined to that portion of the disputed land which the plaintiff claimed as appurtenant to Tuppeh Lodhweh.

The learned Judge next proceeded to deal with the claim of the plaintiff to recover possession of Soogee, and the land to the north and west of the village marked by that name in Captain Sherwill's map. He held that the plaintiff's evidence had made out no title to recover this; that, on the contrary, the evidence that Soogee as far as Ghaut Marug was really part of Havelee was very strong; and, consequently, though unable to account for its not being included in Ellis' map, he awarded this portion of the land in dispute to the defendant.

He next proceeded to consider the defendant's title in respect of the ghauts west of Soogee and south of Simroun, *viz.*, Gooreya, Sehla Mela, Sikhole, and others. The portion of the land in dispute which belonged to, or is represented by, those ghauts, had been claimed by the plaintiff as appurtenant to Tuppeh Simroun.

He failed, however, in Mr. Justice Norman's judgment to give any trustworthy evidence that the land ever formed part of Tuppeh Simroun, or that the farmers of that Tuppeh ever exercised any dominion over the land, or that the profits of the ghauts in question were ever included in the collections of Simroun. He produced no pottahs or kubooleuts relating to the bunkur of the ghauts, nor any accounts whatever of bunkur and boondée in respect of Simroun. On the other hand, the learned Judge thought that the defendant had failed to show affirmatively by trustworthy evidence that Ellis and Farquharson were wrong in excluding this tract from Havelee. He observed that if he could have given full effect to his own impressions he would have ruled that the inclusion of the bunkur and Boondée Mehals in Piron's settlement was effected by means of fraud; but that, giving effect to that part of the judgment of the Committee of 1864 which threw upon the plaintiff the burthen of proof, and taking the Bunkur, Boondée, and Phulkur Mehals to be included, and rightly included, in Piron's settlement, he thought that, in the absence of any proof that the tract in question had been previously included in the settlement of Purbutparah, or that the owner of that pergunnah had ever exercised any ownership over the land, he was bound to say that the Bunkur, Boondée, and Phulkur Mehals of the tract in question included all the profits derivable from the soil; and if so, that the property of the soil was, at the date of the resumption, vested in the owner of Pergunnah Havelee as an integral part of that estate. The learned Judge added, "If the plaintiff has any right to this portion of the land, it appears to me that, under the directions contained in the judgment of their Lordships, I must say that he has failed to prove it."

He then proceeded to deal with that position of the disputed territory which

lies south of the Karmeg Hill, otherwise called the Khurwa Dalan. The title to this, as has been already stated, was, by the arrangement before Mr. Craster, left to be determined in the execution-proceedings to be thereafter taken. The High Court, however, thought that the question should be determined on the appeal before them; and gave to the Counsel for the defendant an opportunity of producing any evidence which, but for the arrangement in question, they would have produced on this part of the case. Of that opportunity they did not avail themselves, but relied on the failure of the plaintiff under the general burden of proof that lay on him, to show that this portion of the land was not included in Posun Pasee's lease. The High Court, however, held that it was the duty of the defendant to produce Posun Pasee's lease; and that, in its absence, the land immediately in question must be pronounced not to be included in Piron's settlement; and, therefore, under the terms of the order in Council, to belong to the plaintiff.

Mr. Justice Norman gave effect to his findings by defining on a copy of Sherwill's map by the course of a stream and two red lines the boundaries of the land which he proposed to leave in the possession of the defendant; and by awarding to the plaintiff the rest of the land in dispute.

Mr. Justice Elphinstone Jackson, as has already been stated, did not concur with his colleague. He agreed, that the land south of the Karmeg Hill ought to be adjudged to the plaintiff; but, as to the land north of that hill, he felt that the High Court was bound by the order in Council, and that Mr. Justice Norman's judgment was inconsistent with that order. His own views are thus expressed :—

"It has been argued before us that the decision of the Privy Council leaves the whole question open as to whether any portion of the disputed land is attributable to, or is conveyed by, the settlement of the bunkur and boondee rights. If the plaintiff could show even now that the ghauts or hills, the bunkur and boondee rights of which were settled with Havelee, were situated in Havelee proper, as measured by Captain Ellis, I think he might still obtain a decree for the whole land in dispute. But there is no longer any attempt to do this. It is admitted, or if not admitted, it is quite clear that those bunkur rights extended over a large portion of the disputed land. There is no doubt or mistake as to the position of the ghauts in which those bunkur rights existed. If the bunkur rights of Hursa Totya, Baromussia, Kallythan, Marug, Kurrailee, etc., are rightly included with Havelee, they convey also the bunkur rights of the whole tract of land situated between them and Havelee. If the bunkur rights carry the land, then they carry with them the right to the whole of the disputed land from the spot where the survey boundary of Lodhweh has been laid down. The sole exception is that portion of the land to the north of the Hursa Totya Ghaut, which is described in the map as Amjhur Hill and Bhorekhund Chuckabo. The Amjhur Hill is not mentioned in any of the pottahs on which the settlement was founded. The road through it does not lead to Havelee. Both the plaintiff's evidence and that of the defendant, as given in the original trial, point to this portion of the hills as constituting the position of Morekhut, which is one of the mouzahs of Tuppeh Lodhweh. Plaintiff has, I think, clearly shown that the settlement of Piron conveys no rights over this portion of the hills. But as regards the remaining portion of the hills, *vis.*, that between Hursa Totya on the north, and the hills surrounding Marug on the south, the plaintiff does not attempt to show that they are not attributable to the bunkur rights settled with Havelee. It is certainly argued that bunkur rights do not convey the land. But in such a case as this, where land is wholly jungle and uncultivated, the right to bunkur would be *prima facie* proof of the right to the land. I think the Judge was quite correct in this view of the case."

And after some further observations to the effect that the land to which the bunkur rights attached must go with the bunkur right; that the plaintiff had failed to show that he could separate any portion of the disputed land from the land to which the bunkur rights attached, and had not, indeed, attempted to do so; that it

was no longer open to him to dispute the settlement, or to contend that the bunkur included in it belonged to Tuppeh Lodhweh, the learned Judge came to the conclusion that the plaintiff's suit to recover the land situated to the north of the Karmeg Hill, and claimed by him as a portion of his Tuppehs Simroun and Lodhweh, should be dismissed, except as to the Amjhur Hill, which should be decreed to the plaintiff.

It is, no doubt, true that this learned Judge proceeded to intimate that had the whole question as to the right of the plaintiff or the defendant to bunkur rights, as well as the land of the ghauts, been open to his consideration, he would have concurred with Mr. Justice Norman in decreeing to the plaintiff the hills north, as well as south, of the Karmeg Hill, with the exception of the portion of the disputed land about Soogee ; which, but so far only as it lay at the foot of the hills, or extended up to the slope of Marug Mountain, he thought, had been proved to have always belonged to Havelee.

The formal decree was, of course, drawn up in accordance with Mr. Justice Norman's judgment, and has given rise to the present appeal and cross appeal ; the defendant claiming by the former to have the decree of the High Court reversed, and the decree of the Zillah Judge affirmed ; the plaintiff claiming by the latter to have the decree of the High Court varied in so far as it relates to Soogee and the other lands left in the possession of the defendant, and to have a decree for the whole of the disputed territory.

It is to be observed that upon the enquiry as to the nature and character of the Bunkur and Boondee Mehals and of the ghauts, comprised in Piron's settlement, and the right which they included in the land attributable to them, these judgments are all one way. That of Mr. Justice Norman may seem, in some passages of it, to give an uncertain sound ; but he, too, came to the conclusion, as in the case of the ghauts west of Soogee and south of Simroun, and the lands about them, that the Bunkur, Boondee, and Phulkur Mehals included all the profits derivable from the soil, and, if so, carried with them the property in the soil. This general conclusion seems to their Lordships to be indisputable. The existence of an incorporeal right in the nature of an easement to be exercised *in alieno solo* implies a grant to the owner of the easement from the owner of the soil. And inasmuch as the resumed pergunnah of Havelee and the Nizamut Mehals, up to the time of the commencement of the dispute, belonged to the same person, it is not easy to see how any such easement can ever have been created.

Again, the effect of the judgment is to divide the disputed territory into two large portions, *viz.*, that which is south, and that which is north, of the Karmeg Hills. The northern portion is again subdivided, by Mr. Justice Norman's judgment, into three portions, *viz.*, that which he has left in the defendant's possession ; that which lies north and east of the road through the Amjhur Ghaut ; and that which lies between the two other portions. Mr. Justice Jackson, on the other hand, makes but two subdivisions of the northern portion, *viz.*, that which belongs to the Amjhur Hills ; and that which does not fall within that description.

Their Lordships propose to deal first with the land south of the Karmeg Hills. As to that they see no ground for disturbing the decree under appeal.

The title of the defendant rests on the inclusion of the land immediately in question in the settlement of Piron. That settlement, so far as it related to the disputed territory, was founded generally on the depositions and pottahs of Peer Khan Soubahdar, Durshun Singh, Posun Passee, and others. There is nothing to connect this southern portion of the disputed territory with the holding of Peer Khan.

The holding of Durshun Singh would now seem, from the further evidence which has been elicited on the remand, to have been wholly within the measured area of Ellis' map. This evidence appears to their Lordships to be fairly summed up by Mr. Elphinstone Jackson at p. 676 of the new record. In any case, there is nothing to show that Durshun Singh's pottah covered any of the disputed land south of the Karmeg Hills.

Again, neither Posun Pasee's pottah, nor his kubooleut, is forthcoming; nor is there any evidence which satisfactorily connects the holding by him which was the subject of Mr. Piron's settlement with this southern portion of the disputed territory.

On the other hand, the order in Council has already affirmed the plaintiff's title to Gormaha; i.e., to an indeterminate part of this tract of land. It has also limited the defendant's interest in Mouzah Bakum to the small area lying within the confines of Ellis' map. In this state of the evidence, their Lordships are clearly of opinion that there is no proof that this southern portion of the disputed territory, or any part of it, was comprised within the Bunkur and Boondee Mehals or ghants settled as part of Havelee; and consequently, that under the order in Council, the plaintiff is entitled to recover it, whether it is in fact wholly or only partially comprised in Mouzah Gormaha.

As to the northern portion of the disputed territory, their Lordships have already intimated that, in their opinion, the proper *ratio decidendi* is that which Mr. Justice Elphinstone Jackson thought himself bound to adopt, and not that which was in fact adopted by Mr. Justice Norman.

Again the question what was included in the settlement seems to be almost identical with what at that date was held by Peer Khan Soubahdar. Mr. Elphinstone Jackson held that, in the absence of evidence on the part of the plaintiff to show what parts of the disputed territory were not attributable to the ghants about which they lay, the possession of the defendant must prevail; and that, with the exception of the Amjhur Hill, which will be hereafter considered, the whole of the northern portion of the disputed territory must be taken to be included in the settlement, and to belong to Havelee.

Their Lordships are of opinion that this view is correct. The ghants scheduled in Peer Khan's pottah, from Hursa Potecah, or Hursa Tooteea, in the north, to Sikhole or Sehla in the south, are all traceable in this tract of land. And, indeed, the conclusion that, on the construction which their Lordships have put on the order in Council, all the land last mentioned must be taken to belong to Havelee, may be said to be common to all the Judges, since it is implied in the second finding of Mr. Justice Norman at p. 658 of the new record. The only difficulty that arises concerning it is that which is suggested on the cross-appeal in respect of Soogee. And, oddly enough, that is the very portion of the land in dispute as to which all the Judges have found that the defendant has a good title independent of the settlement—a title which Mr. Elphinstone Jackson says was hardly disputed by Counsel for the plaintiff (p. 676). It may be remarked, moreover, that this fact is inconsistent with the plaintiff's theory that the possession by the defendant of any land beyond the measured area of Ellis' map was an encroachment upon the Nizamut Mehals; and the result of a conspiracy between the original defendant, the former owner of the whole Khurruckpore zemindary, and is some slight evidence of what was alleged to be the original rights of Havelee.

The difficulty suggested is, however, this:—Soogee was not included in Peer Khan's pottah of the ghants. In his deposition before Mr. Piron (old record, p. 345, in writing) he speaks of it as held by a separate pottah. There is no clear proof that that pottah was afterwards produced before Mr. Piron, or that what it covered was included in his settlement. The rent received by that pottah does not appear to enter into the sum of S. Rs. 1,116 mentioned in the settlement. It is therefore urged that, under the strict construction of the order in Council, Soogee and its appurtenances not being included in the settlement, must be adjudged to the plaintiff.

On the other hand, it is argued that the intention was obviously to include in the settlement whatever was held by Peer Khan under lease from the proprietors of Havelee; that his second pottah is mentioned in his deposition; that all the evidence shows that he did so hold Soogee and its appurtenances, and that the

expression of Mr. Piron in the passage so often quoted from his report is whatever was found by the depositions of Peer Khan and others, etc. Mr. Cowie has also contended, and his contention seems to be borne out by the schedule to the original plaint, that the plaintiff has never claimed Soogee as such. In these circumstances, their Lordships think that they would not be warranted in giving the plaintiff a decree for Soogee and its appurtenances against the defendant, who is shown to have had from the beginning of the suit both the possession of, and title to that village; and that it must be treated as virtually included in the settlement.

The only remaining question is the right to the land lying north and east of the road through the Amjhur Ghaut. The Amjhur Ghaut is not amongst those mentioned in the schedule to Peer Khan's pottah. *Prima facie*, therefore, it was not included in Piron's settlement. The land about it has clearly nothing to do with Soogee. The learned Counsel for the defendant referred their Lordships to a kubooleut of Peer Khan's at p. 193 of the new record, in which Ghaut Amjhur is specified as leased to him; but that document was not before Mr. Piron. It bears date the 15th March, and was registered on the 18th March 1844; whereas the pottah, which was before Mr. Piron, appears to have been executed in January 1840 (25th Mang. 1247 F.), and to have been registered on the 13th January 1842. It is possible that, in the interval, those interested in enlarging the borders of Havelee may have advanced further into the disputed territory. The defendant's Counsel have also called in aid an old kubooleut of 1211 F., at p. 462 W., and a pottah of 1228, at p. 469 W. of the old record. But to say nothing of the discredited thrown upon the defendant's documentary evidence by Mr. Justice Norman, and to some extent by his colleague also, it is sufficient to remark that the same rule which their Lordships have on another part of the case applied to the plaintiff must also be applied to the defendant, and that these old documents, tendered to prove the original title of Havelee, have no bearing on the question of what was, in fact, included in the settlement as held by Peer Khan. Reference has also been made to certain proceedings of the revenue officers subsequent to the settlement, particularly to Mr. Quintin's letter, at p. 249, O. R., which, referring to a report of Mr. Piron, states that Amjhur Ghaut was included in the settlement. This letter, however, was written in 1849, when Peer Khan seems to have got into possession of Amjhur Ghaut; and what he then held may easily have been confounded, or assumed to be identical, with what he held under the pottah of 1840, which, in this very letter of Mr. Quintin's, is treated as the basis of the settlement. Subsequent statements of the revenue officers as to the effect of the settlement, cannot, in their Lordships' opinion, avail to supply the evidence which the settlement-proceeding itself, and the pottah on which it purports to be founded, fail to afford. A more important document is the proceeding of Mr. Piron of the 11th May 1844, which was had before his signature of the final settlement proceeding on the 20th June 1844, though after the grant to Maharanee Wujhoonissa of a lease of Havelee on the basis of the contemplated settlement on the 9th April 1844. In that proceeding, which was at the instance of the Maharanee complaining of a disturbance by Resaz Ali of her possession of the ghaut included in the settlement, mention is made of Ghaut Amjhur as one of those ghauts. It is to be observed, however, that that mention is only in the abstract of her petition; and that it is possible that, when Mr. Piron reported to the Magistrate that all the ghauts so mentioned were settled with Havelee, his mind was not directed to Ghaut Amjhur in particular, or to the fact that it was not specified in Peer Khan's pottah. The proceeding is not properly part of the settlement-proceedings, nor an adjudication of right binding upon the plaintiff.

On the whole, then, though not without doubt, their Lordships have come to the conclusion that Ghaut Amjhur, with whatever land it covers, has not been shown to have been included in the settlement of Havelee, and that, under the terms of the order in Council, the plaintiff is entitled to recover the land north and east of the road passing through that ghaut.

The order, therefore, which their Lordships will humbly advise Her Majesty to make, is—

First. To reverse the decree of the High Court, except so far as it reverses the decree of the Lower Court; and, in lieu thereof, to declare and decree that in addition to the villages of Gormahah and Ghorakhore, in the former order of Her Majesty mentioned, the plaintiff is entitled to recover and do recover so much of the land in dispute as lies to the north and east of the road which runs through the Amjhur Ghaut, which road is referred to in the judgment of the High Court at p. 658, line 7, of the printed record; and further that, as between the plaintiff and defendants, the former is entitled to recover and do recover as part and parcel of the mouzah of Gormahah all that part of the disputed land which is to the south of the line drawn from Kurwah Nath to Kurwa Dallah upon the map annexed to the judgment of the High Court, and initialled by the said Court on the said map; but that as to all the rest of the land in dispute, the plaintiff's suit should be, and do stand, dismissed.

Secondly. That the defendants do pay to the plaintiff the mesne profits realized by them from Gormahah and Ghorakhore, and from such other lands as are hereby decreed to him, from the date of the commencement of the suit up to the date of the delivery of possession, and that the same be ascertained and assessed by the Courts in India in execution of this decree.

Thirdly. That the defendants do refund to the plaintiff, or do account for all costs paid by him, the said plaintiff, to the defendants from the date of the institution of the suit to the date of this decree, so far as such costs have not already been repaid or accounted for.

Fourthly. That the defendants do pay to the plaintiff the costs incurred by him in the Indian Courts in proportion to the amount of the land decreed; and that the plaintiff do pay to the defendants the costs incurred by him in the same Courts in proportion to the land disallowed; and that each party do bear his own costs of this appeal, and cross-appeal, and also of the former appeal to Her Majesty in Council.

Their Lordships cannot but feel that owing partly to the nature of the subject, and partly to the course which the suit has taken, it is more than usually difficult to make a decree that is perfectly satisfactory to them. They have done their best, however, to bring this long litigation to an end, consistently with what had been decided by their predecessors. They are anxious that the order to be made should leave as little room as is possible for future dispute; and if the learned Counsel on either side wish to be heard on its form, their Lordships are willing that the cause should be mentioned on the minutes on any day before the report is laid before Her Majesty for confirmation.

The 11th January 1876.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Testamentary Disposition—Conditions recorded therein valid.

*On Appeal from the High Court of Judicature, North-Western Provinces,
Allahabad.*

Mahomed Altaf Ali Khan

versus

Ahmed Buksh and others.

Where a testatrix devises a certain disposition of her whole property in the course of a *wajib-ul-urz* relating to only a portion of it, and independent testimony of her intention to make this disposition was produced : HELD that the disposition was valid against a claim of possession set up by a rival claimant.

Mr. Cowie, Q.C., and Mr. Nasmith for Appellant.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Respondents.

The point in this case is a very short one. The plaintiffs claimed under a will of Mussumat Bunnoo Jan, who is admitted on both sides to have been the owner of the property in question, and to have had power to dispose of it by will. The defendant's claim was simply that of possession.

It is admitted that by the Mahomedan law no writing is required to make a will valid, and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained. In the first place, the plaintiffs put in a certain power of attorney executed by the testatrix to one Kishoon Lall, to make what is called a *wajib-ul-urz*, and this document is to this effect : that a new settlement having been made of the property this lady made her appearance in respect of one Mouzah Ismaelpore, and she directed a *wajib-ul-urz* to be made in respect of that Mouzah. But then she goes on to say, the *wajib-ul-urz* is to contain an alienatory clause to the effect : "After my demise Ahmed Buksh shall be the proprietor of one moiety of my property, and Mussumat Nujmoonissa, my adopted daughter, the proprietress of the other moiety." Now it was contended that although these words of demise in themselves extended to the whole of the property of the testatrix, still the scope of this document must be limited to Mouzah Ismaelpore, to which, in the beginning, it particularly refers, and if this document stood alone there might possibly have been some question on this subject. But there was also verbal evidence to the effect that the testatrix did express an intention that the whole of her property should be devised by will to the plaintiffs, and as far as their Lordships understand the judgment of the Judge of the Subordinate Court, that Judge appears to have believed the evidence, because he came to the conclusion that it was the intention of the lady to give the whole of her property, though he thinks she has not carried that intention into effect. Accordingly his judgment was, that her testamentary disposition only took effect with respect to Mouzah Ismaelpore. That decision was reversed by the High Court, on the ground that it appeared from the evidence in the case generally, consisting partly of this document and partly of verbal evidence which seems to have been credible, that the lady intended to devise the whole of her property to the plaintiffs.

Their Lordships are of opinion that the High Court was right in that conclusion, and they will therefore humbly advise Her Majesty to confirm the judgment of the High Court, and to dismiss the appeal with costs.

The 1st February 1876.

Present :

Sir James W. Colville, Sir Montague Smith, and Sir John B. Byles.

Recovery of Possession—Undivided Hindoo Family—Setting aside Sale—Prior Lien—Limitation.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Mussamut Phoolbas Koonwur and another

versus

Lalla Jogeshur Sahoy and others.

* From the judgment of Kemp and Markby, JJ., decided on the 18th November 1870.

Where a member of a Hindoo family, living under Mitakshara law, and having joint family property, died entitled to an undivided share, leaving two widows, who were afterwards sued for debts incurred for his own benefit, by their husband, and against whom decrees were obtained by the creditors; and one of the surviving members of the joint family sought to recover possession of the interests which had been sold in execution of the decree against the widows: HELD that, so far as the interests in suit were not covered by any prior lien, the surviving member was entitled to recover them from the auction-purchaser :

Where, however, some of the interests in question were covered by a zur-i-peahgee mortgage, and the exact nature of the lien thus created had not been fully explained in the trial, HELD that the surviving member could not recover his interests until he had satisfied this lien :

And where, in the same suit, the objection was taken that the claim would not stand because of a defect in the frame of the suit, whereby a co-sharer in the joint family property was not made a party to the suit : HELD that, as the said co-sharer had previously been put in possession of his moiety of the property, and had put in a waiver of all further claims, and no further claimant could possibly arise, the plaintiff's suit was not prejudiced by the defect :

HELD also, that a guardian, in a suit like this one, is not debarred from bringing a suit on behalf of a minor claimant, whilst the disability of infancy continues, because it is not the policy of the law to postpone the trial of claims.

The suit, out of which this appeal has arisen, concerns a moiety of the undivided share of one Bhugwan Lall Sahoo, in certain immoveable property, situate in Zillah Sarun. Bhugwan Lall Sahoo, who died in 1860, was the member of a Hindoo family which was descended from a common ancestor named Deepa Sahoo, and was governed by the law of the Mitakshara, the general law of the province in which it was domiciled. He died childless, but left two widows, Moheshee and Parbuttee. They therefore would have been his general heirs had he been wholly separate in estate; and were in any case entitled to such part of his succession as had been acquired, or was held by him as separate estate. On the other hand, if the status of the family continued at the time of his death to be that of a joint and undivided Hindoo family, his interest in the joint family property survived to his male coparceners. The only persons who answered that description were Sudaburt Pershad, and the plaintiff Hurreenath Pershad. They, in some of the proceedings, are called his nephews, but according to the pedigree set out in the appellant's case, and apparently proved in the cause, they were his first cousins, the sons of two different uncles.

It must now be taken to have been conclusively determined that, Bhugwan at the time of his death, though entitled to certain subsequent acquisitions as separate estate, was, as to all the properties acquired by the family in the name of any of its members before the year 1846, joint in estate with Sudaburt and Hurreenath, and accordingly that his share in those properties became vested by survivorship in them. This question was first litigated in a suit brought by Sudaburt in 1861. The principal defendants to that suit were the widows. The judgment of the Zillah Judge, confirmed on appeal by the High Court on the 10th March 1863, made the distinction above stated between the properties acquired before, and those acquired subsequently to 1846, affirming the title of the surviving male members of the joint family to the former. It unfortunately, however, happened that owing either to the frame of this suit, or to the manner in which the decree made in it was executed, the result of this earlier litigation was only to put Sudaburt into possession of one moiety of Bhugwan's share in the joint family property.

Subsequently the remaining half-share of Bhugwan in portions of the joint family property appears to have been seized and sold in execution of various decrees obtained against his widows as his representatives. And on the 10th April 1865, the present suit was instituted by the mother and guardian of Hurreenath in order to recover possession, and to have his name entered as proprietor of his moiety of Bhugwan's share in the joint properties, and to cancel and set aside the execution sales under the decrees against the widows. The defendants to that suit were the widows, the different purchasers under the execution sales, and, under the description of "Precautionary Defendants," the widow of another deceased member of the joint family, as to whom there is now no question, and Sudaburt Pershad, the plaintiff in the former suit. As such defendant Sudaburt filed the written statement

at page 18 of the record, in which he disclaimed all interest in the suit, on the ground that under the decree in his own suit he had been put in possession of his share in the property in dispute. The cause was tried between the plaintiff and the other defendants, and a decree was made by the Principal Sudder Ameen on the 9th April 1866, which, in so far as it related to the particular properties which are the subject of the present appeal, was in favor of the plaintiff. Against this decree the parties defendants, who were affected by it, appealed to the High Court. Their appeals were necessarily separate, inasmuch as the suit was so framed as to embrace interests, not only dependent on different titles, but confined to particular portions of the property in dispute. The High Court decided many of these appeals in favor of the defendants, upon grounds of which some will be afterwards considered. This appeal to Her Majesty in Council originally embraced only eleven of the separate decrees so made. And of these Mr. Cowie has given up one—viz., No. 237. Accordingly their Lordships have now only to deal with the questions involved in the ten appeals, numbered respectively 178, 224, 235, 239, 244, 234, 243, 238, 240, and 245.

The course of proceeding in the High Court with respect to these appeals was as follows:—The Division Bench before which they came, conceiving that they involved points of law on which the authorities were conflicting, referred the following questions to the consideration of the Full Bench* :—

1. Bhugwan Lall, a member of a Hindoo family, living under the Mitakshara law, and having joint family property, died entitled to an undivided share in such property, and leaving two widows, him surviving. After the death of Bhugwan Lall, his widows were sued in their representative capacity in respect of debts incurred by him in his lifetime on his own account, and not for the benefit of the joint family, and decrees were obtained against the widows in that capacity. In execution of one or more of these decrees, an interest in certain portions of the joint family property, to the extent of the share to which Bhugwan Lall was entitled in his lifetime, has been sold by auction, and the purchasers have taken possession. Can the nephew of Bhugwan Lall, who is one of the surviving members of the joint family, recover from the purchasers possession of the interests which they have purchased, or any part of them?

2. Bhugwan Lall, in his lifetime, executed an ordinary zur-i-peshgee mortgage, in respect of his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family. Can the nephew of Bhugwan Lall recover from the mortgagee, without redeeming the same, possession of the mortgaged share, or any portion of it?

The first of these questions the Full Bench unanimously answered in the affirmative. The result of their opinions is thus expressed by the Chief Justice, Sir Barnes Peacock, at the close of his judgment:—"I think, therefore, that this property, not being the property of the widows, and not being the property of the heirs of the deceased, could not be made available under the decree against the widows; that if it could be made available at all for payment of the debts of the deceased, it must be in a suit against the survivors to charge the share of the deceased in the joint estate with the payment of the decree, by suing the survivors for the debt, and asking to have the deceased's share of the estate made available in the hands of the survivors to the same extent as that to which it would have been made available if the deceased had left a son and the estate had gone to him by inheritance, instead of to the survivors by survivorship. I think, then, that the question must be answered in the affirmative; that plaintiff has a right to sue the purchaser under the decree to recover back the estate, inasmuch as the property belongs to him, and the title of the purchaser under the decree against the widows is an invalid title."

Upon the second and more difficult question the Chief Justice, after reviewing

* See 12 W. R. (F. B.) 1.

the authorities, came to the conclusion that, according to the law of the Mitakshara, as settled by authority in the Presidency of Bengal, Bhugwan Lall had no authority, without the consent of his co-sharers, to mortgage his undivided share in the joint family property in order to raise money on his own account, and not for the benefit of the family. He further observed that the facts were not sufficiently stated to enable the Full Bench to say whether the nephew Bhugwan Lall could recover from the mortgagees, without redeeming the same, possession of the mortgaged share, or any portion of it. The other members of the Full Bench also concurred in this opinion.

The appeals, the parties not consenting to have them decided by the Full Bench, necessarily went back to the Division Bench, and were thus dealt with.* Mr. Justice Markby, after going through the facts in each case, held that Nos. 170, 224, 235, 239, and 244, were wholly governed by the answer of the Full Bench to the first question, inasmuch as in each the title of the appellant defendant depended entirely on the validity of his purchase at a sale had in execution of a decree against the widows, and was consequently defective.

In No. 243 it was alleged by the appellant that the property claimed, Mouzah Telpakhoord, was subject to a zur-i-peshgee lease, executed by Mukhun Sahoo, a member of the joint family who predeceased Bhugwan Lall. Mr. Justice Markby, however (Record, p. 466), seems to have found that the title of the appellant did not depend on this alleged zur-i-peshgee, from which he had been ousted, but on a purchase at a sale in execution of the decree which he had obtained against the widows ; and consequently that this case was not distinguishable from No. 170.

In No. 234, however, the property in question was clearly subject to a subsisting zur-i-peshgee lease, created by Bhugwan Lall ; and in this case, therefore, there necessarily arose the further question, whether the plaintiff could recover this parcel of land without redeeming the mortgage on it. And the learned Judge, accepting, apparently against his own judgment, the principle affirmed by the answer of the Full Bench to the second question, held that it would entitle him to do so. There remained three other cases, viz., Nos. 238, 240, and 245, which would have fallen into the first of the before-mentioned classes, if the learned Judge had not held, for reasons which will be presently considered, that the plaintiff's claim in respect of them was barred by the one year's rule of limitation, prescribed by the 246th Section of Act VIII of 1859. If then the case had rested there, the result would have been a decree in favor of the plaintiff on all the appeals now in question, except the three last. Mr. Justice Markby, however, proceeded to lay down a principle which governed all the cases, and, as it seemed to him, justified in each, the dismissal as against the appellant of the plaintiff's suit. That principle will be afterwards more fully stated and considered.

Mr. Justice Kemp, the other Judge of the Division Bench, concurred with Mr. Justice Markby on this last point, but expressed no opinion on the question of limitation which was raised in appeals Nos. 238, 240, and 245. A decree was accordingly made in favor of the parties appellant in each of the ten appeals. And this consolidated appeal is against those decrees.

Their Lordships propose in the first instance to consider whether the appeals Nos. 238, 240, and 245, have been rightly disposed of on the ground of limitation. The facts proved are that, in each of these cases, the plaintiff, through his guardian, preferred a claim to the property, when attached, under the 246th Section of Act VIII of 1859 ; that that claim was rejected ; and that the present suit was not brought within one year from the date of the order of rejection. This objection would have been fatal to the suit, had the party preferring the claim been an adult ; and the only question to be determined was whether the plaintiff, being under the disability of infancy, could claim the benefit of the 11th Section of Act XIV of 1859, which empowers him or his representative to bring a regular suit within the

* See 14 W. R. 339.

same time after the cesser of the disability as would otherwise have been allowed from the time when the cause of action accrued. This question, Mr. Justice Markby observed, involved several contested propositions, viz.:—

1. That ss. 11 and 12 of Act XIV of 1859 apply to s. 246 of Act VIII of 1859.

2. That the plaintiff is under disability within the meaning of these Sections.

3. That the benefit of these Sections applies as well to the period during which the disability continues, as to the period when the disability has ceased.

Upon the two first propositions, his opinion was in favor of the plaintiff; upon the third he held that whatever benefit the minor was to have, was to accrue to him not during the disability, but when the disability might cease; and accordingly that the present suit being brought by him, whilst still a minor through his guardian, must fail.

Upon the second of the propositions stated by Mr. Justice Markby, their Lordships cannot see how, in face of the plain language of the 12th Section, there can be any room for doubt.

Upon the first they also agree with the learned Judge that ss. 11 and 12 of Act XIV of 1859 do apply to the 246th Section of the Act VIII of 1859.

The two Statutes were passed in the same year, the assent of the Governor-General being given to Act VIII on the 22nd March, to Act XIV on the 4th May 1859. The object of the first was to enact a general Code of Procedure for the Courts of Civil Judicature not established by Royal Charter. The object of the second was to establish a general Law of Limitation in supersession both of the regulations which had governed those Courts, and of the English Statutes which had regulated the practice of the Courts established by Royal Charter. Looking to the fifth sub-section of the first Section, and the 3rd and 11th Sections of Act XIV of 1859, their Lordships have no doubt that the intention of the Legislature, was that the period of limitation resulting from the 246th Section of Act VIII should, in the case of a minor, be modified by the operation of the 11th Section of Act XIV; and that this construction has obtained in the Courts of India appears from the case cited from the "Third Weekly Reporter," C. R., p. 8.

In coming to this conclusion, their Lordships have not failed to consider the recent decision of this Board in the case of *Mohummud Bahadoor Khan v. The Collector of Bareilly* (L. R., 1, Indian Cases, p. 167).^{*} That case, however, they think, is distinguishable from the present. It arose upon a very special statute, and upon that ground the judgment rests. Their Lordships there said: "It was argued that the clauses in the General Statute, Act XIV 1859, relating to disabilities, might be imported into this Act, but this cannot properly be done. Act XIV is a Code of limitation of general application. This Act is of a special kind, and does not admit of those enactments being annexed to it." And they proceeded to observe that the application of the statute (if it did apply) would not assist the appellants, who would not even in that case have brought their suit in proper time.

This being so, the only other point to be considered on this question of limitation is whether the learned Judge was right in holding that an infant cannot, after the expiration of the year, bring a suit by his guardian whilst the disability of infancy continues. Their Lordships cannot agree in this construction, which it would appear from the cases cited by Mr. Bell (*Ramchander Roy v. Umbica Dossee*, 7 W. R., 161; *Ram Ghose v. Greedhur Ghose*, 14 W. R. 429; and *Suffurcoonsa Bibee v. Noorul Hossein*, 17 W. R. 419) has not been accepted or followed by the Courts in India. It is unreasonable in itself, since it implies that the infant's claim, which is admittedly not barred, was asserted too soon rather than too late; and it cannot be the policy of the law to postpone the trial of claims. Again, to render such a construction imperative, the phraseology of the 11th Section must be altered by making the words "after the disability shall have ceased" precede, in-

^{*} See also 21 W. R. 318; 2 Suth. P. C. R. 957.

stead of following, as they do, the words "within the same time." Their Lordships are therefore of opinion that the plaintiff's suit is not open to the objection that, in so far as it concerns the properties in question in Nos. 238, 240, and 245, it has not been brought within the proper time.

The next point to be considered is whether the High Court was right in allowing all the ten appeals, and in dismissing the plaintiff's suit as to those portions of the joint family estate which were the subject of them on the ground that the suit was wrongly framed.

It is to be observed that the objection taken by the Division Bench to the frame of the suit, assumes the correctness of the answer given by the Full Bench to the second of the questions referred to it, and is in the nature of a corollary from the proposition therein affirmed. The learned Judges of the Division Bench argue that if it be true that a member of a joint and undivided Hindoo family cannot alienate his undivided share in the joint family property without the consent of his co-sharers, it follows that he cannot alone sue for his separate share. And they rely upon a decision in the "12th Weekly Reporter, page 483," in which it was ruled that two only of the members of a joint and undivided family could not sue to set aside a charge created by one member of the family, and to recover their particular shares in the property charged, but that the suit must be brought by or on behalf of all the members of the joint family. Their Lordships do not mean in any way to impugn the authority of that case, or to dispute the general principle affirmed by it. They do not, however, think that the principle is applicable to the peculiar circumstances of, or ought to govern, the present case.

In this case Sudaburt, the only other member of this joint family, has, under the practice which was then allowed to prevail in the Courts of India, succeeded in recovering, and has been put into possession, of his share of the joint family property. He cannot be said to have any beneficial interest in respect of which he could now sue as plaintiff; and supposing him to have an interest, the present plaintiff has made him a party to this suit in the only way in which a person who is unwilling or unable to be joined as plaintiff can be brought before the Court, *i.e.*, by joining him as a defendant. In that character Sudaburt has disclaimed all interest in the subject-matter of the litigation, alleging that he has already been put into possession of all to which he is entitled. Again, in most, if not all, of the appeals the title of the substantial defendants is founded on execution sales confined to that moiety of Bhugwan's share which, on a partition, would now fall to the plaintiff. The objection to the frame of the suit was not taken by the substantial defendants; it seems to have originated with the Judges of the Appellate Court. It is one of form rather than substance; for it cannot be said that if it does not prevail, the defendants (Sudaburt being a party to this litigation and admitting that he is in possession of his share) can be harassed by any second suit. On the other hand, if the objection prevails, the defendants will remain in possession of property to which, after full trial, they have been found to have no title, and the plaintiff will be left to the chances of another suit, in which he may be met by objections well or ill founded on the lapse of time, or the effect of the decrees under appeal as *res judicata*. Their Lordships are of opinion that they ought not to allow the objection to prevail against the substantial justice of the case.

What has been said is sufficient to determine this appeal in favor of the appellant, so far as it relates to the decrees of the High Court in the nine appeals numbered respectively 170, 224, 235, 239, 243, 244, 238, 240, and 245.

There is, however, as has been already stated, a further question as to the appeal numbered 234, and at the hearing it occurred to their Lordships, who have unfortunately to determine this appeal *ex parte*, that if the respondents had appeared, they might, without a cross-appeal, have contested the correctness of the answers given by the Full Bench to the questions referred to them, answers which are not in the form of a decree, or even of an interlocutory order. To the answer to the

first question their Lordships think no objections could have been urged successfully. The second question, however, involves a point of Hindoo law, upon which the authorities are not altogether consistent; nor are their Lordships satisfied that the principle laid down by the Full Bench would, if correct, govern this particular case, of which they will now proceed to examine the circumstances somewhat more in detail.

The property to which it relates is thus described in the schedule to the plaint at page 8 of the record. The village is specified as Tulmanpore Bhada in two kalums (items). The share of the joint family is stated to be one of ten annas and eight pie. Of this five annas and four pie are deducted as the share of Sudaburt Pershad, which reduces the share claimed by the plaintiff to five annas and four pie. The column of remarks contains the following statement: "This mouzah was held in zur-i-peshgee lease under a zur-i-peshgee deed executed by Saligram Sahoy and Ramruchea Sahoy. It was sold at an auction on the 18th November 1862, and purchased by the defendant Bikramajeet Lall for three rupees. The zur-i-peshgee and lease are fit to be cancelled."

Bikramajeet Lall and another defendant were the appellants in No. 238, which seems to have covered the whole of the five annas and four pie share of Tulmanpore Bhada with other portions of the property in dispute. From what has been stated above it follows that their title, resting as it does upon a purchase at a sale in execution of a decree against the widows, is defective; that the right of the plaintiff to impeach it is proved, and accordingly their appeal ought to have been dismissed. This, however, does not determine the rights of the plaintiff as against the zur-i-peshgeedars. He may be entitled either to recover so much of the property as is covered by the zur-i-peshgee by setting aside the zur-i-peshgee lease, or merely to stand in the shoes of the nominal mortgagor. But the nature and extent of his right can only be determined in appeal No. 234.

The appellants on that appeal were the original zur-i-peshgeedars Saligram Sahoy and Ramruchea Sahoy. The zur-i-peshgee deed is at page 423 of the record, and appears to have covered originally only 5 annas and 4 pie of the entire 16 annas of Mouzah Tulmanpore Bhada. If then it be true that Sudaburt Pershad has succeeded in recovering one moiety of this, the subject of the dispute on this appeal is the remaining moiety or a 2 annas and 8 pie share. And this appears to have been the view of the High Court, for their decree on this appeal (see pp. 479-80) is limited to a 2 annas and 8 pie share. If, on the other hand, Sudaburt has not succeeded in his suit in setting aside the zur-i-peshgee as against him, or in otherwise wresting possession of his share from the zur-i-peshgeedars, it follows that the question of the validity of this zur-i-peshgee remains to be determined between the latter on the one side, and him and the present plaintiff on the other.

The plaint in this suit alleged no special grounds for setting aside the zur-i-peshgee of the 9th December 1859, and indeed contained no special mention of it. The written statement of the defendants Saligram and Ramruchea (p. 31) set up that deed, and insisted on their rights under it. But none of the issues are specially pointed to the validity of the deed. Nor do the judgment or the decree (p. 439) of the Principal Sudder Ameen deal with that question. All that they decide with respect to the share claimed in Tulmanpore Bhada is that "plaintiff be put in possession thereof in the manner in which possession has been given by the decree of the 5th April 1862" (to Sudaburt).

This reference to the suit of Sudaburt makes it material to consider whether there really was any adjudication upon this question in that suit. The suit, it will be remembered, involved the right of succession to the whole of the property of which Bhugwan Lall died possessed as between his widows and the surviving members of the joint family. The plaint which is set out at page 226 of this record, contains no specific statement touching the zur-i-peshgee deed of the 9th December 1859, unless it be in the schedule (at p. 231), where in the columns of remarks it is said "the

deed to the extent of plaintiff's share ought to be amended." The judgment of the Zillah Judge (p. 55) put the share in Tulmanpore Bhada into the first parcel which it found to be joint family property. So far it affirmed the title of Sudaburt and Hurreenath, and negatived the title of the widows, to whatever interest in it belonged to Bhugwan Lall at the time of his death. But in answer to the 11th issue it expressly found (p. 571) that the deeds executed by Mukhun, Bhugwan or the other partners were valid. The decree was a general decree for possession over the properties in the first list. The High Court, on appeal, simply affirmed this judgment and decree of the Zillah Court. Can it be said that this judgment and decree import any adjudication touching the invalidity of the deed of the 9th December 1859, as against the surviving members of the joint family, even if the plaintiff in this suit could claim the benefit of such an adjudication? The judgment, so far as it goes, is on the face of it the other way. The terms of the decree may import only that the plaintiff Sudaburt was, so far as his share was concerned, to be put into possession of the rights of Bhugwan. If in the execution of that decree, he has contrived, it may be wrongfully, to dispossess to the extent of his share, the zur-i-peshgeedars, that circumstance cannot give title to the plaintiff.

Again, what has been found by the High Court with respect to this appeal? The answer of the Full Bench expressly stated that the facts were not sufficiently stated to enable them to say whether the nephew of Bhugwan Lall could recover from the mortgagee, without redeeming the same, possession of the mortgaged share or any portion of it. That statement, taken in connection with the general principle affirmed by them, imports that there was no *constat* that the execution by Bhugwan of the deed was without the consent of his co-sharers, or not for the benefit of the family. Mr Justice Markby (at p. 466) does not consider this latter question, but simply says, "As no objection was made to the reference to the Full Bench, I think we ought to accept its decision for the purposes of this case, and to hold that the appellants have failed to establish their title."

In these circumstances there appears to have been no real trial of the question between the plaintiff and the appellants in No. 234; and therefore, assuming the principle enunciated by the Full Bench in its answer to the second question to be strictly correct, their Lordships do not feel themselves at liberty to reverse the decree in favor of the appellants, and to make a decree in favor of the plaintiff. This being so, they abstain from pronouncing any opinion upon the grave question of Hindoo law involved in the answer of the Full Bench to the second point referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued before them. That question must continue to stand, as it now stands, upon the authorities, unaffected by the judgment on this appeal.

Their Lordships have felt some doubt as to the form of the order which ought to be made on appeal No. 234. The plaintiff has failed to establish his title to recover the land against the zur-i-peshgeedars. He might, however, have established such a title even in this suit, had a proper issue been framed and determined. On the other hand, he has established his title to the property, subject to the zur-i-peshgee. His rights may be prejudiced by the decree as it stands. The suit is an example of the inconvenience of embracing in one suit titles to various parcels of land, which, although having a common foundation, are different in many particulars, and are to be asserted against defendants having no common interest. Their Lordships have come to the conclusion, that the dismissal of the present suit against the appellants in No. 234 ought to stand, but that the decree of the High Court on that appeal ought to be varied by adding a declaration, that it is to be without prejudice to the right of the plaintiff to recover the lands in question on satisfaction of the zur-i-peshgee. This appeal, so far as it relates to No. 237 (the case given up by Mr. Cowie), must be dismissed, and the decree made by the High Court in that case affirmed. In the other nine cases, the decrees of the High Court must be reversed, and an order made, dismissing in each case the appeal to the High Court, with the

costs of the appeal in that Court, and affirming the decree of the Principal Sudder Ameen as to the parcels of property which are the subjects of those appeals. The above will be the substance of the order which their Lordships will humbly recommend Her Majesty to make.

Their Lordships think that there should be no order as to the costs of this appeal.

The 5th February 1876.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Will—Construction—Cyprès—Charity.

On Appeal from the High Court of Judicature at Fort William in Bengal.

The Mayor of Lyons

versus

The Advocate-General of Bengal and others.

The bequests in the will of Major-General Claude Martin, for the discharge and relief of poor debtors detained in prison in Calcutta, having failed by reason of the abolition of imprisonment for debt, the Privy Council held (1) that these gifts were capable of being applied *cyprès* notwithstanding that the residuary bequest was to charity; (2) that upon the construction of the will there was not such a necessary inference of intention to be found in the terms and provisions of the will as to raise the implication of a bequest over by the testator of these legacies upon the failure of the particular charities; and (3) that the appellant was not competent under his present petition, which was confined to the claim of a share of the residue as residuary legatee, to open the scheme, which had been settled and confirmed by the High Court, for the *cyprès* application of the fund in dispute on the ground that the appellant was excluded from participation therein.

Mr. Cowie, Q.C., and Mr. Hemming, Q.C., for Appellant.

Mr. Cotton, Q.C., and Mr. E. Macnaghten for Respondents.

Sir Montague Smith gave judgment as follows:—

The questions in this appeal arise upon one of the bequests in the will of Major-General Claude Martin, whereby he gave the annual sums of Rs. 5,000 and Rs. 1,000 to be applied respectively to the discharge and relief of poor debtors detained in prison in Calcutta. The residue of his large property the testator bequeathed, in the special manner more particularly stated hereafter, to increase the funds of certain charitable establishments, which, by previous clauses in his will, he had founded in Calcutta, Lucknow, and the city of Lyons, in France.

The bequests to poor prisoners in Calcutta having failed by reason of the abolition of imprisonment for debt, the point to be considered is, whether these gifts are to be dealt with by the Court upon the principle of a *cyprès* application of them, or whether, as the appellants contend, they fall into the residue, so as to increase the endowments of the three establishments above referred to.

The testator was a Frenchman, born in Lyons. He entered the military service of the East India Company, and attained the rank of Major-General. With the sanction of the British Government he afterwards took service under the Ruler of Oudh, and resided at Lucknow, where he died in 1801.

The will, dated 1st January 1801, was composed and written by the testator himself in English, a language of which, it appears, he had only an imperfect knowledge. It contains numerous bequests, comprised in thirty-four articles or clauses, and has been the subject of many suits and much litigation. Several

questions arising upon it, and notably the question whether the English law relating to aliens had been introduced into British India, were determined by this Committee on appeal in 1836. The judgment was delivered by Lord Brougham, and some passages of it will hereafter be referred to. The general history of the suits will be found in Mr. Moore's full report of the case (see *The Mayor of Lyons v. The East India Company*, 1 Moo. I. A., 176).

By the will in question the testator bequeathed his property, which he valued at upwards of thirty lacs of rupees, partly to individual legatees, and more largely to various charitable objects. The most prominent of the charities were the institutions he founded in Lucknow, Calcutta, and Lyons for educational and other purposes, his desire being to perpetuate his memory in these cities. The purposes are not precisely alike in the three cities, owing to the different conditions of the countries to which they belong. The bequest to Calcutta is found in the 24th article of the will; that to the city of Lyons is contained in the 25th article, and is as follows:—

“I give and bequeath the sum of 200,000 sicca rupees to be deposited in the most secure interest fund in the town of Lyons, in France, and the Magistrates of that town to have it managed under their protection and control; that above-mentioned sum is to be placed, as I said, in a stock or fund bearing interest, that interest is to serve to establish an institution for the public benefit of that town; and the academy of Lyons are to devise the best institution that can be permanently supported with the interest accruing of the above-named sum; and, if no better, to follow the one devised in the article 24th as at Lucknow; the institution to bear the name of Martinière, and to have an inscription made at the house of the institution, mentioning the same title as the one of Calcutta, and this institution to be established at the Place St. Pierre, St. Safurinn being where I had been christened—there, at that place to buy or build a house for that purpose; and to marry two girls every year, to each 200 livres tournois, besides paying about 100 livres for the marriage and feast of each of those who married; or if the institution, such as the Lucknow one, educating a certain number of boys and girls, then they are to have a sermon and a dinner for the school-boys and those who are married, and they are to drink a toast in memory of the institutor; and a medal is to be given of the value of 50 livres, with a premium in cash or in kind, to be about 200 livres, to the boy or girl that has been the most virtuous, and behaved better during the course of the year; and also to have a premium of the value of 100 livres for the second that behave better, and also a third premium of about 60 livres for the third that behave better. I am in hope that the Magistrate of the town will protect the institution; and in case the sum above allowed of 200,000 sicca rupees is not sufficient for a proper interest to support the institution, and buying or building the house, then I give and bequeath an additional sum of 50,000 sicca rupees, making 250,000 sicca rupees. One of my male relations residing at Lyons may be made administrator or executor, joined with any one appointed by the Magistrate, to be manager of the said institution; and these managers are to have an economical commission for their trouble, taken from the interest of the sum above-mentioned. I also give and bequeath the sum of 4,000 sicca rupees to be paid to the Magistrates of the town of Lyons, to liberate from the prison so many prisoners as it may extend, such that are detained for small debt; and this liberation is to be made the day of the month I died, as that the remembrance of the donor may be known, and my name, Major-General Martin, is the institutor; and as given and bequeathed the sum of 4,000 sicca rupees to liberate some poor prisoners as far as that sum can afford. This I mention to have it made known as that, if neglected, that some charitable men may acquaint the Magistrate of the town of Lyons, as that they might oblige my executor, administrator, or assigns, to pay the same above said, and be more regular in their payments.”

It is to be observed that this 25th article contains the gift of an annual sum of Rs. 4,000 to be paid to the Magistrates of Lyons to liberate poor prisoners detained for debt.

The analogous gift in favor of poor prisoners in Calcutta, which forms the subject of the present appeal, is not in like manner included in article 24, containing the principal bequest to that city, but is found in a separate article (the 28th), which is as follows:—

"I give and bequeath the sum of 5,000 sicca rupees to be paid annually to the Magistrate, or Supreme Court of Calcutta, or to Government. This sum is to serve to pay the debt of some poor honest debtor detained in jail for small sum, and to pay as many small debts and liberate as many debtors as the sum can extend. This liberation is to be made the day, month, I died, as a commemoration of the donor; and as being a soldier, I would wish to prefer liberating any poor officers or other military men detained for small debt preferable to any other. And I also give and bequeath the sum of 1,000 sicca rupees to be paid yearly, and to make a distribution of it to the poor prisoners remaining in jail on the same day as the one mentioned above, both sums making 6,000 rupees every year."

The material part of the 43rd article, which contains what may be treated as a residuary disposition, is in the following terms:—

"After all accounts being settled, and sum insured for the interest for the payment of the several monthly pension, and the several payment of gift and others, as also the several establishment, if a surplus above £100,000 sterling, or about 10 lacs of sicca rupees, remain of my estate, that above surplus of 10 lacs of sicca rupees is to be divided in such a manner as to increase the several establishment of Calcutta, at Lyons, and Lucknow, as that they may be permanent and exist for ever. Besides the sum allowed for finishing all the building, and other of Constantia House, which I suppose may amount to 200,000 sicca rupees, I also give and bequeath the sum of 100,000 sicca rupees for the support of the college and other school, to be regulated as the Calcutta establishment, as per articles 24, as also as the establishment at Lyons, articles 25, the gift for the poor of Lucknow, to be conducted as mentioned in articles 23. I also give and bequeath the sum of 4,000 sicca rupees to be paid annually for to liberate as many prisoners for debt at Lucknow as it may extend, and if none, then that sum is to remain to the estate; any sum remaining is to be placed at interest for to accumulate, and improve the several establishment and concern of indigo."

This article, it may here be remarked, comprises a gift of Rs. 4,000, to be paid annually to liberate poor prisoners for debt at Lucknow, but with a direction, that, "if none, that sum is to remain to the estate."

Without going into the details of the suits, it will be convenient to refer generally to the proceedings relating to the fund now in dispute.

It appears that by an order of the Supreme Court of Judicature at Fort William of the 11th November 1801, made in the cause of *Uvedale v. Palmer*, a scheme which had been settled by the Master for the administration of the charities for the release and relief of poor prisoners at Calcutta was confirmed by the Court, and funds to satisfy these charities were, by orders of the Court, transferred to the credit of two accounts entitled respectively, "Distribution of General Claude Martin's Fund for the Release of Prisoners," and "Distribution of General Claude Martin's Fund for the Relief of Prisoners."

The above orders are not found in the Record, but their existence was admitted by the Counsel, and the substance of them is stated in the petition of the Officiating Advocate-General of the 3rd August 1865, and in a previous decree of the 30th August 1840. It also appears that the income of these funds, in excess of what was required for poor prisoners, had accumulated, and at the date of the petition of the Advocate-General above referred to, the fund amounted in the aggregate to about Rs. 351,000.

This petition (Record 88), after stating that for many years past, owing to the passing of laws for the relief of insolvent debtors and other causes, the existing scheme "had become obsolete"; submits (par. 9) that there were useful charitable objects of a kind not very different from those contemplated by the testator, and also charitable objects of other descriptions which the testator approved and made the subjects of other bequests, towards which the income of the funds might now be beneficially applied; and prays to be at liberty to submit a scheme for the application of the funds "in lieu and supersession of the former schemes."

On the 3rd August 1865 an order was made on this petition as prayed. This was done without citing the Mayor of Lyons; and in making it the Court evidently assumed it had power to deal with these funds on what is called the *cypres* principle.

A scheme was accordingly settled and confirmed by an order of the Court on the 2nd March 1866.

This scheme provides, in substance, that a sum of Rs. 150,000, representing an annual income of Rs. 6,000, should be reserved in an account to be headed, "The Account of General Martin's Fund for the Release and Relief of Prisoners;" the income of which was to be applied by the visiting justices to assist convicts who had conducted themselves properly in prison upon their discharge; and that the corpus of the fund, after reserving the above sum of Rs. 150,000, should be applied as follows, viz: "that one lac of rupees, should be transferred to the credit of the Governors of the Calcutta branch of La Martinière, and the residue (amounting to nearly a lac of rupees) after paying the cost of these proceedings, should be transferred to the credit of the Lucknow branch of La Martinière for the general purposes of these institutions respectively." Some special directions also were given regarding the disposition of the fund transferred to Lucknow.

It will be convenient to mention here what has been done with respect to the charities for the liberation of poor prisoners in Lyons and Lucknow. With respect to Lyons, it was declared by the decree of the 23rd February 1832 (and this declaration was not disturbed on the appeal, in 1836), "that a sum sufficient to satisfy the bequest of Rs. 4,000 to be paid annually for the liberation of prisoners at Lyons, together with the accumulation of interest since testator's death, had been fully paid to the Mayor and Commonalty of Lyons" (Record 78). It appears, therefore, that this fund, instead of being carried to an account in the causes, as was done with the Calcutta fund, was, before the year 1832, paid over "fully" to the municipality of Lyons, and that the administration of it has since taken place without any control by the Court.

With respect to Lucknow, the decree of the 23rd February 1832 declared that it being impossible, owing to the form of government at Lucknow, and other causes, to give effect to the gift in favor of poor prisoners at that place, the bequest was void. This declaration relating to the gift to poor prisoners of Lucknow was not disturbed on appeal, and the residue was increased by the amount which would have been required to satisfy it. No objection appears to have been made to the Lucknow gift going into the residue; but it is to be remembered that in the clause of the will relating to this legacy it is expressly directed that in case of failure "the sum is to remain to the estate."

The order of the 2nd March 1866, confirming the scheme for the application of the funds in dispute, appears to have been unquestioned until 1873, when the petition of the Mayor of Lyons, which gives occasion to the present appeal, was filed. That petition (dated 21st June 1873), after stating the facts, and asking relief with respect to other sums which was granted in the Court below, prays that it might be declared that the bequests in the 28th article of the testator's will had failed, and that the sum standing to the credit of the accounts for the release and relief of prisoners at the date of the order of the 2nd March 1866, fell

into and formed part of the residue of the testator's estate. It also prays for relief consequent on this declaration, to the effect that this amount with the accumulations should be ascertained and carried to the general credit of the causes, and divided between the petitioner and the other residuary legatees.

The Judges of the High Court, in a judgment fully stating their reasons, whilst granting relief to the petitioner on other matters, refused this prayer; and inserted in their formal decree a declaration containing the ground of their refusal in these terms:—"That the charitable gift in the 28th clause of the will was an absolute charitable gift, capable of being applied *cypres*; and that the petitioner, the Mayor of Lyons, as one of the residuary legatees under the will, is not entitled to any of the funds appropriated to that gift."

It is to be noticed that the only question raised by the petition is, whether the appellant, representing the city of Lyons, is entitled as one of the residuary legatees to a share of these trust funds, as having fallen into the residue. Whether the Martinière establishment of Lyons should have been included in the distribution provided by the scheme ordered by the Court is a different question, which is not raised by the petition.

Three points were made at the bar by the appellant's Counsel.

1. That the doctrine of *cypres* disposition of charitable legacies is inapplicable where the residuary bequest is to charity.
2. That if this be not true as a general proposition, the doctrine is inapplicable to the particular case, by reason of the special provisions of General Martin's will.
3. That the previous decrees have determined the question in the appellant's favor.

I. The appellant's Counsel did not dispute the general doctrine, and there is no doubt that although strongly disapproved of by Lord Eldon, it was in his time so firmly established, that this great Judge felt himself bound, contrary to his own opinion, to give effect to it. But their broad contention was that there was no room or necessity for the interposition of the Court where the residuary bequest is to charity, and they sought in the reason of the rule the grounds for supporting this distinction. The rule, they said, was founded on the presumption that although the gift might be to a particular charity, the intention was to give to charity generally, and the Court therefore, when the particular disposition could not be carried into effect, undertook to make a *cypres* application of the fund in order that charity should not be disappointed. The reason of the presumption, it was said, being to prevent funds given to charity from falling to residuary legatees or next of kin, and so disappointing the general intention of charity, altogether failed, and left no foundation for the interposition of the Court where the bequest of the residue itself was to charity. Why, it was asked, should the Court interfere to intercept a fund falling into a residue devoted to charity, substituting its own discretion for the testator's?

The question thus raised does not seem to have been distinctly before the Courts in any of the previous decisions; but their Lordships, after fully considering the argument, are unable to perceive satisfactory grounds for such a limitation of the *cypres* doctrine: certainly not as a limitation applicable generally to all cases in which the residuary bequest is to charity, whatever its kind and nature may be. The principle on which the doctrine rests appears to be, that the Court treats charity in the abstract as the substance of the gift, and the particular disposition as the mode, so that in the eye of the Court the gift notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails, and cannot lapse.

This seems to be what Lord Eldon understood to be the effect of the decisions, from the following passage of his judgment in *Mills v. Farmer*, as reported in 19 Ves. 466:—

"With regard to charity, therefore, without going through all the cases, which

I examined with great diligence in *Moggridge v. Thackwell*, a case that, bound by precedent, I decided as much against my inclination as any act of my judicial life, I consider it now established, that although the mode in which a legacy is to take effect is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote that charity is the legatee, the Court does not hold that the mode is of the substance of the legacy, but will effectuate the gift to charity, as the substance; providing a mode for *that legatee* to take which is not provided for any other legatee." This passage is reported in somewhat different language, but substantially to the same effect, in 1 Mer. 99.

Nor can the suggested distinction, as a general qualification of the doctrine, be, in reason, maintained. Cases may be easily supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it. If a large sum were given to endow a college, and the residue bequeathed for the support of three poor almswomen, or to provide coals at Christmas for ten poor persons, it would be manifestly absurd, supposing the *cyprès* doctrine be established at all, to withhold the application of it in instances of this kind. It cannot, therefore, in their Lordships' opinion, be laid down as a general principle that the *cyprès* doctrine is invariably displaced where the residuary bequest is to charity.

II. But it was next contended that, however this may be, the Court below was wrong in applying the *cyprès* doctrine to the will in question. Undoubtedly the charitable establishments mentioned in the residuary bequest are of a comprehensive character, as well as prominent objects of the testator's bounty: and the argument of the appellant's Counsel on this part of the case was strongly urged and has been carefully considered by their Lordships. The argument on this point really raises two distinct questions; (1) whether the *cyprès* doctrine is excluded; and (2) whether upon the construction of the will there was a bequest over of the legacy, in case of failure of objects, to the Martinière charities.

On the first (in the discussion of which it must, of course, be assumed there was no bequest over, otherwise *cadit questio*) the argument was founded on the presumed intention of the testator to make the Martinière establishments the principal objects of his bounty, and to give them the benefit of all lapsed funds. There is certainly much to favor this presumption; but if it be granted for the sake of the argument that, looking at the whole will it is probable the testator, supposing he had thought about it at all, would have wished the bequest in question to have gone to increase the funds of these establishments, can this conjecture of intention—and upon the hypothesis that the will does not contain expressly or by implication a bequest over, it can be no more—exclude the operation of the doctrine? It seems to their Lordships that an answer in the negative is found in the explanation of the doctrine already given, and that on this point the contention of the Counsel for the respondent is supported both by principle and precedent. It was in effect that the Court, when deciding whether the *cyprès* doctrine applies, looks only to the particular gift, and if it finds charity to be legatee, sustains the legacy as such, without regarding at this stage of the enquiry (whatever may be proper when a scheme comes to be framed) the rest of the will.

This view of the doctrine appears to have been present to the minds of the learned Lords who took part in the decision of *The Ironmongers' Company v. The Attorney-General* (see 10th Cl. and Fin. 908), although the discussion in the House of Lords turned wholly on the propriety of the scheme for the distribution of the trust funds: it never having been doubted apparently that the doctrine itself was applicable. In the will in that case the testator had divided the residue of his property between three charities, and the question arose upon a scheme for the appropriation of one of them, *viz.*, the gift for redeeming British slaves in

Barbary, which had failed for want of objects. It was held that, in applying the *cypres* doctrine, the Court was to look primarily to the object of the charity which has failed, and was not bound to apply the funds which were set free in that case to the two other charities mentioned in the residuary clause of the will. The Counsel, in arguing, is reported to have said: "The proper application of the doctrine of *cypres* is, that you are to look to the objects of the testator, and to what comes near to those objects." To which Lord Cottenham replied: "No, *cypres* means as near as possible to the object which has failed." Although this opinion was expressed with reference to a scheme for the distribution of the fund, it is clearly to be inferred that this would have been the consideration by which Lord Cottenham would have been guided in a case where he had to decide whether the doctrine applied at all. And upon fully considering the operation as well as the principle of the rule, it is difficult to see that it could be otherwise. Their Lordships, therefore, are brought to the conclusion that the jurisdiction of the Court to act on the *cypres* doctrine upon the failure of a specific charitable bequest arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue.

The question remains whether such an implication arises upon this will. It certainly cannot be inferred from the terms in which the respective gifts to poor prisoners in Calcutta and Lyons are bequeathed, that the testator had contemplated the failure of either of these charities, or had formed any intention in that case regarding them; on the contrary, the inference arises, upon comparing these clauses with the corresponding gift for the benefit of prisoners at Lucknow in which there is a direction that in the event of failure it shall remain to the estate, that he had not. If, then, an implication can be made, it must be from the residuary clause itself, construed with the other parts of the will relating to the Martinière establishments. The frame of this clause is peculiar: "after the several payment of gift and others, as also the several establishment—if a surplus above ten lacs remain, that above surplus is to be divided in such a manner as to increase the three establishments." Assuming this to be a residuary disposition into which, in case of failure, legacies other than to charity would fall, yet, in considering the present question, the peculiar frame and language of it cannot be disregarded, and from these it may be inferred that what was present to the testator's mind, and what alone he intended to dispose of, was a residue after the funds for these charities had been provided and set apart. It seems, therefore, to their Lordships, that there is not such a necessary inference of intention to be found in the terms and provisions of the will as is required to raise the implication of a bequest over by the testator of these legacies, upon the failure of the particular charities.

III. The third point argued at the bar was that the decrees already passed are judgments in his favor on the questions above discussed. What the Counsel mainly relied on was a general declaration as to the surplus funds contained in the decree of the 23rd February 1832, which was left undisturbed on appeal (Record p. 76), and a disposition by a later decree of the 31st August 1840, of part of such surplus funds among the three Martinière establishments (Record, p. 172).

It is to be observed that the judgment of the High Court does not notice this point, nor does it appear to have been insisted on below. But however this may have been, their Lordships cannot find anything in the decrees referred to which decides the question. The declaration in the decree of 1832 was to the effect that after setting aside sufficient funds for the various charitable and other purposes of the will, the surplus, if amounting to ten lacs, should be at once divided between the three establishments, and if it fell short of ten lacs, should accumulate until it amounted to that sum, and be then divided. This is no more than an exposition of the will with regard to the surplus, after provision had been made for the par-

ticular gifts. The Court did not then contemplate the failure of the gift in question, and could not have intended to make any declaration regarding it. The disposition referred to in the later decree of 1840 was only a distribution of part of the surplus on the footing of the declaration in the decree of 1832.

Reliance was placed by the appellant's Counsel on some observations in the judgment of this tribunal, delivered by Lord Brougham, in the former appeal. A question had arisen whether the gift to found the establishment at Lucknow could, in the circumstances of the country, be carried into effect. The decree below, founded on reports of the Master, declared the inability of the Court to give effect to that bequest, but the Court considering that the Governor-General had the means of doing so, had ordered the funds to be paid to the Government for that purpose. This tribunal held that this part of the decree was not warranted by the Master's Reports, and directed a further reference upon the facts. In stating the questions which arose, Lord Brougham made the observations relied on:—"Can the decree as to the application of the fund stand?—Shall the fund be applied to the establishment and support of a college at Lucknow?—Shall it sink into the residue and be divided between the two charities appointed to be established at Calcutta and at Lyons?—for the cases of *Attorney-General v. Bishop of Llandaff*, and *Attorney-General v. Ironmongers' Company*, make it clear that in this case, which is indeed stronger than either of those, the other two charities must take, if the gift fails as regards the third." It is obvious that the question of the ultimate disposition of the fund was not ripe for decision, the point then under consideration being the directions proper to be given for carrying into effect, if possible, the Lucknow charity; and, indeed, the decree advised by this Committee, giving directions for that object, was expressly made "without prejudice to any question as to the final application of the same fund under the directions hereinafter contained or otherwise." The observations in the judgment, therefore, can only be regarded as an opinion, and not as a judgment. So regarded, however, they would have been entitled to great weight, if their authority had remained unimpeached. But the subsequent decision in the case of the *Attorney-General v. The Ironmongers' Company* in the House of Lords, in which Lord Brougham concurred, corrected the views His Lordship had expressed in an earlier stage of that case (see 2 Mylne and Keen 586), and in the observations referred to. That decision was in effect that among charities there was nothing analogous to benefit of survivorship.

It was lastly submitted by the appellant's Counsel, that if a *cyprès* application was admissible, the actual scheme which excluded the Lyons charity from participation in the fund is an improper one. The High Court held, and, as their Lordships think, rightly, that it was not competent for the appellants, under their present petition, which is confined to the claim of a share of the residue, as residuary legatees, to open the scheme. But with a view to prevent further litigation and expense, the Judges expressed an opinion that if it was proper to reform the scheme at all, it might be right to confine it to charitable objects in the city of Calcutta, excluding both Lucknow and Lyons. Their Lordships have been invited to correct this view, and to declare that the Lyons charity ought not to be excluded.

Agreeing with what was said in the House of Lords, in the case of the *Ironmongers' Company*, as to the care and circumspection to be exercised by a Court of Appeal in substituting its discretion for that of the Court below, their Lordships would be reluctant in any case to interfere with a scheme unless it were plainly wrong, and still more to unsettle by a premature declaration, one which is not regularly before them. Besides, bearing in mind the opinions expressed in the House of Lords, so often referred to, they are not satisfied, as at present advised, that the view of the High Court does not accord with them. The sum of these opinions appears to be, that whilst regard may be had to the other objects of the

testator's bounty in constructing a scheme, primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. If this be the rule, may not the gift to poor prisoners in Calcutta be considered to have a local character; and in that case, may not a scheme properly framed for the benefit of other poor persons in Calcutta be supported, as being *cypres* to the original purpose? And if these questions are capable of being answered in the affirmative, it follows that it would not be a valid objection to the present scheme that it gives no part of the funds to Lyons. The contention upon this point, then, appears to come to this, that the inclination of the testator to benefit the Martinière institutions so strongly appears, that it ought to guide the Court in framing a scheme, in preference to the principle of selecting an object near to that which has failed. Opinions may well differ on such a point. Reasons are not wanting in favor of the appellant's contention; but, on the other hand, much may be said in favor of the view that these gifts to poor prisoners bear the character of a charity for the relief of misery in the particular locality. The necessary funds for them were directed by the will to be set apart, and in the case of the Lyons charity were, long ago, paid over to the municipal authorities of that city. It may well be doubted whether if such a contingency as the failure of the gift to Lyons should occur, it would be thought proper that any part of the funds paid over to the authorities there should be restored to India.

Their Lordships are not now called upon to decide whether the application of the gift which has failed to the relief of criminal prisoners, and the transfer of part of it to Lucknow, are proper, or the best possible disposition of the fund. All they need say about the actual scheme is, that they do not feel justified upon the present appeal in declaring, as they are invited to do, that it is necessarily bad, because no part of the fund has been appropriated to the Lyons charity.

In the result, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

The 10th February 1876.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Adoption—Guardian's Evidence—Right to Adopt—Defects in Evidence.

*On Appeal from the High Court at Calcutta.**

Jumoona Dassya Chowdhrair

versus

Bamasoondari Dassya Chowdhrair.

Where a Hindoo widow had adopted a son in pursuance of an authorisation to adopt which was alleged to have been executed by her late husband, and her mother-in-law sued to set aside the adoption as invalid, and the case turned entirely upon the genuineness of the authorisation, the Privy Council, in consideration of the nature of the suit, which would destroy not merely the title but also the civil status of the adopted son, and in consideration of the obligation which lay on the plaintiff to give her own evidence in support of her suit, declined, in the absence of any such evidence from plaintiff, to set aside the Calcutta High Court's decision in favor of the defendant. The legal prohibition against a disqualified proprietor's making an adoption without the consent of his guardian extends to an authorisation to adopt, but is confined to the proprietors of estates under the Court of Wards and does not apply to other proprietors who have attained to the age of discretion.

Defects in evidence relating to the execution of a deed authorising adoption, where the intention

* From the judgment of Kemp and Pontifex, JJ., decided on the 14th February 1873.

to grant such authority has been proved or may be assumed, are less material than defects in evidence relating to benefits conferred on various persons in the disposition of a property by will.

This is an appeal against the decree of the High Court of Calcutta, which, reversing a decree of the Subordinate Judge of Zillah Rajshahye, dismissed the plaintiff's suit.

The suit was brought by a Hindoo widow, Jumoona Dassya, against her daughter-in-law, Bamasoondari Dassya, who was sued in her own right, and also as the guardian of Giris Chunder Moozoomdar, whom she had adopted under an authority alleged to have been executed by her deceased husband. The object of the suit, which may be taken to be a suit between Jumoona Dassya and the infant adopted, was to set aside that adoption, and to have it declared invalid. Jumoona was the widow of Guru Pershad, who died in the year 1851. He left, besides his widow, two sons, Govind Chunder and Gopal Chunder, and three daughters. On his death-bed he executed a wasiutnamah, the effect of which was to constitute his widow the guardian of the two sons, and manager of his property during their minorities, with a direction that, on their attaining majority, the elder should take a nine annas share, and the younger only a seven annas share of his estate. Govind Chunder, the eldest son, died in the year 1853. He had, according to the custom of Hindoos, been married in his father's lifetime, whilst yet a child of tender years, to another child some years younger than himself. It is alleged on the part of the defendants that on his death-bed, the day before his death, he executed a document authorising his widow to adopt a son; and the truth of this allegation is the principal question in the cause.

If the adoption stands good, the adopted son is not only entitled as actual possessor to the share of Govind Chunder, his adoptive father; but upon the death of Jumoona, will, if then living, become entitled to take the share of the other brother, who died unmarried, and whilst still a child, in preference of the sisters of his father. On the other hand, if the adoption is invalid, Jumoona, if she survives Bamasoondari, will become entitled on the death of the latter to the share of her eldest son.

This contingent interest is the only *locus standi* which she has in the present suit; although the desire to strengthen the future and contingent claims of her daughters may have been an additional motive for bringing it.

Various questions were raised in the suit which are now of no moment. The only substantial issues are, first, whether Govind Chunder did execute the alleged authority to adopt; and, secondly, if he did so, whether he was by reason of his age capable of executing such a document.

Their Lordships think it will be desirable, in the first place, to come to a clear conclusion upon a question which has been very much disputed in the cause, namely, the age of Govind Chunder at the time of his death, because it is one which bears upon both the issues to be now determined. It bears of course directly upon the latter of them, and it bears indirectly upon the former, inasmuch as the older Govind Chunder was, the more probable is it that he would desire to execute such a document as that in question.

The contention in the present suit is, that although Bamasoondari was, at the time of her husband's death, eleven or twelve years old, he was only between thirteen and fourteen; that there was not a difference of more than two years between them. That there can be any doubt now as to the age of Bamasoondari, is, their Lordships think, impossible. It is true that, immediately after her son's death, Jumoona, in a report made to the Collector, appears to have stated that her daughter-in-law was not more than eight or nine years old, and that the age of her son was twelve years; admitting, therefore, that there was a difference of three or four years between them. In a subsequent proceeding, that is in her written statement filed in the Act IV case, in 1854, she expressly stated that the age of her son was greater by four years than that of the plaintiff. Hence, we

have a clear admission on her part that there was a difference of some four years between the ages of Bamasoondari and her husband, although she may have sought to make them both younger than they really were by throwing back the age of the former to eight or nine years. The question, however, of Bamasoondari's age was solemnly tried and determined between her and her mother-in-law in the suit of 1860. The horoscope of Bamasoondari was then produced, and the finding of the Judge made it perfectly clear that she must have been, at her husband's death, of the age of eleven or twelve years. The result of that suit, no doubt, has been the *consensus* of the witnesses on both sides in the present suit as to the age of Bamasoondari. But the effect of the admission of Jumona remains, and there is no reason why we should come to any conclusion other than that the difference of age between Bamasoondari and her husband was that which was originally stated. Their Lordships, moreover, think there is great force in the observations of Mr. Justice Kemp, a Judge admittedly of large experience as to native usages and customs, upon this point. He thinks that Hindoo marriages are usually arranged so that there is a difference of considerably more than one or two years between the age of the husband and wife; and their Lordships think this is probable and reasonable. The foundation upon which marriages between infants, which so many philosophical Hindoos consider one of the most objectionable of their customs, is the religious obligation which is supposed to lie upon parents of providing for their daughter, so soon as she is *matura viro*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. Therefore, it is to be expected, both for physical and moral reasons, that marriages should be arranged so that the husband, when called upon to receive his wife for permanent cohabitation, should have attained the full age of adolescence and also the age which the law fixes as that of discretion.

Their Lordships, therefore, upon the evidence, have no difficulty in coming to the conclusion that Govind Chunder was, at the time of his death, of the age of fifteen or sixteen, and, therefore, of an age which, according to the law prevalent in Bengal, is to be regarded as the age of discretion.

Their Lordships will now proceed to consider the question as to the *factum* of this instrument.

The story told by Bharut Chunder Roy, the father of Bamasoondari, and therefore the most important witness on that side, is in effect this, that the day before the execution of the instrument he had a conversation with Govind, and represented that he ought to execute a deed of permission to adopt a son; that Govind assented to this; that the witness afterwards communicated what had so passed to Jumona, and that she finally said, "Then, my child, write and give permission to adopt a son." A good deal of criticism has been applied to the reasons for giving a power to adopt which Bharut Chunder says he assigned on this occasion. Their Lordships think that the more plausible construction to be put on what he swears he then said is, that he had had in view the supposed spiritual advantages which his daughter might derive from having an adopted son; advantages which seem to be considered of some value, though not perhaps of the same value that they are to an adoptive father. It is then sworn that on that day the draft of the deed of permission was begun, but that it was not finally finished until the next day. There is some obscurity as to the preparation of this draft, and the actual giving of instructions for it by Govind Chunder. And if this were a case in which a will was propounded, giving benefits to various parties and making a disposition of property, as to which it would be necessary to satisfy the Court that the testator fully knew what he was about, the evidence would be extremely defective. But when the question is only as to the mode of carrying out a permission to adopt, to which the party had signified his assent,

the defect in the evidence becomes less material. It is, however, an observation that may fairly be made for the plaintiff that there is not such satisfactory evidence as to this draft as their Lordships might expect to find. The lapse of time since the transaction may in some degree account for this. According to the case for the defendants this draft was fair copied on the day preceding the death of Govind Chunder, upon a stamped paper purchased on that day at Nattore, a place which appears to be at the distance of ten or twelve miles from the family house where the deed was executed. This fair copy is said to have been made by a person other than the person who wrote the draft. The latter is said by some of the witnesses to have been one Bagchi, and the writer of the fair copy is said by all the witnesses who depose in favor of the instrument to have been Ramnarain Sircar.

Bharut Chunder further states that this fair copy was executed by Govind Chunder, and that Jumona then went into the inner apartments, and brought out Bamasoondari, to whom the completed instrument was delivered by Govind Chunder. The witnesses for the plaintiff, on the other hand, whilst they contend that no such transaction ever took place, assert that Govind Chunder was on that day speechless and incapable of doing what he is said to have done; that Bamasoondari was not in the house, but was then living at her father's house; and that, although sent for, she was unable to come for want of a palki.

In this conflict of evidence, their Lordships are not able to form a confident opinion as to the credibility of one set of witnesses as opposed to the other; and they have not in this cause the advantage of having a clear expression of opinion by the Judge of first instance as to the demeanor, and consequent credibility, of those witnesses when produced before him. His judgment, which was in favor of the plaintiff, proceeds first upon the assumption that it was impossible to purchase the stamped paper at Nattore, and to have the deed engrossed and executed upon the same day; next, upon the general improbability of the transaction; and further upon certain appearances upon the document in connection with the signatures of Ramnarain Sircar, and other subscribing witnesses. He, no doubt, also intimates his belief in the testimony given for the plaintiff to the effect that on the day in question Govind Chunder was speechless.

The learned Judges of the High Court have dealt with two of the above points. They seem to have satisfied themselves, and their Lordships are not prepared to impugn their conclusion, that the stamped paper on which the document propounded is written, might, though purchased on the morning of the day of execution, have reached the house in time to have the document engrossed and executed, as it is said to have been engrossed and executed. They, having the original before them, were further of opinion that the appearances which have been referred to were not such as to excite any grave suspicion touching the genuineness of the document. They also, with better means of judging than their Lordships can have, came to the conclusion that the witnesses for the defendant were of a more respectable and independent class than the witnesses produced by the plaintiff.

There are two disputed facts relating to the transaction which, if established, would go far to prove the defendant's case. The first is the presence of Bamasoondari. Their Lordships agree with the High Court in thinking that the story told by the plaintiff's witnesses in order to account for the alleged absence of Bamasoondari is anything but satisfactory. The young man is shown to have been ill for several days. It is sworn on the other side that Bamasoondari was living in her husband's house, and had been there a month at least, or two months, previous to his death. Her age renders that probable; but even if from any accidental cause she happened, when her husband was taken ill, to have been at her father's house, their Lordships think that the suggested want of conveyance, considering the apparent position of the family, is wholly improbable, and a story

which the learned Judges of the High Court were justified in disbelieving. They therefore believe that Bamasoondari was present on that occasion; and that is a fact which necessarily affects most materially the credit due to the plaintiff's witnesses.

Then, again, there is the alleged concurrence of Jumoona. Jumoona has not been examined as a witness in this cause. The reason why she was not examined can hardly be the prejudice of natives of position to appear as witnesses, since she produced as her witnesses upon the point of Govind's age her own daughters. She was the most important witness in her own case, both upon the point of the age of her son, and upon her alleged consent to the execution of the document. That the document, if executed at all, should have been executed without her consent, is, their Lordships think, in the highest degree improbable. It is well known what the position of a mother in a Hindoo family is; what influence, although she may not be concerned at all in the management of the property, she exercises over the family; what respect is paid to her opinion. Nor is the influence of a mother likely to be least when her son, a youth, is dying in the house. Then, again, the relation of this lady to Govind was not merely that of a Hindoo mother to her son. She was, under the will of her husband, invested with the management of the property during the minority of her son, who was still in law a minor. In fact, to all intents and purposes she must have been at that time the mistress of the house. Her alleged concurrence was thus a point which it was most material for her to contradict by her own testimony given in the cause, and subject to the test of cross-examination.

Their Lordships, in making this observation, are not insensible to the nature of the suit. It is one in which she, upon a remote and contingent interest, an interest which will probably never accrue to her, comes into Court, not only to destroy the title of a person in possession of an estate, but to destroy his civil *status*; and therefore a more than ordinary burden of proof lies upon her.

A good deal has been said as to what took place after Govind Chunder's death. It is perfectly clear that the existence of this document was asserted by Bamasoondari and those who acted for her as early as 1854, when she made an application under the Act of 1841. Afterwards she tried to get possession of her husband's share of the property; and an Act IV proceeding was commenced in the same month of August 1854. From the schedule of deeds which forms part of the proceedings in that case, it appears that the document was then actually produced and filed in Court. On the other hand, Jumoona seems then, and indeed from the time at which she made her report of her son's death to the Collector, persistently to have disputed the existence of a valid authority to adopt. If, therefore, she really concurred in the alleged transaction, there must have been a subsequent quarrel very shortly after Govind's death. Originally Bharut Chunder and she must have been upon good terms, since she is expressly enjoined by her husband's *wasiutnamah* to have regard to his experience, and to consult him upon all matters of importance. It is not improbable that a rupture took place when, at his instigation or under his influence, his daughter first asserted her right to the possession of her husband's share of the property, which she clearly did before August 1854, and that thereupon the mother determined to set her face against the alleged right to adopt. But if she honestly repudiated the document, there is no evidence of a quarrel, and that is a circumstance in favor of her. Weighing the whole evidence as to the execution of this document, and considering how important the testimony of Jumoona was, and that in omitting to give it she has at least failed to produce the best evidence in her power in support of her own case, their Lordships are of opinion that they have not sufficient grounds, whatever doubts they may entertain as to certain parts of the evidence for the defendant, for interfering with the finding of the High Court. They desire to state that in coming to that conclusion they do not rely upon the evidence which

has been given on the part of the defendant, to the effect that Jumoona, as late as 1865, when the ceremonies of the adoption were performed in the family house, was present, and made gifts to the adopted son. This fact is not spoken to by Bharut Chunder himself. It is not spoken to by two independent witnesses who have no concern with the dispute as to the execution of the authority to adopt, and only come to depose to the performance of the ceremonies; it is in itself highly improbable, considering the hostility in which the parties had previously been; it is opposed to the evidence of the family priest, who says that Jumoona positively forbade his taking part in those ceremonies; and it is only to be accounted for by the ingenious suggestion of Mr. Bell, of a subsequent reconciliation and a second rupture subsequent to that; all which is mere speculation. Their Lordships do not positively affirm that the defendant's witnesses who depose to this fact have forsworn themselves; they only say that it has not been proved to their satisfaction, and does not at all influence their judgment.

The only remaining point is that taken by Mr. Doyne, to the effect that although Govind Chunder may have been of the age of discretion according to the Hindoo law, as prevailing in Bengal, he was still a minor under Reg. XXVI of 1793, and that under the 33rd Section of the prior Reg. X of 1793 he could not make the adoption without the consent of his guardian. The last-mentioned enactment prohibits a disqualified proprietor from making an adoption, except with the sanction of the Court of Wards; and it has been determined by the Sudder Court in the case cited—a case which afterwards came here, though not on the same point—that the prohibition applies equally to an authority to adopt and to an actual adoption. But the words of the 33rd Section of Reg. X of 1793 would seem to confine its operation to persons who are under the guardianship of the Court of Wards. And we have the judgment of Mr. Justice Mitter, to the effect that where a minor is not under the Court of Wards, but has attained years of discretion according to the Hindoo law, he is capable of executing such an instrument as this. If then the case actually turned upon this point, their Lordships' opinion would have been that Govind Chunder was not incapacitated from executing this instrument by reason of his not having attained the age of eighteen years. If, however, the consent of Jumoona was, as their Lordships think they must take it to have been, given to the execution of the instrument, the particular objection thus taken by Mr. Doyne would not arise.

Their Lordships have dealt with this case as if the question were one fairly open for trial between the parties. They give no opinion as to what the effect of a decree in such a suit may be, whether one in favor of the adoption is binding against any reversioner except the plaintiff, or whether, on the other hand, a decision adverse to the adoption would bind the adopted son as between himself and anybody except the plaintiff. All their Lordships can do on the present occasion is to say that Jumoona has not made out her right to have this adoption declared invalid, and they must humbly advise Her Majesty to affirm the judgment under appeal, and to dismiss this appeal with costs.

The 11th February 1876.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Escheat—Escheat of Permanent Under-tenure—Trust or
Charge on Escheated Estate.*

*On Appeal from the High Court at Calcutta.**

Ranee Sonet Kooer
versus
 Mirza Himmut Bahadoor.

Where a Hindoo father created a mokurruree tenure within his zemindari in favor of his illegitimate daughter by a Mahomedan lady, and the lawful widows of the father sought to resume the tenure on the death of the illegitimate daughter without heirs: HELD, that where there is a failure of heirs the Crown, by the general prerogative, will take the property by escheat, but will take it subject to any trusts or charges affecting it: HELD, also, that there is nothing in the nature of a mokurruree under-tenure, which might be sold or otherwise alienated, independently of the parent estate, to prevent the Crown from taking it subject to the rent reserved upon it by the zemindar.

The question raised by this appeal, though short, is somewhat novel, and there appears to be little positive authority upon it.

It appears that Rajah Modenarain Singh, being a Hindoo zemindar, but having an illegitimate family by a Mahomedan lady domiciled in his house, granted the mokurruree in question in the name of one of the infant daughters of that family, Shurfoonnissa Begum. The grant was clearly intended to create an absolute and hereditary mokurruree tenure, inasmuch as it contains the essential words "generation to generation," which in documents of that kind have always been considered to have that effect; and their Lordships do not find in the particular document any special terms which would distinguish it from a grant of an ordinary mokurruree istimraee tenure. It is clear on the evidence that Shurfoonnissa Begum died before her father, and not very long after the creation of the tenure; and further, that after her death, the father during his life, and afterwards his widows, who, by the Hindoo law, are his heirs, continued to receive the rent reserved from those in possession of the lands, the receipts for such rent being, with one exception, taken in the name of Shurfoonnissa, the original grantee, and in that exceptional case in the name of Burratee Begum, her mother. One of the questions raised by Mr. Doyne is, what effect ought to be given to that reception of rent as a recognition of the tenure and an answer to the present claim to resume the lands included in it.

From this receipt of rent after the death of Shurfoonnissa, which must have been well known in the family, an inference may undoubtedly be drawn that the zemindar either originally intended to make the grant for the benefit generally of his illegitimate family, or after the death of his daughter was willing that it should have that effect; and it is difficult to suppose that the widows were not for some time willing to act on some such view of the transaction. It is impossible, therefore, to treat the parties in possession as mere trespassers. The recognition of their interest by the receipt of rent from them would constitute some kind of tenancy requiring to be determined by notice or otherwise. Their Lordships, however, are not prepared to say that this circumstance is of itself sufficient to defeat the claim of the plaintiff in this suit. They think that the ground upon which the decision of the High Court is to be supported, if supported at all, is that the plaintiff in the suit is not the person who, assuming the parties in possession to have no legal title, is entitled to recover the land by the destruction of the tenure. That, of course, raises the question which the High Court has dealt with; namely, whether, on the death of Shurfoonnissa without heirs, the right to the possession of the land reverted to the original grantor, or whether the tenure on such a failure of heirs should be taken to have escheated to the Crown.

The doctrine of escheat to the Crown in the case of a vacant inheritance was much considered by this Court in the case of *The Collector of Masulipatam and Cavalry Vencata Narrainapak*, which is reported in the 8th volume of

* From the judgment of L. S. Jackson and Ainslie, JJ., decided on the 23rd May 1871, reported in 15 W. R. 549.

Moore's Reports, Indian Appeals, page 500.* In that case the property in question was a zemindari. The last male zemindar had died, leaving a widow, who took a widow's estate, and upon her death there were no heirs of her husband to inherit the zemindari. The zemindar was, however, a Brahmin; and the point raised in the suit was that on that ground the estate was not subject to the law of escheat. This contention was founded on the text of Menu, which says, "The property of a Brahmana shall never be taken by the king; this is fixed law;" and also on a passage in Nareda, where it is said, "If there be no heir of a Brahmana's wealth on his demise it must be given to a Brahmana, otherwise the king is tainted with sin." It seems to have been admitted in that case that the British Government had at least the same rights that the ruling power would have had under the Hindoo law, the question being whether that limitation which the Hindoo law was said to impose on the right of the Hindoo Raja or King was to prevail against or fetter the rights of the Crown. Lord Justice Knight Bruce, delivering the judgment of this Committee, said:—"It appears to their Lordships that, according to Hindoo law, the title of the king by escheat to the property of a Brahmin dying without heirs ought, as in any other case, to prevail against any claimant who cannot show a better title; and that the only question that arises upon the authorities is whether Brahminical property so taken is in the hands of the king subject to a trust in favor of Brahmins." And in a subsequent passage of the judgment he went on to say:—"Their Lordships, however, are not satisfied that the Sudder Court was not in error when it treated the appellant's claim as wholly and merely determinable by Hindoo law. They conceive that the title which he sets up may rest on grounds of general or universal law. The last owner of the property in question in this suit derived her title under an express grant from the Government to her husband, a Brahmin, whom she succeeded as heiress-at-law. If upon her death there had been any heirs of her husband, those heirs must have been ascertained by the principles of the Hindoo law; but by reason of the prevalence of a state of law in the mofussil, which renders the ascertainment of the heirs to take on the death of an owner of property a question substantially dependent on the *status* of that owner. Thus the property being originally and remaining alienable might have passed by acts *inter vivos* in succession to British subject, to foreign European owner, to Armenian, to Jew, to Hindoo, to Mahomedan, to Parsee, or to any other person, whatever his race, religion, or country. According to the law administered by the Provincial Courts of British India, on the death of any owner being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindoos and Mahomedans by positive regulation; in other cases it rests upon the course of judicial decisions." And the final conclusion of the Committee was this:—"Their Lordships' opinion is in favor of the general right of the Crown to take by escheat the land of a Hindoo subject, though a Brahmin, dying without heirs; and they think that the claim of the appellant to the zemindari in question (subject or not subject to a trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow Lutchmedavamah in her lifetime. In the latter case the Government will of course be entitled to the property, subject to the charge." In a subsequent case relating to the same estate, and reported in the 11th Moore's I. A., p. 619,† the question was between the Collector, representing the Government, and a person claiming to have a valid and subsisting charge by an act of the widow, a charge which the widow was competent to create; and it was held that the Government took subject to the charge, and the suit was dismissed, but without prejudice to the right of the Collector, as representing the Crown, to redeem the

* See also 2 W. R. P. C. 59; 1 Suth. P. C. R. 417.

† See also 2 W. R. P. C. 61; 1 Suth. P. C. R. 476.

charge and recover the estate. The property, no doubt, in this case was a zemindari; but the decision seems to establish the principle, that where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, but will take it subject to any trusts or charges affecting it. There, therefore, seems to be nothing in the nature of the tenure which should prevent the Crown from so taking a mukurruree, subject to the payment of the rent reserved upon it.

It has been argued, however, that this mukurruree, not being an independent zemindari, but being carved out of a zemindari, stands upon a peculiar footing, and that, upon the failure of heirs, the zemindar takes by right of reversion, or, if not strictly by right of reversion, that the tenure escheats to him as the superior lord, rather than to the Crown. The mukurruree was clearly an absolute interest. It was also an alienable interest. It might have been seized and sold, as Mr. Doyne has shown, under Act X of 1859, even in a suit for rent. It could not have been forfeited for the non-payment of rent; for in such a case the zemindar could only have caused it to be seized, put up for sale, and sold to the highest bidder. It is, therefore, property which, like that in the case above cited, might have passed to any purchaser, whatever his nationality, or by whatever law he was to be governed. It cannot, their Lordships think, be successfully argued that, having so passed, the estate would have determined upon the death of Shurfoonnissa (supposing it had been sold in her lifetime) without heirs; for the grant contains no provision for the lessee of the estate created in such event. There seems, therefore, to be no ground for saying that the lands have reverted in the proper sense of the term to the zemindar; and the only question is, whether, on the failure of heirs of the last possessor, he is entitled to take a tenure subordinate to and carved out of his zemindari by escheat.

Their Lordships are of opinion that there is no authority upon which the power of taking by escheat can be attributed to the zemindar. The principles of English feudal law are clearly inapplicable to a Hindoo zemindar. On the other hand, it is clear that, if the zemindar has not such a right, the general right of the Crown subsists, and must prevail.

On the whole, therefore, their Lordships think that the High Court have come to a correct conclusion in holding that, supposing the parties in possession have nothing but their possession to depend upon (a question on which their Lordships give no opinion), the superior title, under which alone they can be ousted from possession of the lands, is not in the zemindar or his representatives, but in the Crown. They will, therefore, humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

The 10th March 1876.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Re-formation of Chur—Alluvion—Right of Original Owner.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

* From the judgment of Kemp and Glover, JJ., decided on the 17th April 1873.

Rani Sarat Sundari Debya and another
versus
 Soorjya Kant Acharjya and another.

Where land re-forms by alluvion on a site capable of identification, the right of the owner of the original site to the chur is indisputable.

In this case the respondents were plaintiffs, and they sought to recover from the appellants, who were defendants, possession of certain chur land thrown up by the river Jamoona, which we may take to be accurately described upon the Ameen's map, and to be that which has been throughout the proceedings called "C." The title which the plaintiffs sought to establish was that this land had, in consequence of the recession of the river Jamoona, and by gradual accretion, become part of the village of Juggutpoora, which forms part of his zemindari.

The former history of the land appears to be this. Some time before 1851 or 1852, a certain chur, which the defendants say was upon the same site as the existing "C," was thrown up by the river. We may call this the original "C." Of the anterior history of the site there is not much evidence; but it is certainly probable that the river, which seems to be of a peculiarly unruly character, had formerly diluviated the lands of the defendants, and that the original "C" was a re-formation upon what had previously been their land. But, however that may be, it is perfectly clear that in the thakbust proceedings of 1852 or 1853 this original "C" was treated as the land of the defendants, and was designated Mouzah Soosooa. It further appears that these proceedings did not take place behind the back of those whom the present plaintiffs represent, but that there was an application and a proceeding before the Collector for the rectification of the boundary of this Mouzah Soosooa as at first demarcated. That proceeding is set forth at page 68 of the record; and looking at it and at the map, their Lordships conceive that at that angle in the thakbust map of Mouzah Soosooa which lies between Nos. 35 and 37, the thakbust officers had originally included a certain small chur in the mouzah, and that upon an application to the Collector, both parties being present before him, the boundary was rectified by giving that small chur to Juggutpoora, and making the coloured river, as it now stands, form the eastern boundary of Mouzah Soosooa, from No. 35 to No. 49.

Now, can it be doubted that if this original "C" had never been submerged again, the defendants would have had a perfectly good title to it as against the plaintiff, and probably as against all the world? It, however, appears that the river after travelling to the east, travelled back again to the west, diluviating the original "C," and then dividing at one point into two channels, threw up the churs which are marked in the map as "A" and "B;" that some little time afterwards the existing "C" appeared, that the defendants took possession of it, and have ever since been in possession. This must have taken place some time between 1861 and 1865; for in the latter year the defendants claimed "A" and "B," treating them as an accretion to "C," but failed in that suit. There was at that time, as clearly appears from the final judgment of the High Court, a definite channel, though not the main channel of the river, between "C" and "A" and "B" which formed the eastern boundary of "C" and the western boundary of "B." The result of that suit was that "A" and "B" fell to Juggutpoora; and nothing more was done till the year 1870, the defendants remaining in possession of "C."

One point taken by Mr. Bompas is that the defendants never acquired a permanent title to the original "C;" or at all events, that when that chur was again washed away by the river, it fell into the domain of the Crown or State; and therefore that the defendants cannot claim the existing "C" as a re-formation on their land; but that the title to it must be determined by the law of gradual accretion. Their Lordships cannot accede to this argument. They conceive that if the existing "C" can be identified as a re-formation on the site of the original "C" that was

demarcated as Mouzah Soosooa in 1852, the general law must prevail. It is well known that as to that general law there has been some doubt and confusion in the Courts of India ; and that notwithstanding the decision of this Board in the case of *Mussumut Imam Bandi v. Hurgovind Ghose*, 4th Moore's I. A.,* the Indian decisions have been conflicting upon this point,—the right principle having been laid down by a Full Bench of the High Court presided over by Sir Barnes Peacock, although subsequently disaffirmed by another Full Bench of the same Court. Until the law was finally set right by this Committee it cannot be said to have been well settled in the Courts of India, and there are traces of this uncertainty and confusion in the earlier proceedings set out in the present record. It is now, however, admitted that the case of *Lopes v. Muddun Mohun Thakoor*, 13th Moore's I. A. p. 472,† and the subsequent decisions of this Board must govern the present question, so that even if the present defendants were plaintiffs in the cause, and could make out that the land claimed was a re-formation upon land which belonged to them, they would be entitled to recover it from a party in possession.

A fortiori they are entitled to defend their possession against a party who sets up against them the law of gradual accretion.

The case seems to have been very well tried in the Court of first instance, and the facts come out much more clearly than in these chur cases they generally do. The Ameen who made the local investigation came to the conclusion, upon grounds which appear to their Lordships to be satisfactory, that this new "C" was a re-formation upon the site of the original "C;" and the Zillah Court, acting upon that, dismissed the suit, making a decree in favor of the defendants. The cause then went to the High Court, and that Court, throwing some discredit on the report of the Ameen, came to the conclusion, that by gradual and imperceptible accretion, and by virtue of the law relating to such accretion, "C" had become an adjunct to Juggutpoora. To their Lordships it appears that nothing which is said in the judgment of the High Court substantially affects the credit due to the report of the Ameen ; and they think that in cases of this kind it is always desirable, if possible, to give effect to the local investigation made by an experienced officer upon a view of the place. One material finding of the Ameen is this : he was asked to say "whether it was true that when the chur, now the land in dispute, formed, there were deep and flowing *sotas* of the river Jamoona both on the east and west of it;" and he finds that while there was deep water flowing on the east and west of the disputed land, the disputed land began to form, as has been mentioned above.

In the teeth of this finding it is difficult, if not impossible, to say that the existing "C" was an accretion, in the proper sense of the term, to "B." And on the other hand, the investigation of the Ameen, and the measurements which he made, seem clearly to establish that the greater portion of the land in question has re-formed upon a site capable of being identified as the site of the Mouzah Soosooa, which was the subject of the thakbust proceedings in 1852.

In these circumstances their Lordships think that the judgment of the Lower Court was the right judgment, and they must humbly advise Her Majesty to reverse the judgment of the High Court, and in lieu thereof to make an order dismissing the appeal to the High Court, with costs in that Court, and affirming the judgment of the Zillah Court. The appellants must also have the costs of this appeal.

* 7 W. R. P. C. 67 ; 1 Suth. P. C. R. 208.

† 14 W. R. P. C. 11 ; 2 Suth. P. C. R. 336.

The 24th March 1876.

Present :

Sir James W. Colville, Sir Barnes Peacock, and Sir Montague Smith.

Adoption—Authority to Adopt—Madras Law of Adoption.

On Appeal from the High Court of Judicature at Madras.

Sri Virada Pratapa

versus

Sri Brozo Kishoro Patta Deo.

Where the widow of a zemindar claimed her husband's estate on behalf of an adopted son, putting in a document authorizing her to adopt, which was alleged to have been executed by her deceased husband; and the rival claimant was a half-brother of the deceased, who would have inherited the estate but for the said document, but who was shown to have been on bad terms with the deceased (during his lifetime); the Privy Council, dealing with the document as one that bore a genuine signature, and was supported by antecedent probabilities, declared in favor of the plaintiff's claim.

HELD, also, however, that though in Madras a Hindoo widow, not having her husband's express permission, may, if duly authorised by his kindred, adopt a son to him, yet the permission must be given by some one within the undivided family and having a direct interest in the estate, and not by a distant relative.

Rajah Adikonda Deo, the then holder of an impartible zemindary in the district of Ganjam, which in these proceedings is called sometimes Chinnakimidy, and sometimes Pratapagheri, died on the 23rd November 1868. He left no legitimate male issue, but a widow, then *enceinte*, whom it will be convenient to designate by her title of Mahadevi. He had, however, several natural sons, one of whom, Ramakrishna Deo, contrived, on the death of his father, to be invested by some of the retainers with the "sadh," and asserted a claim to the zemindary on the ground that he was in fact legitimate, and had been designated by Adikonda as his successor in an urzi signed by him on the 19th November, and forwarded to the Collector. This claim has since been found to be groundless, and may be treated as no longer existent.

The appellant Raghunadha, who was a half-brother of the deceased zemindar, must now be taken to have been an undivided brother, and the person who, according to the ordinary law of succession, was entitled to the zemindary on the death of Adikonda without a legitimate son, either procreated or adopted.

It is necessary, in order to explain some parts of the subsequent history of the case, to observe that the question of succession, when it first arose, was further complicated by the fact that the zemindary, though permanently settled, was one of those as to which it was then conceived that, owing to the omission to issue a permanent sunnud, the Government of Fort St. George had retained the right of nominating on the death of each successive holder his successor. The confirmation by this Board of the decision of the High Court of Madras in the Maranagapury case (see Law Reports, 1, Indian Appeals, p. 282)* has since established that there was no legal foundation for this pretension on the part of Government; and it must now be taken to be settled law that the title to the zemindary is to be determined by the ordinary law of succession in like cases.

On the day after that of the death of Adikonda, *i.e.*, on the 24th November 1868, the Mahadevi addressed an urzi to the Collector (p. 143), in which she stated the death of her husband; that the family was composed of women and children; that she had then none legally entitled to the talook, but was three months gone with child; and prayed to be entrusted with the care of this talook. In this document she made no mention of an authority to adopt.

It is shown, however, beyond all question, by the Collector's letter of the 2nd December 1868, which is recited in the proceedings of the Board of Revenue at p. 105 of the record, that before that date he had received a second urzi or letter from the Mahadevi, in which she had alleged that it was her husband's express wish that, in the event of her having not a son, but a daughter, she should adopt a son. And if the exhibit R. at p. 64 of the record be that second urzi, or a true copy of it, there can be no doubt that as early as the 26th November 1868, the Mahadevi had asserted publicly that her husband had, on the 20th of that month, executed in her favor a written authority to adopt a son in the event which afterwards happened. The confusion which seems to have taken place in the Civil Court, with respect to the proof of exhibit R, has given rise to a controversy on its authenticity which will be afterwards considered. But whatever may have been the precise contents of the second urzi, it is unquestionable that, as early as the 11th December, the Mahadevi presented a formal petition to the Government of Fort St. George, in which she stated that Adikonda, before his death executed and gave to her a putrica or will containing words to this effect:—"You have now conceived; if you bring forth a male child, he will be a Rajah to the talook; in case of a female child, you are authorized to select a good child for the seat;" and that in several subsequent petitions and applications she persistently put forward and relied upon a written authority to adopt executed by her husband. One of these, bearing date the 18th March 1869, stated the date of the instrument to be the 20th November 1868; and in most of them she claimed to be heiress to the zemindary in default of a legitimate son, natural or adopted, of her husband. Raghunadha seems on his side to have been also asserting his claim before the Government and the Revenue Authorities.

The action taken by the Government of Fort St. George was as follows:—

The Board of Revenue, on the report of the Collector, had, on the 7th January 1869, expressed its opinion that Raghunadha had the best claim to the zemindary, provided the Mahadevi did not give birth to a son; but that if she should have a son, that son ought to succeed. Thereupon Government, on the 1st March, ruled that a posthumous son would be entitled to the inheritance, and directed the Collector to take such measures as he might think fit to ascertain whether the widow was really pregnant, and to verify the sex of the child when born. To the widow's repeated applications it made answer that the claim to the zemindary was under consideration. On the 11th July 1869, the Mahadevi was delivered of a daughter, and on the 17th September in that year Government, in the exercise of its supposed power, and on the recommendation of the Collector, supported by the Board of Revenue, resolved (p. 143) to recognize Raghunadha, who had been reported by the Collector to be the undivided brother of the deceased zemindar, as the successor to the Chinnakimidy estate; thereby overruling the Mahadevi's claim to be heiress to her husband; and ignoring her asserted right of adoption.

Pending these proceedings there had been litigation between the Mahadevi and Raghunadha, touching the right to a certificate, under Act XXVII of 1860, for the collection of the debts due to the deceased zemindar. This was determined in favor of the Mahadevi by the Civil Judge on the 31st March 1869. But on the 11th February 1870, his decision was reversed by the High Court, and the certificate granted to Raghunadha, apparently on the general ground that the claim of an undivided brother was preferable to that of a widow, and that there was no satisfactory proof of division.

For some short time after the determination of the Government in his favor, Raghunadha and the widow seem to have lived together in amity. She retained, apparently with his consent, the custody of the keys of the gouthaghoras, or treasuries, in which the jewels, cash, and other valuables that had been left by the late zemindar were kept; but allowed Raghunadha to receive thereout both

jewels and cash for the purposes of his installation, which took place on the 1st February 1870. He again was in correspondence with the Collector in November touching the villages to be assigned to her for her maintenance (pp. 115 and 116); and speaks of their friendly relations, although in one of his letters he complains that Haribondha Surmanto and two or three more wicked persons were "making intrigues and giving evil advice." But this state of amity, if it ever sincerely existed, was of brief duration. In the course of 1870 the parties again plunged into active litigation. In this suit, numbered 9 of that year, Raghunadha sought to recover from the Mahadevi the jewels and cash in the gontaghoros, greatly exaggerating their amount and value, as property to which he was entitled as zemindar. In her suit, No. 12 of 1870, she sought to recover from him the particular jewels and cash which had passed from her to him on the occasion of his installation, alleging that he had received them by way of loan on a promise to restore the former, and repay the latter. Her suit was ultimately dismissed on the ground that she had failed to establish any such contract. In the other suit the material issues were whether Raghunadha was the undivided brother of Adikonda, or separate in estate from him; whether the Mahadevi, as widow of Adikonda, was entitled by right of succession, to the money and jewels left by him; and if not, whether Adikonda had made to her at the time of his death a gift of them that was valid against Raghunadha.

In this suit, the Civil Judge found that Raghunadha, the plaintiff, was the undivided brother of Adikonda, and that Adikonda, at the time of his death, did not make a gift to his wife of any part of the property then in dispute. He, found, however, in the first instance, upon the second issue, that the Mahadevi, as widow of Adikonda, was entitled to all the money and jewels left by him; proceeding, apparently, on the ground that, inasmuch as each succeeding zemindar must be taken to have held the estate by virtue of a new grant from Government, he held it as self-acquired property; and consequently, that, on his death, his personal assets would pass to his widow, to the exclusion of his brother. Before, however, a final decree had been drawn up in this suit, the Marungapury case was decided by the High Court of Madras; and the Judge thereupon granted a review of his decision. On that review, he found that the Mahadevi, as widow of the late zemindar, was not entitled to the money or jewels left by him; and, finally, made a decree in favor of Raghunadha, but for an amount much less than that claimed by him. There was no appeal against the decrees in these suits. They decided as between the Mahadevi and Raghunadha that the status of the family was that of indivision; and that Raghunadha being, in default of male issue of Adikonda entitled to the estate was entitled to the jewels and cash as appurtenant thereto. They have, however, little bearing on the questions now to be determined; although some of the depositions taken in them have been relied upon as affecting the credibility of the testimony given by the same witnesses in the present suit.

Pending these two suits of 1870, and on the 20th November in that year, the Mahadevi adopted the present respondent. He was the son of the zemindar of Piddakimidy, who is admitted to be a sapinda of Adikonda Deo, though separate in estate from him; both families being, as shown by the pedigree at p. 19, derived from a common ancestor, Purushottama Deo. Nor is the validity of the adoption impeached, except on the ground that the Mahadevi had not sufficient authority to make it.

On the 15th December 1870, the respondent, by his adoptive mother and guardian, the Mahadevi, commenced his suit for the recovery from Raghunadha, of the zemindary and of all the property appurtenant thereto, with mesne profits. The defendant, Raghunadha, originally set up, by way of defence, that his title as zemindar appointed by Government could not be questioned. But it is now admitted that, since the decision of the Marungapury case, this defence cannot

prevail; and that the only questions to be decided are, whether the exhibit Q, which is propounded as the written authority to adopt, of the 20th November 1868, was, in fact, executed by Adikonda Deo, and, if not, whether the adoption is not, nevertheless, valid according to the law that prevails in the Presidency of Madras, as one made by a widow, without express authority from her husband, but with sufficient sanction and consent on the part of her husband's relatives.

The Civil Judge decided both these questions against the respondent. He came to the conclusion, both from external and internal evidence, that the document was a forgery; he was also of opinion that the requisite assent to an adoption, in the absence of an authority from the husband, was not given, and consequently that the adoption was not valid as against the defendant. The High Court inclined to the opinion that Q was, in fact, executed by Adikonda, but did not go very much into the evidence for or against the document, being of opinion that, even if no express authority was given by Adikonda, the adoption by the widow, being made with the consent of one of his sapindas (the father of the child adopted), was valid by the law of Madras.

Their Lordships propose to consider, first, whether Q was, in fact, executed by Adikonda.

It has been strongly urged upon them that the judgments of the two Indian Courts upon this question, though not concurrent, are not directly conflicting, the High Court having omitted to find that the document is genuine, or fully to consider the evidence concerning it; that, in this state of things, their Lordships cannot safely overrule the decision, upon a question depending mainly on the credibility of conflicting witnesses, of a Judge of great local experience, who saw and examined those witnesses, and has expressed his conclusion in a judgment that demonstrates with what remarkable care and industry he tried the cause.

Their Lordships are by no means insensible to the force of the general proposition involved in this argument. That force, however, seems to them to be somewhat diminished by particular circumstances in this case. They consider that the voluminous judgment of the Civil Judge deserves the credit due to a most painstaking endeavor to arrive at the truth in a difficult case. But its excessive elaboration tends to impair its value by defeating the proper object of a judgment, which is to support, by the most cogent reasons that suggest themselves, the final conclusions at which the Judge has conscientiously arrived. This document records the fluctuations of the Judge's mind from day to day in the course of an exceptionally long trial; the effect, often temporary, upon him of a particular piece of evidence or argument of Counsel; it subjects every witness to criticism more or less unfavorable; and from this mass of often conflicting statements, it is not easy for a Court of Appeal to extract the precise grounds on which the final conclusion rests.

Again, the Counsel for the respondent have strongly insisted on the objection to the authority of this judgment, which they founded upon the observations of the learned Judge in paragraph 62, etc. (p. 376). It must be admitted that the passage is ambiguous. If it means only that where a case has been manifestly proved to be false (as, *e.g.*, if Q had been shown to be written on a stamp paper purchased after Adikonda's death), it is unnecessary to weigh general probabilities, the observation is a mere truism; since it is obviously idle to enquire whether it was likely a man should do that which it has been demonstrated he never did. On the other hand, if it imports that the Judge refused to weigh the probabilities of the case, because he believed one set of witnesses rather than the other, it would support the objection taken, *viz.*, that in forming his belief he had excluded from his consideration that which ought to have entered into it. Their Lordships, however, upon a review of the whole judgment, are of opinion that, in whatever sense the learned Judge made the observation in question, he did not, in fact, fail

to consider the probabilities of the case. Whether he gave due weight to them will be afterwards considered.

A more substantial objection to the judgment is that it does not dispose of the question as it was presented by the parties. The learned Judge was not content to find that Q was a forgery. By a careful examination and comparison of it with admitted signatures of Adikonda, he satisfied himself that the signature purporting to be that of Adikonda was itself forged. Yet the appellant (p. 255) had admitted that that signature and the sankhu and chakrun (the emblems on it) were of his brother's handwriting; and the case made by him and his witnesses was that the forgery was effected by filling up, after Adikonda's death, a blank paper, which had these genuine marks and signature upon it. Their Lordships agree with the Judges of the High Court in thinking that little weight ought to be given to a comparison of Oorya handwriting by an European Judge, however skilled and experienced, when opposed to the admissions of those who dispute the document. They feel bound, therefore, to assume, and that has been almost admitted in the argument addressed to them on the part of the appellant, that the signature of Adikonda upon Q is of his handwriting. It is obvious, however, that the erroneous conviction of the Civil Judge to the contrary may greatly have biased his estimate of the credibility of the plaintiff's story, and may have prevented him from duly weighing the improbabilities of that told by the defendant, which he did not adopt. The genuineness, therefore, of the signature of Adikonda is a circumstance which materially detracts from the general value and authority of the judgment of the Civil Judge; and their Lordships cannot but feel that they have to determine the question before them upon the evidence taken in the cause, without the assistance which they generally find in similar cases in the judgment of one or the other of the Indian Courts.

That there is in this case a strong antecedent probability that Adikonda did authorize an adoption is incontestable. It does not rest upon mere presumption that on his death-bed he would desire to perform that general duty of imperfect obligation which prompts a childless Hindoo to supply the want of natural male issue by adoption. It is shown that the brothers, though legally undivided, were long on bad terms with each other. The strife began, as appears by the Collector's letter at page 106, on the death of their father in 1835, when there was a dispute as to their succession to the zemindary, Raghunadha claiming it as the eldest son of the then Mahadevi, though younger in years than Adikonda, who was born of a wife of inferior rank. This controversy was determined by the then Government, in the exercise of its assumed power, in favor of Adikonda. The strife, however, was embittered by subsequent quarrels between the brothers, and by the desperate attempt of Raghunadha as late as 1852 to oust his brother by proving him to be illegitimate. In these circumstances, whatever may have been the precise relation of the brothers during the later years of their joint lives, there is a high degree of probability that Adikonda would desire to retain, by all means in his power, the zemindary in his own line; and would be unwilling to expose the wife, to whom he was attached, to the chance of falling from the rank which even as adoptive mother of a reigning Rajah she would possess, to that of a widow entitled only to be maintained, however honorably, by her brother-in-law.

There being then this antecedent probability that he would execute some such document as that which bears his admitted signature, what is the direct evidence to show that he really did or did not execute it? The witnesses, whose names are upon it, are Sumanto the Treasurer, Siva Purohit, now the Dewan of Raghunadha, but formerly the servant in the like capacity, first of Adikonda, and afterwards of the Mahadevi, Balaji, the scribe, and Damapattojosi the Purohit. Of these the two former are the only subscribing witnesses in the strict sense of the term; Balaji, signing only as the writer of the instrument; and Damapattojosi, though named as a witness, not having signed at all. Again, the only one of the four who

deposes to the execution of the instrument is Sumanto. His story (page 215) is that on the 20th November (*i.e.*, on a day between which and the day of the Rajah's death two clear days intervened), at about 3 prohoros of the day (*i.e.*, about 3 p.m.), the Rajah sent the peon Narayani to call in any respectable people (Bollokoko) that might be in the outer hall (Sodoro); that the peon returned with Siva Purohit, Damapattojosi, Bodhrosanto, Bhagirathipani and Balaji; two other persons, *viz.*, Boyiduorahu and Gouro Bondhari being already in the room when the order was given; that Balaji was then sent out to bring paper, pen, and ink; that on his return he wrote the authority to adopt under the Rajah's dictation, making first a draft and afterwards a fair copy; that the list of witnesses which appear in Balaji's handwriting on it was also written at the Rajah's dictation, first in the draft and then in the fair copy; that the subscribing witnesses Siva Purohit and the witness himself then signed, Damapattojosi excusing himself, with the Rajah's consent, from signing, on the ground that he was an old man, and could not see; that Balaji also wrote his name as the writer of the document; that the Rajah himself traced the sankhu and chakrun at the top and wrote his own signature at the bottom of the document; that they all wrote with the same pen dipped in the same ink-bottle; that it took about 2 ghadyahs ($1\frac{1}{2}$ hour) to complete the transaction; and that afterwards and when about the same space of the day remained, the witness, by order of the Rajah, took the document to the Mahadevi, who, while it was being prepared, was in "the chapel," being a room near that of the Rajah, and put it on the threshold, the door being ajar. The witness also states that nearly two ghadyahs before this, and previously to the preparation of the document, he had taken to the Mahadevi by order of the Rajah, the keys of the Treasury House, and had said to her, "The keys of the other Treasury House were given you, now keep the keys of this Treasury and all the property therein."

This witness is directly contradicted by the three other persons, whose names are upon Q, Siva Purohit, Balaji, and Damapattojosi. Their testimony in this suit is to be found at pages 189, 269, and 267 of the Record. The account which they give of the fabrication of Q, is the following:—About ten, or at most twelve, days after the death of Adikonda, Sumanto brought to Balaji a paper, having upon it Adikonda's signature, and the sankhu and chakrun, but otherwise blank, together with a draft, and told him to fair-copy the draft upon the blank paper. Balaji, according to his own account, at first refused, but afterwards obeyed. The result was Q, as it now stands, with the exception of the signatures of the subscribing witnesses. The paper in that state was given by Balaji to Sumanto, who took it to Siva Purohit for his signature. He swears that he refused to sign it, and denies that the signature upon it which purports to be his is of his handwriting. The value of that denial will be presently considered. The paper was subsequently (*i.e.*, about fourteen days after Adikonda's death) taken by Sumanto to Damapattojosi, who also swears he refused to sign it as witness.

The question is which of these two stories is to be believed. The last their Lordships think must be taken with the qualification that, notwithstanding the denial of Siva Purohit, the disputed signature is of his handwriting. That it is so was found by the Civil Judge, and his finding does not depend on mere comparison of handwriting. Its correctness seems to their Lordships to be placed beyond doubt by the exhibit L L, page 3, in which, writing to Iswara Puttro as late as the 10th July 1869, he speaks of the document executed by the late Rajah to the Mahadevi, and urges his correspondent to use his best endeavors to get from Government a recognition of it. It is clear, therefore, that, if Q be a forgery, Siva Purohit was at one time a consenting party to that forgery. The Civil Judge has undoubtedly recorded a most unfavorable opinion of Sumanto. He says of him: "H. S. lied and prevaricated grievously. I could not believe anything one bit the more readily from the fact that he asserted it" (Judgment,

paragraph 54, page 320). Yet the credibility of this witness, however small, is nevertheless superior to that of Siva Purohit and Balaji. Notwithstanding his demeanor he may have told what is substantially a true story; whereas the others must either have been guilty of perjury in this suit, or have been conscious actors in an antecedent forgery. Damapattojosi is not open to this imputation, and is apparently a more respectable witness. All that the Judge says against him is, that "he protested too much." But there is a high degree of improbability in his story.

The *prima facie* improbability that there should exist any blank paper with the genuine signature of the deceased Rajah upon it is no doubt removed by the evidence of Binayaka (p. 263), and the production of the four blank papers similarly signed, which that witness swears he discovered eighteen months before he gave his deposition (i.e., early in 1870) in the late Rajah's record-box. There is, however, no proof that at the time when Q is said to have been forged any such papers had been found; and the subsequent discovery of them may have suggested the present answer to the plaintiff's case. If, however, it be assumed that the supposed forgers had but one such paper in their hands ten days after the late Rajah's death, it is obvious that such a paper was very precious; and it is inconceivable that they would have inserted Damapattojosi's name in the list of witnesses until they were assured of his willingness to sign. If, again, they had then in their hands more than one such paper, they would naturally, on Damapattojosi's refusal to join in the conspiracy, have destroyed it, and fabricated a similar instrument on which his name should not appear. The story then told by him is less probable than that told by the plaintiff's witnesses in order to account for the non-signature of it by him; for he is shown to be a person of weak sight, and not to have been in the habit of writing with a pen. All these three witnesses against the document are shown to be now more or less dependent upon the defendant; and there is little, if any, other affirmative evidence in support of the defendant's case.

On the side of the plaintiff, however, there is a considerable amount of direct testimony in confirmation of that of Sumanto.

Of the witnesses in this category, who are vouched by Sumanto as present when it was prepared and executed, are Boyiduorahu, the native doctor; and Gouro Bhondhari the barber; who are said to have been with the Rajah when he sent the peon to call in the respectable people; Narayana Bisoyi the peon sent; and Bordhono Santo, and Bhaghirathipani, who were brought in with Siva Purohit, Damapattajosi, and Balaji. They generally confirm Sumanto's account of the transaction. It is true that all are more or less discredited by the Civil Judge; that the barber is not relied upon even by the respondent as worthy of credit; and that the evidence of the peon, who says he was not continuously in the room, is of little value. But the others, particularly Bordono Santo, who was related by marriage to Adikonda, seem to be of respectable position, are persons who were not unlikely to be present; and their statements, notwithstanding some slight discrepancies, in the main confirm Sumanto's account of the transaction. In further corroboration of the plaintiff's case his Counsel rely on the evidence of the Mahadevi and of Iswara Puttro.

The latter is the vakeel, who, in 1868 and 1869, prosecuted the Mahadevi's claim before the Government at Madras. He seems to have been employed as a vakeel by Adikonda in his lifetime; and there is nothing to impeach his general respectability. His testimony is to the effect that having been sent for by the Rajah, on account of some pending suit, he was at the house after the execution of Q; and that on the next day, that is, on the 21st November, the Rajah being then in full possession of his faculties, told him that he had the day before executed in the Mahadevi's favor a written authority to adopt. This evidence does not justify the observation of the Civil Judge that "it amounts to nothing," since, if believed,

it would establish a clear admission by the Rajah of his antecedent act. It is, however, open to the exception taken by Mr. Norton, *viz.*, that it is but evidence of an oral admission, said to have been made by a deceased person, and as such, incapable of contradiction, and open to suspicion. His presence, moreover, at the place at the time in question is not sworn to by any other witness, and is not very satisfactorily accounted for.

The evidence of the Mahadevi (p. 205) is to the effect that on the morning of the 20th November she was weeping over the Rajah, who was very ill; that he told her in the event of her not having a male child to adopt one, and promised to give a written authority for the purpose; that in the evening of that day, whilst she was sitting within her room with the door a little ajar, Sumanto brought a paper and left it on the threshold, saying it was the authority to adopt; that afterwards, and when the lamp was lighted, *i.e.*, after sunset, she took the paper to the Rajah, nobody else being in the room; that he took it from her and said, "I have given you a written authority—you are pregnant. You will bring forth a male child, if not you will adopt," and then returned it to her, and that she afterwards kept it in her box. She identified Q as that paper. She further deposed that the key of the goutaghoro was brought to her by Sumanto before he brought the document; and afterwards, in answer to a question not given in the record, said, "The keys and this written authority were given to me in the evening when there were two ghadies to sunset."

Of this witness the Civil Judge (p. 320) has recorded the following opinion:—
"On the face of her deposition, I see no reason to think her untruthful, but rather the contrary; and yet in O. S. No. 9 of 1870 she put forward, and supported with much evidence, three assertions on important facts which have been declared false, or have been disbelieved, *viz.*: (1st) division between Adikonda and the defendant, it being admitted by her in this suit that they were undivided; (2nd) an examination of the treasuries showing that they contained but a small sum, with a view to reduce the amount recoverable by the plaintiff against her, if he should be successful in that suit; (3rd), the gift of the jewels and cash by Adikonda to her. And now she has put forward Q, which is certainly a forgery; she has supported it with much evidence; she has sworn that Adikonda himself, in speaking to her, acknowledged it as his; and she has contradicted the story told by all her witnesses."

Of the objection to the Mahadevi's credit, which the learned Judge founds upon Q, and the evidence given by her in support of its execution, it is enough to observe that he thereby begs the question which he had to try, *viz.*, whether it was a forgery or a genuine instrument. He would hardly have done this if he had not previously, and by comparison of handwriting, satisfied himself that the signature of Adikonda was itself forged. That this foregone conclusion, which must now be taken to be erroneous, must materially have affected his general estimate of the credibility of the plaintiff's witnesses is therefore shown by the passage just cited from his judgment. Nor do their Lordships attach much more weight to his other objections to this lady's credit. They do not find any material contradiction between her statement in this suit and those of the other witnesses. There is undoubtedly a discrepancy as to the time when the key was delivered (as to which only Sumanto and the native doctor speak). But that the Mahadevi, a native woman examined from behind the purdah, should have made some confusion as to the time that elapsed between the two acts of delivery does not, in their Lordships' view, materially affect her credit. Again, her contention in the former suit that her husband and the defendant were undivided brothers, may, under the circumstances, have been raised *bond fide*. The fact which was found against her cannot have been in her own personal knowledge, and it was one which before that decree was not perfectly clear. That she should have undervalued (if she did undervalue) the amount of property in the goutaghoro will surprise nobody con-

versant with native suits in India. On his side, Raghunadha grossly exaggerated the amount and value of that property. Again, the alleged gift of the jewels and cash to her was no doubt found by the same learned Judge against her. There may have been no appeal against his decision (the adoption having then taken place), but it is obvious that the fact of that gift is again in issue in this suit, and that it was more or less determined in the other upon the view which this same Civil Judge then formed of the credibility of the plaintiff's witnesses in this suit. There is, however, one circumstance connected with that suit of 1870 which affects the credibility, not only of the Mahadevi, but of other witnesses for the plaintiff, and ought here to be considered. That circumstance is the date on which the gift was said to have taken place. The Mahadevi, in that as in the present suit, deposed that she received the key and the written authority to adopt on the same day. And this is the story now told by those of the witnesses who, in their depositions in the former suit, were silent on the authority to adopt. But the date assigned to the gift of the jewels throughout the suit of 1870 was "two days" before the Rajah's death, which, in common parlance, would import, and seems to have been so understood, the 21st November. The date assigned to the transaction in this suit is a date between which and that of the Rajah's death two clear days intervened, i.e., the 20th November.

This circumstance would be almost fatal to the plaintiff's case as to Q if it were possible to suppose that that case had been got up after the evidence in the jewel suit was given. But the depositions in that suit were taken in December 1870; and when it is shown beyond all doubt that the Mahadevi had at least as early as the 18th March 1869 (in her petition at page 70), stated the date of the alleged authority to be the 20th November; that the witnesses who impeach Q which bears that date, admit it to have been in existence ten days after the Rajah's death, and say that Sumanto was the concoctor of the fraud; it is impossible to suppose that Sumanto would ever have treated the authority to adopt as executed only on the 21st. Nor, indeed, is it easy to see why the gift of the jewels should have been represented to have taken place on that day. One of the issues contested in the cause was whether Adikonda was of sufficient mental capacity to make the gift; and the nearer to the time of his death the date of the gift was laid, the greater the difficulty of showing his capacity of making it. There may have been some strange confusion in the jewel suit as to the effect of the term "two days before his death," and misapprehension as to the date to which the witnesses then meant to depose. Their Lordships are unable further to explain this discrepancy; but for the reasons above given they do not think that it seriously affects the question now under consideration.

Their Lordships desire next to say a few words about two documents of which much has been said in the argument before them.

The first is E. E., at page 89 of the Record. Their Lordships are not inclined to adopt the statement of the defendant, that he signed this security bond without a knowledge of its contents. They do not, however, attach much weight to the words, "as soon as I, or my son, from my giving him in adoption, get possession of our zemindary," as evidence in favor of the genuineness of Q; for the utmost that any inference to be fairly drawn therefrom would establish is, that in January 1869, the defendant knew that the Mahadevi had asserted an authority to adopt (a circumstance which is otherwise probable); contemplated the possibility of the power being established and his son adopted under it; and was persuaded by his creditor to provide against such a contingency. Siva Purohit was at that time acting for the Mahadevi; and if Q. were forged, the defendant would not then have had the knowledge which he says he subsequently acquired of the fabrication of the document. The most, then, that can be said of E. E. is that it contradicts his statement, that he knew nothing of an alleged authority to adopt until a later period.

The other document is R. It is dated the 26th November, and contains a distinct statement by the Mahadevi that her husband, on the 20th November, executed in her favor a written authority to adopt, to the effect of Q. It bears upon it the words (by whom written is not known), "Received 1st December evening, by hand, foul copy." The contention on the part of the defendant is that this document affords no legal proof of the contents of the second urzi, stated in the Collector's letter of the 2nd December to have been received by him from the Mahadevi; and that the terms in which he refers to that urzi are consistent with the supposition that the Mahadevi then put forward only an oral authority to adopt—Q not having then been fabricated. What the Collector says on this point is:—"In her second (letter) she adds that it was her husband's express wish that, if she brings forth a son, such son should succeed; if a daughter, that she (the widow) should then adopt a son." These terms are not necessarily inconsistent with those of R. All that can be said of them is that they do not state affirmatively that she alleged her husband's wish to have been expressed in writing, or on a particular day.

It is now admitted on both sides that R is not the original urzi; that it is not an official copy of it, which, as such, would be receivable as evidence; and that if grounds had been laid for proving the contents of the missing urzi by secondary evidence, R has not been shown to be a true copy of it. Each side has imputed to the other foul play in respect of this document, but neither hypothesis is supported by proof or probable in itself. The proceedings afford some grounds for thinking that the original urzi, as well as R, was produced from the Collectorate, but it seems that, owing to a blunder or, as suggested, a fraud on the part of a vakeel, R was shown to the witnesses who were at first examined upon it as if it were the original, and that the original, if ever before the Court, has slipped out of the record.

It is to be regretted that when the mistake was discovered, and the contest about this document arose, the Civil Judge did not further investigate, by enquiry at the Collectorate or otherwise, the history of R and ascertain what had become of the original urzi. Either party might have called on the Judge to do this, but neither did so. It was suggested by Mr. Norton in his reply, that their Lordships might now see fit to direct such an enquiry. They do not, however, think that they would be justified in thus prolonging this litigation, inasmuch as they do not consider that a knowledge of the precise terms of the second urzi is essential to the determination of the issue before them. It is no doubt true that if the second urzi were in the terms of R the Mahadevi must have asserted the existence of a written authority to adopt bearing the same date and to the same effect as Q before the date at which Q is said by the defendant's witnesses to have been fabricated. But this circumstance, though it would throw considerable discredit on the defendant's case, would not conclusively disprove it; because it is possible that the document so said to exist might not have then actually come into existence. Again, if the second urzi were only in the terms of the Collector's letter, it would not, as has before been observed, be inconsistent with the existence of a written authority to adopt. Their Lordships will, therefore, deal with the questions before them on the assumption that the precise terms of the second urzi have not been proved, and leave the plaintiff to bear the burden of having failed to establish that, before the 2nd December, the Mahadevi asserted that she had a written authority of a particular date; and the defendant to bear that of having failed to show affirmatively that she then asserted only a parol authority. They now proceed to consider the grave objections to the genuineness of Q, which the learned Counsel for the defendant have founded on the form and appearance of the document.

Their Lordships have the original before them, and so far as they can judge some of these objections are, to say the least, plausible. The list of witnesses in

the handwriting of the writer of the instrument is unusual. It is also unusual for the witnesses to sign before the executing party, and to write their signatures immediately above his. The form of the instrument might naturally be expected to be that of exhibit X. d. (p. 77), the translation submitted to Government by the Mahadevi's vakeel with her petition of the 26th July 1869; and it has been contended on the part of the appellant that that exhibit was purposely so modified in order to avoid the suspicions which a more literal translation of Q would have engendered. Lastly, it was contended that the appearance of the document is inconsistent with the evidence which represents that all the signatures were written at the same time, and with the same pen and the same ink; the fine signature of Balaji being written after those of the subscribing witnesses. Their Lordships were certainly at first much impressed by the last objection. It is, however, to be observed that after insisting on the impossibility of all the signatures being written with the same pen, the Zillah Judge, on the 26th November 1871 (p. 311), saw fit to record that, having just had to look again at Q., he thought it quite possible, though not very likely, that with the pen that made the last "ro" of Sumanto's signature Adikonda might write as well as his signature is written; and a good writer like Balaji might write as finely as his signature is written. Very different appearances may certainly be produced by the same pen and ink when used by different hands; and this is more likely to happen with the coarse ink that is used by the natives of India.

Again, as regards the objection founded on X. d., it is to be observed that it seems to be satisfactorily answered by the Judge himself at p. 318, who finds that X. d. is, in fact, the translation of a Telegu version of Q., taken down probably by a Telegu man from the mouth of Iswara Puttro, there probably being few persons at Madras who could read or translate an Oorya document like Q.

Of the list of witnesses, it is sufficient to say that it is difficult to see why it should have been inserted in Q., if it were not done by the order of the Rajah. The suggestion on the other side is that it was inserted in order to fill up the space above the Rajah's signature on the blank paper. But surely a forger would have had no difficulty in expanding the document so as to fill up the vacant space. Nor, as their Lordships have already remarked, is it likely that a forger would have inserted the name of Damapattojosi in that list until he had ascertained whether that person was willing to sign.

Upon the whole, then, their Lordships dealing with this document as one which bears the genuine signature of Adikonda; and as containing a disposition which he was likely to make; and weighing the evidence and the probabilities in favor of the plaintiff's case, against the evidence and the probabilities in favor of the defendant's case, have, not without doubt or difficulty, come to the conclusion that the former so preponderates over the latter that they ought to pronounce in favor of Q., as a valid written authority to adopt executed by Adikonda on the 20th November 1868.

This finding is, of course, sufficient to dispose of the present appeal; and renders it unnecessary for their Lordships to consider whether, if it had been the other way, they could have affirmed the decree of the High Court upon the grounds stated in the judgment of Mr. Justice Holloway. The great importance, however, of the subject induces them to make some observations upon it.

That, according to the law prevalent in the Dravada country, which includes the district in which the Chinnakimidy zemindary is situate, a Hindoo widow, not having her husband's express permission, may, *if duly authorized by his kindred*, adopt a son to him, is a proposition which cannot now be controverted. The law has been so settled by the decision of this Committee in the Ramnad case;* and the principles and authorities upon which it rests are elaborately considered and reviewed both in the judgment of the Committee, "12 Moore,

* See also 10 W. R. P. C. 17; 2 Suth. P. C. R. 135.

Indian Appeals, p. 269," and in the judgment of Mr. Justice Holloway in the same case, "2 Madras, H. C. R., page 206."

The two judgments, however, though agreeing in this general conclusion, which was all that was necessary for the determination of the cause, were by no means *ad idem* on several points, and notably on the nature of the authority required.

Mr. Justice Holloway intimated an opinion that, if the requirement of consent is more than a moral precept, the assent of any one of the husband's sapindas would suffice. This Committee was far from adopting that broad proposition. It pointed out that on the question, who are the kinsmen whose assent will supply the want of a positive permission from the husband, the authorities are extremely vague; that there exists a broad distinction between cases in which the deceased husband was a member of a joint and undivided Hindoo family; and those in which, he being separated, the widow has taken his estate by right of inheritance; but that, even in the latter case, the assent of some person who stands to her in the relation of protector may be requisite. It is unnecessary to repeat at large this portion of their Lordships' judgment on that occasion which is to be found at pages 441 to 443 of Mr. Moore's Report.

The question has since come before the "Sudder Court of Travancore" in the case reported in the "Madras Jurist" of February 1873; and before the High Court of Madras in the present case. In the Travancore case the Court, though a foreign Court not bound by the decisions of this tribunal, in a judgment of remarkable ability and research, adopted the principles suggested by this Committee as those which should govern the determination of the question in the case of an undivided family, and ruled that the assent of certain separate dayadies of the deceased husband was not sufficient to validate an adoption by a widow, to which the husband's undivided brother and the head of the undivided family had not assented. In the present case Mr. Justice Holloway, adverting to what was said by this Committee in the Ramnad case, concerning an undivided family, observed, "Whether this be so or not, it has no application to the present case, in which the property is to be held in severalty, and not in coparcenary." And he finally formularised the following propositions:—

1. The adoption by the widow, with the assent of a sapinda, is a substitute for the actual begetting by a sapinda.
2. That the argument from analogy is in favor of the assent of one sapinda rather than more.
3. That his assent is not to supply a capacity for rights, but a capacity for action.
4. That proximity to the deceased with respect to rights of property is wholly beside the question, and if this were not so, the rule would be entirely defeated.
5. That in the present case that capacity has been sufficiently supplied, as in the law which this assent of sapindas has superseded, a child begotten by this assenting sapinda would have been undoubtedly legitimate.

Their Lordships cannot adopt these propositions as a correct exposition of the law.

They observe in the first place that they are all more or less founded on the assumption that the law of adoption now prevalent in Madras is a substitute for the old and obsolete practice of raising up seed to a deceased husband by actual procreation; and that the limitations, if any, upon the power to adopt are to be traced by analogy from that practice. In the Ramnad case (12 Moore, I. A., p. 441*) their Lordships, after stating their general conclusion, added the following observations:—"They think that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural develop-

ment of the Hindoo law, or upon analogies, real or supposed, between adoptions according to the Dattaca form, and the obsolete practice, with which that form of adoption co-existed, of raising up issue to the deceased husband by carnal intercourse with the widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient treatises above referred to, and in particular by the Dattaca Mimansa of Vidya Narainsamy, the author of the Madhavyan; but as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention."

To these remarks of their predecessors their Lordships adhere. They desire further to observe that it is to their minds extremely doubtful whether the supposed analogy is sufficient to support Mr. Justice Holloway's propositions in their integrity. The myth of Satyavaty referred to by Narainsamy, and most of the texts relating to the obsolete practice which are to be found collected in Colebrook's Digest and elsewhere, all imply an authority external to the widow as the justification of her act, an act repugnant to the general rule of asceticism and celibacy imposed upon Hindoo widows. Most of the texts speak expressly of "the appointed" kinsman. By whom appointed? If we are to travel back beyond the Kali age, and speculate upon what then took place, we have no reasonable grounds for supposing that a Hindoo widow, desirous of raising up seed to her deceased husband, was ever at liberty to invite to her bed any sapinda, however remote, at her own discretion; and that his consent, of itself, constituted a sufficient authorization of his act.

Positive authority, then, does not do more than establish that, according to the law of Madras, which in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay, a widow, not having her husband's permission, may adopt a son to him, if duly authorised by his kindred. If it were necessary, which in this case it is not, to decide the point, their Lordships would be unwilling to dissent from the principle recognized by the Travancore case, viz., that the requisite authority is, in the case of an undivided family, to be sought within that family. The joint and undivided family is the normal condition of Hindoo society. An undivided Hindoo family is ordinarily joint not only in estate, but in food and worship; therefore not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly or by implication delegated the task of regulation. The Hindoo wife upon her marriage passes into and becomes a member of that family. It is upon that family that, as a widow, she has her claim for maintenance. It is in that family that in the strict contemplation of law she ought to reside. It is in the members of that family that she must presumably find such councillors and protectors as the law makes requisite for her. There seem to be strong reasons against the conclusion that for such a purpose as that now under consideration she can at her will travel out of that undivided family, and obtain the authorization required from a separated and remote kinsman of her husband.

Mr. Justice Holloway, however, not directly determining anything adversely to the principle affirmed in the Travancore case, distinguishes the present on the ground that, although the family must be taken to be undivided, the particular property is to be held in severalty and not in coparcenary. It is not necessary for the determination of this appeal that their Lordships should decide whether this distinction can be supported, and they abstain from doing so. They may, however, observe that a distinction which is founded on the nature of property seems to belong to the law of property, and to militate against the principle which Mr. Justice Holloway has himself strenuously insisted upon elsewhere (2 Madras, H. C. R., p. 229), viz., that the validity of an adoption is to be determined by spiritual rather than temporal considerations; that the substitu-

tion of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property a mere accessory to it.

Their Lordships desire further to observe, that even if the distinction suggested were adopted, it would be necessary, in order to maintain the present adoption as one duly made without the permission of the husband, to go the full length of ruling that the assent of one separated and distant sapinda (and that the natural father of the child taken in adoption) is an authority sufficient to validate the act.

Mr. Justice Holloway, indeed, in one place treats Raghunadha as an assenting party to the exercise of the power to adopt, though not to the particular adoption.

Their Lordships, however, are of opinion that even this general assent is not established by E. E., or by the other evidence in the cause. The parol testimony on this point is untrustworthy; and E. E., taking it at its highest, is consistent with the supposition that Raghunadha then intended only to provide for the contingency of the Mahadevi's establishing the authority to adopt, which she said she had derived from her husband, and exercising it in favor of his son. It must, therefore, be taken that the only sapinda of Adikonda, who is shown to have assented to this adoption, is the Rajah of Piddakimidy, the father of the adopted child; and their Lordships have already intimated their grave doubts whether such assent would in any case have constituted a sufficient authority.

In the present case there is an additional reason against the sufficiency of such an assent. It is admitted on all hands that an authorization by some kinsman of the husband is required. To authorize an act implies the exercise of some discretion whether the act ought or ought not to be done. In the present case there is no trace of such an exercise of discretion. All we know is, that the Mahadevi, representing herself as having the written permission of her husband to adopt, asked the Rajah of Piddakimidy to give her a son in adoption, and succeeded in getting one. There is nothing to show that the Rajah ever supposed that he was giving the authority to adopt, which a widow, not having her husband's permission, would require.

Their Lordships have deemed it right to make these remarks, though not essential to the determination of the present appeal, because this doctrine of the power of a widow, not having her husband's express permission to adopt a son to him, which, before the decisions in the Ramnad case, had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of Madras. It may be the duty of a Court of Justice administering the Hindoo law to consider the religious duty of adopting a son as the essential foundation of the law of adoption; and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems therefore to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it; and the propositions of Mr. Justice Holloway appear to their Lordships calculated unduly to enlarge those limits.

Their Lordships have further to observe that the decree, as it stands, makes the defendant accountable for mesne profits from the time when he was placed in possession by the order of Government. That was about September 1869. At that time Raghunadha was, in default of a son of Adikonda, natural or adopted, unquestionably entitled to the zemindary. The adoption took place on the 20th November 1870, and the plaint states that the cause of action then accrued to the

plaintiff. The plaint itself was filed on the 15th December 1870, and there is no proof of a previous demand of possession. Their Lordships are of opinion that the account of mesne profits should run only from the commencement of the suit. They think that the decree, with that modification, ought to be affirmed, and they will humbly advise Her Majesty accordingly. But their judgment must be understood to proceed on the establishment of Q as a genuine permission to adopt; and not upon the ground upon which the High Court principally relied. The costs of the appeal must follow the result.

The 28th March 1876.

Present :

The Lord Chancellor, Lord Selborne, Sir James W. Colvile, Sir Barnes Peacock, Sir Montague Smith, and Sir Robert P. Collier.

*Bhownuggur Cession Case—Transfer of Jurisdiction—Cession of Territory—
Legislation as to Sovereignty—Territorial Jurisdiction—Evidence Act.*

On Appeal from the High Court of Judicature at Bombay.

Damodhar Gordhan

versus

Gunesh and others.

The Thakoor of Bhownuggur having up to 1866 held different portions of his estates in Kattywar under two different kinds of jurisdiction, by one of which he exercised high Civil and Criminal powers as an independent prince under the supervision of a Political Agency representing the British Government, while by the other he occupied the position of a subject in British territory; and the Government of India having resolved on removing the irritation felt by the Thakoor at this distinction, by transferring the territory under British jurisdiction to the more immediate jurisdiction of the Thakoor, by an agreement under which, however, the transferred territories should revert to the jurisdiction of the British Government in the event of any gross misconduct on the part of the Thakoor, of which misconduct the Government of Bombay was to be the Judge:

HELD, *firstly*, that, if such a transfer were valid, it would not amount to a cession of British territory to a native State, but would merely amount to a transfer of certain territories from ordinary British to a special local jurisdiction; but, *secondly*, that the transfer in the present case, which was alleged to have been effected by sundry notifications in Government Gazettes, was not valid, because even such a transfer as was contemplated could not legally be effected without a Legislative Act, such as had not been passed in this case. **HELD**, also, that as the Governor-General in Council is precluded from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, no Legislative Act, purporting to make a Government notification conclusive evidence of a cession of territory, could exclude a judicial enquiry as to the nature and lawfulness of any such alleged cession. **HELD**, also, that the jurisdiction of the High Court over the territory in question was territorial, and would cease immediately on a valid cession.

Sir Wm. V. Harcourt, Q.C., Mr. Fitzjames Stephen, Q.C., and

Mr. Macnaghten, for Appellant.

Mr. Forsyth, Q.C., and Mr. J. D. Bell for Respondents.

In this suit, which was instituted in the British Court of Gogo for the recovery or redemption of certain land situate in the village of Gangli, on the footing of mortgage, a decree for the plaintiff (whose representatives are the respondents here) was made by the Moonsiff of Gogo, but was reversed on appeal by the Assistant Judge of Ahmedabad. On a special appeal by the plaintiff to the High Court of Bombay, the case was remanded to the Court of Ahmedabad for re-trial.

So far, there was no question of the jurisdiction of these different Courts over the land in controversy, as territorially situate within their proper limits, and over the parties to the suit as resident within the same limits. But in 1866, after the

remand by the High Court, the jurisdiction of all these Courts is alleged by the appellant to have ceased by reason of the cession by the British Government of certain territory, within which Gangli was included, to a native potentate, the Thakoor of Bhownuggur. A notification that the territory so alleged to have been ceded was removed, from and after the 1st February in that year, from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency, appeared in the "Bombay Government Gazette" of the 29th January 1866. The District Judge of Ahmedabad proceeded, nevertheless, to rehear the appeal, and, on such rehearing, he restored the original judgment of the Moonsiff of Gogo in favor of the plaintiff. Thereupon the defendant brought another special appeal to the High Court of Bombay, alleging the notification in the Gazette of the 29th January 1866, as proof that the rehearing had been *coram non judice*; but the High Court, on the 2nd December 1870, rejected this special appeal, holding that notification to be insufficient to show that the jurisdiction of the Court of Ahmedabad had ceased before the rehearing. On a petition, however, by the defendant for a review of that order, accompanied by some further documentary evidence, the High Court appears to have considered (Record, p. 191) that a transfer of lands from British territory to the jurisdiction of a native prince, by the authority of the Secretary of State for India, might have been authorized by the Statute 21 and 22 Vic., cap. 106, sec. 3 : and a review of the order of the 2nd December 1870 was therefore directed. On the review, the Judges of the High Court held that it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a foreign power; and on that ground they made the order of the 24th March 1873, now under appeal, confirming their former order of the 2nd December 1870. The question, whether the law thus laid down by the High Court of Bombay is correct, was fully and ably argued at this bar in July last; and their Lordships would have been prepared to express the opinion, which they might have formed upon it, if, in the result of the case, it had become necessary to do so. But, having arrived at the conclusion that the present appeal ought to fail, without reference to that question, they think it sufficient to state, that they entertain such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court of Bombay, as to be unable to advise Her Majesty to rest her decision on that ground.

Before, however, the judgment rejecting the special appeal to the High Court of Bombay can be reversed, their Lordships must be satisfied that there was, in this case, an actual cession of territory, which had the effect, before the rehearing by the District Judge of Ahmedabad, of depriving Gangli of the character of British territory, and its inhabitants of the status and rights of British subjects. That question, considered as one of fact in this particular case, apart from the general constitutional question as to the power of the Crown to make a cession in any case, does not appear to have been so fully considered by the High Court of Bombay as their Lordships think it deserved to be. It has now (on the 17th February last) been the subject of a separate argument at this Bar.

The facts, material to the determination of this question, may be thus stated.

There are in the Province of Kattywar one or more talooks, of large extent and value, belonging to the Thakoor of Bhownuggur, which (whether that Province ought or ought not to be regarded as a part of Her Majesty's Dominions) have never been brought under the ordinary administration of the British Government in India. The Thakoor is also the proprietor of other large talooks (the town and port of Bhownuggur, and many other villages and places, including Gangli), forming part of the districts of Dundooka and Gogo, etc., which, having previously been part of Kattywar, were ceded by the Peishwa to the British Government in 1802, by the Treaty of Bassein. The territory so ceded was left, till 1815, under native administration; but in that year it was brought under the ordinary juris-

diction of the British Courts of the Bombay Presidency, and so remained until those proceedings in 1866, the effect of which is now in question. As to these latter estates, the Thakoor, and all his dependents residing thereon, were (beyond controversy) subject to British law and jurisdiction.

Before 1802 the whole Province of Kattywar was divided between the Peishwa and the Guikowar, who claimed over it sovereign rights, chiefly consisting in the exaction of tribute. A small number of estates in the Province were held rent-free; but for the greater part the Chieftains paid tribute, of the same character (so far as their Lordships can judge), as the land-revenue which is paid to the Government in British India; and Mr. Aitchison, in a work of authority, referred to on both sides at the Bar ("Treaties," vol. vi., p. 366), states, that the sovereignty of the country was understood by the Chiefs to reside in the power to which this tribute was paid. The rest of the rights of the Peishwa, in those parts of Kattywar which had not been transferred to the British Government by the Treaty of Bassein, were ceded to Great Britain in 1817.

With respect to the Guikowar (leaving out of consideration one or more talooks, of which that Prince is at the present day the direct proprietor), it appears that in 1807 a settlement was made between the Guikowar and the Chiefs tributary to him, through the intervention, and under the guarantee, of the British Government; engagements being then taken for the payment of a fixed revenue by those Chiefs whose estates were not held rent free. The amount of tribute then fixed for the Kattywar estates of the Thakoor of Bhownuggur, was Rs. 74,000; and as it was thought expedient to consolidate the whole of the claims over all the Thakoor's estates, an agreement was made, with his consent, for the transfer of the revenue payable by him to the Guikowar for his Kattywar estates to the British Government, as part of the consideration for certain arrangements, which were at the same time made for the support of a contingent force. In 1820, by a further agreement, the Guikowar engaged to send no troops into Kattywar, and to make no demands upon the province, except through the British Government. Since that date, the supreme authority in Kattywar (as far as it had been previously vested in the Peishwa, or in the Guikowar), has been exercised solely by the British Government. The tribute payable by the different Chiefs has been collected by the British authorities; the Guikowar receiving from them the share of it, to which he is entitled according to the existing agreements. The tribute payable in 1871 by the Thakoor of Bhownuggur (in respect of the aggregate of his Kattywar estates, and of the estates included in the alleged cession of 1866), is stated in the "Kattywar Local Calendar and Directory" of that year, (a book referred to during the last argument, as containing correct information on public matters relating to the province), as amounting in the whole to Rs. 154,917 per annum: of which Rs. 128,060 were collected in right of, and retained by, the British Government; Rs. 3,999 were collected in right of, and paid over to, the Guikowar; and the sum of Rs. 22,858 was a customary sub-tribute, paid, under the name of "Zortullubee," to the Nawab of Joonaghur, one of the chiefs of the province, who appears formerly to have established some kind of superiority over the rest.

Their Lordships have now to refer to the judicial administration of Kattywar. Down to 1831, this appears to have been left, without any regular control, in the hands of the Chiefs. But in that year (a "Political Agency" having been established at Rajcote in 1820), the British Government constituted a Criminal Court of Justice in Kattywar, under the presidency of the Political Agent, with three or four Chiefs as Assessors, for the trial of capital crimes in the estates of Chiefs who were too weak to punish such offences, and of crimes committed by petty Chiefs upon one another, or otherwise than in the exercise of their recognized authority over their own dependents. Until 1853, every sentence passed by this Court was submitted to the Bombay Government for their approval. (Aitchison, vol. vi., p. 367.) In 1862, the whole of this administration was re-organized. The Province

was then divided into four districts (the eastern district including all the Talooks belonging to the Thakoor of Bhownuggur), in each of which were placed officers, called "Political Assistants," with other British Magistrates under them, all under the control of the Political Agent. The entire number of Kattywar States, under separate Chiefs (large and small), is 188 ; of whom 96 pay tribute to, or in right of, the British Government only ; 70 to, or in right of, the Guikowar only ; and 9 (of whom the Thakoor of Bhownuggur is one) to, or in right of, both Governments (" Kattywar Directory," pp. 54-56). These Chiefs were, by the arrangements made in 1862, distributed into seven different classes. To the first class (consisting of four or five, of whom the Thakoor of Bhownuggur is one), unlimited criminal and civil jurisdiction, with the exception of criminal jurisdiction in certain cases over " British subjects " (however that expression ought to be interpreted) was allowed. The jurisdiction of the second class (either originally, or by the effect of a Circular Order afterwards issued, No. 14 of 1866), was substantially the same. The jurisdiction of the four next classes was restricted, in criminal matters, to limited powers of fine and imprisonment ; and in civil matters, to the cognizance of suits of limited amount ; the greatest powers (those of the Chiefs of the third class) being to imprison for seven years, to impose fines of Rs. 10,000, and to decide civil suits of Rs. 20,000 value ; while the sixth class could only imprison for three months, impose fines of Rs. 200, and decide civil suits of Rs. 500 value. The seventh, or lowest class of all, was entirely deprived of all civil jurisdiction, but in criminal cases, might imprison for not more than fifteen days, and impose fines not exceeding Rs. 25. All other jurisdiction, both civil and criminal, throughout the province beyond the limits of that allowed to the Chiefs, was reserved to the British Officers and Magistrates under the authority of the Political Agent ; and in 1871, there was an establishment of thirty-one such Officers and Magistrates in the whole. (" Directory," pp. 520-527.)

In 1863, two elaborate Codes of Regulations (based upon the Indian Penal and other Codes), were promulgated with the sanction of the Indian Government, for the guidance of the British Judicial Officers and Magistrates in Kattywar. (" Directory," pp. 176-253.) These Codes established, both in name and in substance, regular and fully-organized Courts of Justice, with powers to execute warrants and issue commissions throughout the Province, and to take security from suspected persons in the name of the Queen. (Articles 39, 55, and 154 of the Criminal, and Article 104 of the Civil Code). It may be added that, on the face of these Codes (especially by Article 10 of the Civil Code, which pointedly distinguishes the Chiefs of Kattywar from " Sovereign Powers," and " Independent Chiefs "), and by several later Circular Letters of the Political Agents (No. 11 of 1866, No. 2 of 1867, No. 11 of 1869, and that of the 7th May 1868), the whole jurisdiction exercised by the Chiefs of all the seven classes, is treated as conferred upon them by the British Government.

These being the circumstances which their Lordships think material to a correct understanding of the arrangements between the Indian Government and the Thakoor of Bhownuggur, and of the steps taken to carry them into effect, it now becomes necessary to advert to those arrangements. It appears that the difference between the position of the Thakoor in his Kattywar estates, in which he continued to exercise his ancient powers, paying a fixed revenue, and his position in his British estates (including his two largest towns and his place of residence), in which, since 1815, he had been subject to ordinary British laws, was (in the language of Mr. Aitchison, vol. vi. p. 374) " very irritating to him." With a view (among other things) to remove or diminish this source of discontent, an agreement was concluded between him and the Indian Government in 1860, which is printed at pp. 416-420 of the same volume of Mr. Aitchison's work.

It is entitled " Settlement framed according to Resolutions of the Bombay Government, Nos. 3826 and 3829, dated 23rd October 1860 : "—a title which has

the aspect of an agreement as to rent and other terms of tenure, rather than that of a treaty between the head of a Sovereign State and a Foreign or Independent Power. When the particular terms of this agreement are examined, they confirm that impression.

By the 1st and 8th Articles, the Thakoor of Bhownuggur and the British Government reciprocally agreed to cancel, from and after the 1st May 1861, "the lease of the villages of the Thakoor's talooks in the districts of Dundooka, Ranpore, and Gogo, which was executed in A.D. 1848," and "instead thereof the Thakoor agreed to pay, for the whole of the villages enumerated in that lease, a fixed jumma of Rs. 52,000 yearly for ever," which sum "shall not be in any way affected by the result of any action or other process brought by any party against the Thakoor's right of possession, in any part of the said talooks; nor shall the said estates (excepting Bhownuggur, with Wudwa, Sehore, and the ten villages thereof, about to be attached to Kattywar) be exempted on account of this payment from any general taxation, not coming under the head of land tax or rental, which Government may impose on their districts under the Regulations."

It appears, therefore, that the talooks in Gogo, including Gangli, which were "about to be attached to Kattywar," had been included in the lease of 1848, which was then to be cancelled; and that, although the Government did not reserve, as to those particular talooks, the same right of "general taxation" which they expressly reserved as to the residue of the Thakoor's British estates, which were intended to continue subject to the Bombay Regulations, still those talooks were included in the estates in respect of which a fixed jumma of Rs. 5,200 was to be paid in perpetuity by the Thakoor.

By the 2nd Article, the Thakoor agreed (certain questions of account between himself and the British Government being thereby adjusted), "to pay up his Kattywar tribute, (i.e., the jumma for his Kattywar property, which had been fixed in perpetuity in 1807), yearly in full, according to settlement."

By the 3rd and 9th Articles it was reciprocally agreed, that the port dues and customs of the port of Bhownuggur should continue to be collected at British rates, and by the British Government; but that, when collected, the whole net produce of the port dues, and three-fifths of the net produce of the customs (as "the share of the Thakoor"), should be paid over to the Thakoor by the Government, who were to retain, as "the share of Government," the other two-fifths of those customs.

The town and port of Bhownuggur were part of the territory to which the 7th Article (that directly bearing upon the present question) relates. That Article is in these words:—"Upon the above conditions Her Majesty's Government agree as follows: Government concede, as a favor, and not as a right, the transfer of Bhownuggur itself, with Wudwa, Sehore, and ten subordinate villages, from the district of Gogo, subject to the Regulations, to the Kattywar Political Agency.

This is not the language of cession. It is *prima facie* nothing more than an engagement for the transfer of the places mentioned (including Gangli), which were then, beyond question, British territory, from a Regulation Province, to an extraordinary jurisdiction. The other Articles are consistent with this view.

After the conclusion of this agreement in 1860, a delay of some years followed before anything was done with a view to give effect to the provisions of the 7th Article; "owing (as Mr. Aitchison states, vol. vi., p. 374), to some doubts as to the precise status of Kattywar with respect to British laws." In 1865, however, the Thakoor pressed for the completion of the arrangement. In the letter from the Secretary to the Government of India of the 31st May 1865, to the Acting Secretary of the Government of Bombay (printed at page 181 of the Record), the measure is described as "the contemplated transfer of the town of Bhownuggur, of the district of Sehore, and of the villages in Dundooka and Gogo, to the supervision, laws, and regulations of the Kattywar Political Agency." By that letter

the Governor-General in Council authorized "the contemplated arrangement" being at once carried into effect, with the reservation, however, for which the Government of Bombay were directed carefully to provide, that, "in the event of gross misconduct on the part of the Thakoor (of which the Government of Bombay were to be the judges), these territories should revert." A reason was added for holding that "the projected transfer would have been legalized" by the agreement of 1860;—viz., that "Her Majesty's Secretary of State for India had decided that Kattywar was not British territory."

Their Lordships think that, if such an opinion had been expressed by the Secretary of State for India (of which no direct evidence is found in the papers before them), and if that opinion could be proved to be well founded, it would still not have the effect of converting a transfer of certain British territories from ordinary British jurisdiction "to the supervision, laws, and regulation of the Kattywar Political Agency," into a cession of British territory to a Native State. Such a cession would be a transaction too important in its consequences, both to Great Britain and to subjects of the British Crown, to be established by any uncertain inference from equivocal acts.

Their Lordships assume (though the precise language used does not seem to be quite apt for that purpose), that what was intended was to confer upon the Thakoor of Bhownuggur, within the "transferred" districts, as large a criminal and civil jurisdiction as that which he exercised in his estates situate within the proper limits of the Kattywar Political Agency, subject only to the same supervision and control of the Kattywar Political Agent, to which he was subject in respect of those estates.

But such a grant of jurisdiction (if the Government of India, or the Crown, without a Legislative Act, had been able to grant it), would not have deprived the Crown of its territorial rights over the "transferred" districts, or the persons resident therein of their rights as British subjects. Whatever may have been the opinion of the Indian Government as to the effect of what was done (concerning which their Lordships will only observe that the documents of 1870 and 1871, printed at pp. 183 and 184 of the Record, take it for granted that a cession of territory to a native State had been made, which is the point to be determined), their Lordships' judgment must be founded, not on mere opinions, but on facts; and they find, in point of fact, that there was no cession of territory in this case, unless it can be deemed to have been made by the agreement of 1860, or by the notification in the Bombay Government Gazette of the 29th January 1866 (issued no doubt in obedience to the directions of the Indian Government, contained in the letter of the 31st May 1865); which merely declared, that "in accordance with the Convention, etc." (i.e., with the agreement of 1860), the villages in question were, "from and after the 1st February 1866, removed from the jurisdiction of the revenue, civil, and criminal Courts of the Bombay Presidency, and transferred to the supervision of the Political Agency in Kattywar, on the same conditions as to jurisdiction as the villages of the Talooka of the Thakoor of Bhownuggur heretofore in that province." (Record, p. 176.)

Their Lordships agree in the reasons given by the Judges of the High Court of Bombay, on the 2nd December 1870, for holding this notification insufficient for the purpose intended; and they are unable to find, in any of the other documents afterwards submitted to that Court on the application for a review, any good reason for the subsequent departure of the High Court from that opinion, so far as to admit a review. The second notification of the 4th January 1873, which appeared in the "Indian Gazette" after the review had been ordered, also left the case substantially where it stood before. That notification was merely to the effect that the villages mentioned in the schedule "were, on the 1st February 1866, ceded to the State of Bhownuggur." The nature and effect of the act, so described as a "cession to the State of Bhownuggur," remains (as it was before) a proper subject

for judicial enquiry. What was attempted was, in their Lordships' judgment, neither more nor less than a rearrangement of jurisdictions within British territory, by the exclusion of a certain district from the Regulations and Codes in force in the Bombay Presidency, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a native jurisdiction, under British supervision and control. But this could not be done without a Legislative Act, which, in this case, was never passed. By the Imperial Statute, 3rd and 4th Wm. IV, cap. 85, s. 43, a general power of legislation (with certain exceptions not material for this purpose), was given to the Governor-General in Council as to (among other things) "all Courts of Justice, whether established by His Majesty's charters or otherwise, and the jurisdiction thereof." This power is, in substance, continued by 24 and 25 Vict. cap. 67, s. 22, though the particular clause of the former statute is repealed. By the 24th and 25th Vict., cap. 104, s. 9, the High Courts of the several Presidencies were established, with such jurisdiction as Her Majesty should, by Her Letters Patent, confer upon them; and, under the same statute, each of those Courts was also to have and to exercise, "save as by Her Majesty's Letters Patent might be otherwise directed, and subject to the Legislative powers, in relation to the matters aforesaid, of the Governor-General in Council," all jurisdiction, power, and authority previously vested in any of the East India Company's Courts within the same Presidency, which were abolished by that Act. It is unnecessary to refer to later enactments, which only modified these provisions, in a way not affecting the present case. The jurisdiction, therefore, of the Courts of the Bombay Presidency over Gangli rested, in 1866, upon British Statutes; and could not be taken away or altered (as long as Gangli remained British territory), so as to substitute for it any native or other extraordinary jurisdiction, except by legislation, in the manner contemplated by those Statutes.

Upon two subordinate points in this case their Lordships think it right to add that they agree with the view taken by the High Court of Bombay.

Nothing, in their judgment, turns in this case upon the Indian Evidence Act of 1872, s. 113. The Governor-General in Council being precluded by the Act 24 and 25 Vict., cap. 67, s. 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any Legislative Act, purporting to make a Notification in a Government Gazette conclusive evidence of a cession of territory, exclude enquiry as to the nature and lawfulness of that cession. And with respect to the competency of the Courts of the Bombay Presidency to proceed with the suit between these parties, if Gangli had, by any valid cession, ceased to be British territory, their Lordships agree with the High Court that the foundation of the jurisdiction of those Courts over the subject-matter of this suit, and the parties thereto, was territorial, and that it could no longer be exercised (whatever might be the stage or condition of the litigation at the time) after such a valid cession had been made.

Their Lordships will humbly advise Her Majesty to dismiss the appeal.

The 6th May 1876.

Present:

Sir James Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Vendor and Purchaser—Benamtee—Cause of Action.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Bisheswari Debya

versus

Govind Persad Tewari and others.

Where a *kobala* was entered into with the plaintiff by a Hindoo widow as vendor, and was perfectly consistent with her being *benamteedar*, and perfectly consistent with the allegations in the plaint that her sons caused her to enter into it on their behalf, they being the real owners, they being the real vendors, and they being the persons who actually received the purchase-money, which in a given event was to be returned :

Held, upon the plaint and the allegations found in it, that the plaintiff had disclosed what might be a cause of action against the sons as well as the mother, and was entitled to an adjudication of the question, whether the contract was really entered into by the mother as the agent and on behalf of the sons and by their authority, or whether the plaintiff, knowing the facts, had elected to treat the mother as the sole contracting party.

This was a suit to recover, by virtue of a covenant in the nature of a warranty of title, the consideration money paid by the plaintiff under a *kobala*. The facts of the case are set out sufficiently in the judgment of the Judicial Committee, as well as in the judgment of the High Court which had been appealed from. The question in appeal was whether the deed had been executed by a Hindoo widow as the owner, or as agent and on behalf of her sons, and whether the sons could be joined as defendants.

Mr. Cowie, Q.C., and Mr. Bell for the Appellant.

Mr. Forsyth, Q.C., and Mr. Doyne for the Respondents.

The judgment of the Judicial Committee was as follows :—

Their Lordships think, differing from the opinion of the High Court, that there ought to be a remand of the whole cause, and against all the defendants, for trial to the Civil Judge. Both the Courts below have given judgment upon the plaint, and the instrument of sale referred to in the plaint, without any evidence having been gone into. The Civil Judge was of opinion that upon these documents no cause of action was shown against any of the defendants. The High Court thought he was wrong in that view so far as regards one of the defendants, the fourth, but held that there was no cause of action against the first, second, and third defendants, who are the sons of the fourth.

The facts which appear upon the allegations in the plaint are to this effect, that the three first defendants, with a brother who has since died, purchased a property called lot Chagram, a putnee mehal in pergunnah Khond Ghose, from Nand Kishore Dass, the former Mohunt of the Rajgunge Akhra ; that having failed to pay the rent to the zemindar, lot Chagram was sold, and was first purchased for Rs. 22,000 by the three sons, the three first defendants, as sebaits of Iswar Gopal Jeo Thakoor ; that subsequently they presented a petition praying that the name of their mother, Champa Koomari, the defendant No. 4, might be inserted as purchaser in the place of their names, and that the Collector, in compliance with their petition, entered her name as the purchaser. But the plaint states the consideration money was paid out of the funds of the defendants, the sons. Then the plaint goes on to allege the sale

* From the judgment of Markby and Birch, *JJ.*, in Regular Appeal No 137 of 1873, decided 26th March 1874 ;—21 W. R. 398.

to the plaintiff, which it states in this way : " Subsequently on their being desirous of selling the aforesaid lot Chagram, I consented to purchase it, as they (defendants Nos. 1 to 3) were at that time indebted to me in a considerable amount, and agreed to allow a deduction in the consideration money in part satisfaction of their debt referred to ; accordingly"—then comes what is really the most material allegation in the plaint—"on the 9th of Assar 1276 they caused a *kobala* to be executed by the auction purchaser, i.e., defendant No. 4, for a consideration of Rs. 22,200, and the defendants Nos. 1 to 3, being the real owners, became witnesses to the deed." The plaint then refers to a stipulation, for the breach of which the action is brought, which will be referred to presently. It then goes on to show how the consideration money was arranged. "A sum of Rs. 12,672 was deducted both on account of principal and interest, in part satisfaction of the debt which the defendants Nos. 1 to 3 owed to me on the bonds they had executed in my favor ; and one of the bonds was returned to them ; Rs. 3,950 was deducted in part liquidation of the money they owed me on mortgage of certain personalties which, in proportion to the said payment, they took back, and the balance, i.e., Rs. 5,577-8, they have received in (currency) notes and in ready money." The three sons received the whole of the consideration, they were released from large debts, and received the balance in money. This is the mode in which the contract is stated. The contract of sale itself is set out at page 11 of the Record, and no doubt it appears to be a contract entered into by the mother (Champa) with the plaintiff. But that is perfectly consistent with her being *benameedar*, and perfectly consistent with all the allegations in the plaint, that the sons caused her to enter into it on their behalf, they being the real vendors, and they being the persons who actually received the purchase-money, which in a given event was to be returned.

The action is brought for a breach of this provision in the instrument of sale : "If any one making any objection to the sale by me of the said mehal give you trouble in any way, then I will put matters straight. If I fail to do so I will return the consideration money. If I do not return it you will realise it by means of a suit"—that clause providing that in the event of disturbance, and the matter not being put straight, the purchase-money should be refunded. The breach alleged in the plaint is that after the plaintiff had held possession of the mehal as the proprietor thereof, "The Collector of Burdwan, whom the High Court appointed in the month of Kartick 1277 as the receiver of the estates belonging to the Rajgunge Akhra, ousted me in his capacity of receiver from the above mehal, when I made an application to the High Court, seeking to have the estate released ; but the High Court disallowed my prayer, whereupon I wished the defendants either to release the estate or refund the consideration money as stipulated in the *kobala*. They said that they would have the matter settled, but have neglected to do so."

The Civil Judge upon this plaint, and upon this instrument of sale, held that there was no cause of action against anybody, apparently on the ground that this stipulation in the bill of sale was not intended to provide against a general defect of title, but only against objections arising from the personal status of the *benameedar*, the mother, as a Hindoo widow. The High Court thought this view was erroneous, and their Lordships entirely agree with the High Court in the opinion that there is a question to be tried, viz., whether there has been the ouster and disturbance alleged, and whether under the circumstances they constitute a breach of the contract. This is a question depending on the evidence, and the High Court properly remanded the cause to the Civil Judge to try it. But, having made this remand, they decided that the contract was one which bound the mother only, and that the sons not being bound by it, the suit ought to stand dismissed against them.

Their Lordships have some difficulty in perceiving the exact grounds upon which the High Court have come to this conclusion. Mr. Justice Markby seems to admit that there may be circumstances under which the real parties may be bound, although the contract is entered into nominally with the *benameedar*. But he says:

—“ It is contended before us that because Champa Koomari was only what is called a *benamdar*, that therefore all the covenants which she made in this transaction are binding upon the true owners of the property. But no authority for that very general proposition is produced before us, and I certainly do not feel inclined or authorised to lay down any such proposition.” Their Lordships agree with Mr. Justice Markby that no such general proposition can be laid down. The question in all these cases is with whom the contract was made. Cases may be supposed where the contract may be intended, to be made, and may be, in fact, made with the nominal party only ; but, on the other hand, there may be cases where the contract is with the real parties, and probably in the greater number it will be found that the contract is so made ; and when persons are interested on the one side in the estate, and on the other in the money to be received for the estate, the parties who are so beneficially interested on either side are those between whom it may be expected that the contract would actually be. Mr. Justice Markby says at the end of his judgment, “ Whether the male defendants would have been liable had the plaintiff's case been that their names were not disclosed in the transaction, although they were the real vendors, it is not necessary to determine. I think it must be taken upon this point that the plaintiff, knowing the circumstances, has elected to deal with the female defendant on the footing that she is the owner.” Their Lordships think that the learned Judge has taken a mistaken view of the point, because, so far from its appearing upon the point (whatever may hereafter appear upon the evidence), that the plaintiff had elected to deal with the female defendant, the allegations all point the other way ; the allegations are that the sons caused the contract to be made, and the plaintiff throughout treats the mother as the mere instrument, and the sons as the parties entering into the contract.

The question, therefore, to be tried on this point will be, whether this contract was really entered into by the mother as the agent and on behalf of the three sons and by their authority. If it should appear from all the circumstances that the plaintiff, knowing the facts, really did elect to treat the mother as the sole contracting party, then the plaintiff will fail.

Mr. Forsyth in his argument contended that although it might be true that the mother was the agent in making the sale, she must be deemed to be the principal in entering into this particular instrument. Their Lordships think that upon the face of this point there is no foundation for such a distinction. This is not a case where an authority is given to an agent to sell, and the agent exceeds his authority by entering into a particular stipulation ; because not only is it averred in the point (of course that is to be proved) that the sons caused their mother to sell this property, but also that they assented to the instrument of sale by becoming attesting witnesses to it. If that should turn out to be the case when the evidence is given, it would appear that they authorised not only the sale itself, but a sale in the very terms of the *kobala* which the mother executed.

Their Lordships give no opinion whatever on the case upon the merits. They desire to say no more than this, that upon the point and the allegations found in it, they think that the plaintiff has disclosed what may be a cause of action against all the defendants. Whether or not she proves her case at the trial is a totally different question, upon which no opinion can now be given.

In the result, therefore, their Lordships will humbly advise Her Majesty to direct that the decree of the High Court be varied, by ordering that the cause be remanded as against all the defendants.

Their Lordships see no reason why the ordinary rule as to costs should not prevail in this case. The plaintiff will, therefore, have the costs of this appeal, and of the appeal to the High Court ; and their Lordships will direct that the costs of this appeal be taxed by the Registrar, and that these costs and the costs of the appeal to the High Court be the plaintiff's cost in the cause in any event.

The 18th May 1876.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Mahomedan Law—Inheritance—Will—Gift—Onus Probandi—Devise to Pious Uses—Consent of Heirs—Legitimacy—Marriage—Acknowledgment of Son—Presumption.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Khujooroonissa

versus

Mussamut Roushun Jehan.

The policy of the Mahomedan law appears to be to prevent a testator from interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, such as a third, to a stranger. But a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole, or any part of his property to one of his sons, provided he complies with certain forms, the *onus* of proving which clearly is upon those who seek to set up a proceeding of this sort.

According to Mahomedan law, a mere deed of gift without consideration is invalid, unless accompanied by a delivery of the thing given, as far as it is capable of delivery, or a seisin on the part of the donee.

In order to make a deed of gift for a consideration valid, two conditions must concur (1) an actual payment of the consideration, on the part of the donee; and (2) a *bond fide* intention on the part of the donor to divest himself *in presenti* of the property and to confer it upon the donee. The adequacy of the consideration is immaterial.

A devise to pious uses which was in such vague terms as to confer the beneficial interest on the executor, was held to be in contravention of the Mahomedan law and invalid without the consent of the heirs.

The acknowledgment by the father and by the whole family of the legitimacy of a son was held to raise some presumption of the marriage of his mother.

A sufficiently full history of this case is set out in the judgment of the Judicial Committee.

Mr. Cowie, Q.C., and Mr. Bell for Appellant.
Mr. Leith, Q.C., and Mr. Doyne for Respondent.

Sir James Colville delivered the judgment of the Judicial Committee as follows :—

This case, which fills a great mass of printed papers and has occupied much time, finally resolves itself into a few points not attended with any very great difficulty. In order to make those points intelligible a short history of the whole case appears to be necessary. Rajah Deedar Hossein died in 1841, possessed of half of the large zemindary of Soorjapore. He left five sons and five daughters. According to the contention of the one side he left five widows; according to the contention of the other side he left one wife and four concubines. Enayut Hossein, his eldest son, possessed himself of all the property of the deceased Rajah by virtue of two documents which he set up, and which will have to be referred to subsequently, one being a deed of gift as it is called, and the other a will, both dated the 18th November 1839, about two years before the death of the Rajah.

The first document purported to convey to Enayut one-third of the zemindary. The will may be shortly described as giving to Enayut Hossein a third of what remained, burdened with a trust of a somewhat indefinite character for pious uses, but with a bequest of the residue after those pious uses had been satisfied to the beneficial use of Enayut himself. Enayut was put into possession of the whole of the landed property, and it was directed that the other children were not to be

* On appeal from the judgment of Kemp and Seton Karr, *JJ.*, in Regular Appeals Nos. 158 and 178 of 1865, dated 6th January 1866;—see 5 W. R. 4.

enabled to sell or dispose of their shares in any way. Enayut was to pay them certain annuities, which he does not appear to have done, and it was only of the personal property that a division was directed in accordance with the Mahomedan law. By virtue of these documents Enayut took possession of the property of his father, and appears to have reduced the other members of the family to a state of poverty. He struggled for some time to obtain mutation of names, in pursuance of these documents. The mutation was opposed by other members of the family, but was finally obtained in 1844 upon Enayut giving security. After that time some abortive suits were instituted by different members of the family *in formâ pauperis*; but the first proceeding necessary to notice at all at length, is a suit instituted by Khoobunissa, who was the widow of Nuzeroodeen, the third son of Rajah Deedar Hossein, in 1852, as guardian and protector of her infant daughter Roushun Jehan (the present plaintiff), to set aside both the deed and the will and to obtain possession on behalf of her daughter of a 14-anna share (the daughter's share) of the property of Nuzeroodeen. She appears to have also brought a suit for the other two annas on her own behalf.

This suit came to be heard before Mr. Loch, who was the Judge at Purneah in 1855. His decision was to the effect that both the documents, the deed and the will, were in fact executed by the Rajah Deedar; that the deed was valid, but that the will was invalid because it had not obtained the consent of the heirs other than Enayut, which according to his view of the will was necessary by the Mahomedan law. Enayut Hossein appealed against that decision, and Khoobunissa would have had an undoubted right to her cross appeal but for what subsequently transpired. Pending this suit, which was decided in 1855, Enayut Hossein had instituted a cross suit against Khoobunissa for the purpose of carrying into effect an alleged compromise to which he said she was a party, he alleging that she had received some Rs. 31,000 and had executed a document compromising the suit in his favor. This she denied. Issues were raised upon it, and this case came on for trial in August 1856, rather more than a year after the other decision. But on the 30th August of that year, a compromise, which in some respects may be undoubtedly called a real compromise, was come to. Khoobunissa then filed a document, in which she declared that she would not any longer contest the questions between her and Enayut Hossein; that she had received certain money from him and agreed altogether to his terms, and in that document there was a statement that her daughter Roushun Jehan assented to this compromise. Roushun Jehan was also represented as a party to the transaction, and as asserting herself to be of age. That compromise was given effect to by Mr. Loch; it was also given effect to by the Sudder Dewanny Adawlut Court, which dismissed the appeal and gave a decree in the terms of it in December 1856.

Roushun Jehan, the present plaintiff, in 1859 married Syud Ahmed Reza, a member of the other branch of the family, who possessed the half of the pergunnah Soojapore other than that which was held by Deedar Hossein; and in 1860 she filed a suit, in which she asserted that she was no party to, and had no knowledge of, the compromise between Enayut and her mother, and that it was effected by fraud and collusion on the part of both of them. She prayed that that compromise might be set aside, and she prayed in substance for a review of the judgment of Mr. Loch, so far as it was against her. She made also three further claims: the first to a share derived by her father from his brother Edoos Hossein, who had died before him; the second to a share in right of her grandmother, Bibee Loodhun, whom she alleged to have been a wife of Deedar Hossein. She thirdly claimed that there should be added to the whole zemindary property a portion which Enayut Hossein had recovered by a decree of this Board against the Rezas, in respect of the right of his grandmother Ranee Sumree. It may be as well at once to dismiss this part of the case, by stating that it is not now denied on the part of Enayut that he recovered this sum, not in his own right, but as a trustee for all the other members of the family.

This suit appears to have been deplorably dealt with in the inferior Courts of India. It came first before Mr. Beaufort, who framed a certain number of issues, and proceeded as far as deciding the issues in bar. Then it came before Mr. Birch, who upset all that Mr. Beaufort had done, and dismissed the suit altogether in a summary manner, on the ground that the cause of action was not stated with sufficient precision. The High Court set this mistake right by remanding the cause to be re-tried; whereupon it came before Mr. Simson, who had succeeded Mr. Birch. Mr. Simson, who seems to have very imperfectly apprehended the nature of the suit, framed an issue, which by no means decided it, and after his trial (if it can be so called) of the case, it came before the High Court again, and was again remanded. This occurred in January or February 1864,* when a very careful and luminous judgment was given by the Chief Justice Sir Barnes Peacock and another member of the Court, which it is now necessary more particularly to refer to. The High Court, after stating that the case had not been properly tried or even apprehended, remanded it for the following issues to be tried, in addition to the one laid down by Mr. Simson, which was as to the validity of the deed. "1. Was the plaintiff of age according to the Mahomedan law, independently of Reg. XXVI of 1793, at the time when the alleged compromise was effected? 2. Did the plaintiff execute the documents which purport to have been executed by her, or any, and which of them? 3. If so, was she induced to execute the same by means of fraud or misrepresentation? 4. Was the compromise a fair one and beneficial to the plaintiff? 5. Did the plaintiff receive any portion of the money alleged to have been paid by the defendant, or any portion of the profits of the putnee talook? 6. Did the plaintiff's mother, Khoobunissa, receive the money? 7. Were all, or any and which of the receipts, alleged by the defendant in his written statement to have been executed by the plaintiff, executed by her? 8. Was the decree in the Zillah Court of Purneah of the 30th August 1856, establishing the receipt for the Rs. 31,400, obtained by fraud or misrepresentation? 9. Was the decree of the Sudder Court of the 10th December 1856, founded on the alleged compromise, obtained by fraud or misrepresentation? 10. If not, was it binding on the plaintiff as carrying out an arrangement beneficial to her, which her mother, as her guardian, was competent to enter into?" The High Court proceed to say, "These are the issues which we consider necessary for a proper determination of the plaintiff's right to set aside the decree of the Sudder Court. It appears to us that this appeal is in the nature of a bill for a review of judgment, and therefore when the decree is set aside by virtue of a regular suit, the same rights will arise as if the Court upon review of judgment had set aside its own decree." Then they go on to say: "The above issues will apply of course to the plaintiff's claim only so far as affects that portion of Deedar Hossein's property which was the subject of the former suit, but they do not apply to the shares which belonged to her uncle and her grandmother, or to the share of the property recovered by the defendant by the decree of the Privy Council. These are wholly distinct matters from that at issue before Mr. Loch, and therefore as to them we think it proper to lay down the following issues to be tried by the Judge." Then come six more issues: "1. Did the father of the plaintiff survive her uncle Edoo Hossein, and is the plaintiff entitled to recover any and what portion of the share, if any, of her uncle Edoo Hossein, of the estate of the plaintiff's late grandfather, Rajah Deedar Hossein? 2. Did Edoo Hossein receive the allowance given by his father's will, or assent to the will? 3. Did the plaintiff's grandmother, Mussamut Bibee Loodhun, *alias* Saemah, succeed to any, and what, portion of the estate of Rajah Deedar Hossein? 4. Did Bibee Loodhun take the allowance as alleged in the defendant's written statement? 5. Is the plaintiff entitled to recover any, and what, portion of Bibee Loodhun's share, if any, of Rajah Deedar Hossein's estate? 6. Is the plaintiff entitled to recover any, and what, portion of the one-anna eight-gunda share of the

* 24th February 1864;—see Sutherland's Reports for 1864, p. 83.

zemindary of Soorjapore, recovered by the defendant under decree of the Privy Council, dated the 11th July 1859?"

All the first ten issues which related to the validity of the compromise in the suit which was heard before Mr. Loch, and came before the Sudder Dewanny Adawlut, were decided by the Judge, Mr. Muspratt, before whom this case came on its remand, in favor of the plaintiff. With respect to the latter issues, the learned Judge found against the plaintiff upon the question of Edoos Hossein surviving his brother Nuzeeroodeen, her father, and he found against her on the question of her right to succeed to any portion of the property of her grandmother, Bibee Loodhun. The case came on appeal before the High Court, who gave a very elaborate judgment in January 1866.* The High Court agree with the learned Judge of the Zillah Court in his finding on all the ten issues relating to the compromise, and there being two concurrent findings upon these issues, which are questions of fact, their Lordships are by no means disposed to disturb them. Indeed, it has scarcely been argued that, giving effect to the rule on this subject, they should be disturbed.

The High Court next came to the conclusion, that the compromise being set aside, owing to fraud and collusion on the part of Enayut Hossein, Enayut Hossein's right of appeal against Mr. Loch's judgment was not revived, whereas the right of appeal on the part of the plaintiff Roushun Jehan was revived. From that finding their Lordships differ. It appears to them that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the plaintiff is to be allowed to be heard to appeal against so much of the decision of Mr. Loch as is against her, Enayut Hossein ought to be heard to appeal against so much of the decision as is against him. The High Court further affirm the decision of Mr. Loch on the subject of the will, which was in favor of the plaintiff, but they reverse his decision so far as it concerns the deed which was against her. Further they reverse the decision of Mr. Muspratt upon the two questions of the right of the plaintiff to succeed to Edoos Hossein, and of her right to succeed to her grandmother. The case, therefore, reduces itself to four questions,—first, the validity of the deed; secondly, the validity of the will; thirdly, the survivorship between Edoos and Nuzeeroodeen; and, fourthly, the plaintiff's right to succeed to her grandmother.

The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been complied with. There is no question of the execution by Rajah Deedar Hossein of this deed giving one-third to his son Enayut on the 10th November 1839. The deed was either—to use English expressions—a deed of gift simply, or a deed of gift for a consideration. If it was simply a deed of gift without consideration, it was invalid unless accompanied by a delivery of the thing given, as far as that thing is capable of delivery, or in other words, by what is termed in the books a seisin on the part of the donee. In their Lordships' judgment there was no delivery of this kind. Even assuming that although the estate was under attachment, a sufficient seisin in it remained to the donor which he could impart to the donee, still it appears by the evidence of Mr. Perry, which is treated as trustworthy on both sides, that in point of fact Rajah Deedar Hossein remained in receipt of the rents and profits of the property until his death. Therefore if the deed were a mere deed of gift there was not that delivery of possession which was necessary to give it effect by Mahomedan law. A question which was touched upon, though not much argued, viz., whether

* 6th January 1866;—see 5 W. R. 4.

the doctrine of Mahomedan law relating to "confusion of gifts" applied, appears not to arise, as there was no delivery of possession.

But it was contended that this was a deed of gift for a consideration, and therefore that the delivery of possession was not necessary. But it was conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, *viz.*, an actual payment of the consideration on the part of the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in presenti* of the property, and to confer it upon the donee. Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount it must be actually and *bonâ fide* paid.

Upon the subject of consideration there is the evidence of Mr. Perry, who was present at the time of the execution of the document; who says that the Rajah admitted that at some previous time he had received the consideration. There is the evidence of Enayut Hossein himself, who speaks to having paid the consideration, although he does not condescend to any particulars, and there is the evidence of one or two other witnesses, who speak of the consideration being given at the time of the execution, which appears scarcely reconcilable with the evidence of Mr. Perry. But the whole transaction must be looked to. Mr. Perry speaks, as far as his knowledge is concerned, of the deed remaining in the possession of Rajah Deedar Hossein, although no doubt there is some evidence to the opposite effect. But it is certain that no proceeding was taken for obtaining mutation of names for more than 12 months after the execution of the deed. A petition was presented on the 16th March 1841, purporting to be on the part of the Rajah, and requesting a mutation of names, and there was another by Enayut on the 3rd May of that year. But, on the 19th June of that year, the Rajah Deedar presented a petition altogether repudiating the transaction, declaring that he had received no consideration money whatever, that it was not intended that any transfer should take place until after his death, and praying that the mutation of names should not be effected. On being questioned what his real wishes were, he still persisted in declaring his wish that Enayut should not be substituted for him in the books of the collectorate. It is true that on the 19th November 1841 a petition was laid before the Collector, purporting to come from Deedar Hossein, in which he set up the transaction, declaring that he had received the consideration money, and desiring that the name of his son should be entered; but that was several days after he was dead. He died on the 15th. The petition was dated on the 14th, received on the 19th, and the Collector very properly declined to act upon it. No evidence was given as to the state of the Rajah when he executed this petition, so shortly before his death (if indeed he did execute it), although Rajah Enayut Hossein, and Heera Lall, the mookhtar who was concerned in it, either of whom could probably have given information on the subject, were not examined as witnesses in the cause.

Taking into consideration all these circumstances, their Lordships have come to the conclusion, that the transaction set up on behalf of the defendants was not a real one, that no real consideration passed, that there was no intention on the part of the Rajah to part with the property at once to his son, but that both father and son were endeavoring to evade the Mahomedan law, by representing that to be a present transfer of property which was intended only to operate after the father's death. Their Lordships therefore agree with the High Court in their view of the effect of the deed.

The next question arises as to the will. It was found as a fact by Mr. Loch that the heirs had not consented to this will: and with that finding their Lordships are satisfied. But it was argued by Mr. Cowie, first, that the will did not require confirmation; secondly, that at all events so much of it as gave one-third to Enayut Hossein for pious uses was not in contravention of Mahomedan law, and was

therefore valid without confirmation. The effect of the will is, in the first place, to declare Enayut Hossein the executor and representative of Deedar and to direct him to look after the zemindary, and so forth. Then follows this passage: "I divide the remaining two-thirds now under my possession, uninterfered and unconcerned by any one else, into three portions. One portion to be laid out as the executor may think proper for the testator's welfare hereafter, by charity and pilgrimage, and keep up the family usage, namely, the expenses of the mosque and *tazeadaree* of the sacred martyrs, and for the comfort of the travellers, the surplus amount to be appropriated by himself the executor." Then it goes on to say, from the other two-thirds "he shall keep everyone by his good conduct and affection contented and satisfied. It is also necessary for all persons having rights, heirs, and friends connected with me to obey the said executor and consider him my representative." Then further: "None of the heirs have power to sell or divide the landed property mentioned in the will." This will, in its general scope, appears to their Lordships to be in contravention of Mahomedan law. With respect to the limited contention, that it may be supported with respect to the devise of the one-third share, it appears further to their Lordships that that devise, considering the vague character of it, and that the beneficial interest is left to Enayut Hossein after he has devoted what he may deem sufficient to certain indefinite pious uses, is in reality an attempt to give, under cover of a religious bequest, an interest in one-third to Enayut Hossein, in contravention of Mahomedan law.

The survivorship between Edoe and Nuzeroodeen is a question made by no means clear on either side. Mr. Muspratt appears to have decided it almost, if not entirely, upon the ground that Enayut Hossein put in certain proceedings *in forma pauperis*, the petition to sue and other documents, purporting to have been executed by Edoe in 1845. If he did then execute them, undoubtedly he had survived his brother, who died in January or February 1844. There appears to have been oral evidence on both sides; on the one side, that Edoe lived until 1845, on the other that he died some time in 1843, a few months before his brother. The judgment of the High Court appears to be in effect that after a very careful consideration of these documents, after directing various searches for the originals, of which attested copies were produced, which searches proved fruitless, they have come to the conclusion that these documents are not genuine. Their Lordships do not feel that sufficient proof is laid before them to satisfy them that the High Court were wrong in that decision. These documents being rejected as fabricated, the Court say in substance that they credit the testimony of the plaintiff rather than that of the defendant, who had shown himself capable of fabricating documents, and that they do not in this question believe witnesses who on other parts of the case had not been believed.

Under these circumstances, whatever might have been their Lordships' view if the case had come before them as a tribunal of first instance, they do not think that sufficient ground has been shown for reversing the decision of the High Court.

There remains the question of the right of the plaintiff to succeed to Bibee Loodhun, and that depends upon whether Bibee Loodhun was merely a concubine or a wife. It is an undisputed fact that Nuzeroodeen, the son of Bibee Loodhun, was treated by his father and by all the members of the family as a legitimate son. It is not that he was on any particular occasions recognized by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise some presumption that his mother was his father's wife. That such a presumption arises under such circumstances appears to have been laid down in a case which has been referred to, *Khajah Hidayut Oollah v. Rai Jan Khanum*,* in the 3rd Volume of Moore's Indian Appeals, p. 295, in which Dr. Lushington, who delivered the judgment of this Board, makes this observation (p. 318): "The effect of that appears to be, that where a child has

* 6 W. R. P. C. 52; 1 Suth. P. C. R. 167.

been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favor of such marriage having taken place." In this case there is no evidence that Bibee Loodhun was a woman of bad character, or that her connection was merely casual. She appears to have lived in the house, at all events up to the death of the Rajah.

The same doctrine was laid down rather more strongly in a recent case, which came before this Board on the 20th March 1873. In the case of *Newab Mulka Jehan Sahiba v. Mahomed Ushkurree Khan*,* a case from Oudh, and a Sheeah case, their Lordships say:—"This treatment of the daughter by the appellants"—that is to say, the treatment of the daughter as a member of the family—"affords a strong presumption in favor of the right of her mother to inherit from her." The question there was whether the mother, who was said to be a slave girl, inherited from her daughter, whom she survived, the same question which would have arisen in this case if Bibee Loodhun had survived her son Nuzeroodeen. Their Lordships go on to say, after noticing various acts of acknowledgment of the legitimacy of the child:—"After these acknowledgments, Mulka Jehan and the appellants who act with her ought, in their Lordship's view, to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct; and in the absence of such evidence, they think the presumption must prevail."

It appears to their Lordships, therefore, that the undoubted acknowledgment by the father and by the whole family of the legitimacy of Nuzeroodeen raises some presumption of the marriage of his mother. But it is said that that presumption is rebutted. The evidence chiefly relied upon for that purpose is the will of the Rajah, in which undoubtedly there is this expression: "For the maintenance of four female servants monthly, 75; annually, 900," and Bibee Loodhun does appear to have been one of those female servants there mentioned. At the same time, it is to be observed, this expression occurs only in the schedule; whereas in a part of the will preceding that schedule there is this expression: "The shares of the executor and of the sons, daughters, and wives of the testator and other claimants from the estate fixed annually at" so and so; and the subsequent provision for the maintenance of every female servant appears to be an expansion of that paragraph in which they are spoken of as wives.

But further, there is the undoubted acknowledgment by Enayut Hossein himself of Bibee Loodhun being a wife, inasmuch as when Khyroonissa, the principal wife, brings a suit against him, Enayut Hossein objects, on the ground that Bibee Loodhun, one of the other wives, is not joined.

Under these circumstances it appears to their Lordships that there is evidence not only from the acknowledgment of Nuzeroodeen's legitimacy by the family, but from the admission of Enayut Hossein, that Bibee Loodhun was a wife, and not merely a servant. It is indeed alleged that she was what is called a temporary wife, and among the Sheeah sect there appears to be a power of taking a mere temporary wife. But it is to be observed that there is no evidence of hers being what is called a temporary marriage, and indeed the witnesses who seek to impugn the marriage on the part of the defendant speak of Bibee Loodhun not as a temporary wife, but as a mere servant. The question, therefore, seems to be not whether she was a temporary wife in the sense attached to that term in Mahomedan treatises, but whether she was a wife or whether she was a mere servant. On the whole their Lordships concur with the finding of the High Court. The evidence preponderates that she was a wife and not a mere servant, though no doubt a wife of an inferior order.

A question further arose as to the amount of the share which the plaintiff would be entitled to, assuming that Bibee Loodhun was a wife, and it would certainly seem

that her share would only be a fifth of an eighth, that is, a fortieth share ; whereas she appears to have received something more by the decree of the Court. But it is to be observed that this in a great measure is a matter of detail, and possibly a clerical error of miscalculation, which might have been set right on an application to the High Court, and that in fact the High Court did invite applications for the purpose of remedying errors of this kind.

The result is, that with the exception of the slight variation of amount in the case of the claim of Mussamut Bibee Loodhun, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal with costs.

The 19th May 1876.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Execution Sale—Irregularity—Review of Orders—Power of High Court Act VIII
of 1859 ss. 249, 257, 376, 378.*

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Girdhari Singh

versus

Hurdeo Narain Sahoo.

Quere.—Whether Act VIII of 1859 s. 376 applies to orders, or merely to decrees. But even admitting that a review of judgment can take place in the case of an order rejecting the objections made by the judgment-debtor to a sale in execution, the auction-purchaser is entitled to be summoned and heard in support of the order sought to be reviewed, as provided by s. 378.

Inadequacy of price is in itself no ground for refusing to confirm a sale according to s. 257.

Where a Lower Court, after rejecting the objections to a sale, refuses to confirm it, or to grant a certificate of confirmation, it is competent to the High Court by a proceeding in the nature of a mandamus, to order the Lower Court to do that which it ought to have done.

Under s. 249 the amount of the Government revenue assessed upon the estate to be sold in execution of a decree should be stated correctly in the notification of sale. Specifying the amount of the revenue at a lower figure than it really is may be an error against the interest of the judgment-debtor, which, if the sale is confirmed and he can prove that he has sustained actual damage by the irregularity, would be a sufficient ground for setting aside the confirmation upon an appeal against it. In the present case the judgment-debtor was held to be barred from objecting to the notification of sale on the ground of error, as it appeared that, in applying for a postponement of the sale, he agreed to the attachment and the notification being maintained.

This was an appeal from an order of the High Court of Calcutta made in the exercise of the power of superintendence over the inferior Courts, conferred by the 24 and 25 Vic. c. 104 s. 15.

The facts of the case are fully stated in the judgment of the Judicial Committee as well as the order of the High Court appealed from. The Lower Court had disallowed certain objections to an execution-sale, and on a second application had reversed its former order. The High Court set aside this order in review as *ultra vires*.

*Mr. Cowie, Q.C., and Mr. Doyne for Appellant.
Mr. Leith, Q.C., and Mr. Bell for Respondent.*

Sir Barnes Peacock delivered the judgment of the Judicial Committee as follows :—

In the present case, Girdhari Singh, the appellant, was the judgment-debtor,

* From the judgment of Kemp and Pontifex, *JJ.*, passed on 11th March 1873,—see 19 W.R. 227.

and the respondent, Hurdeo Narain Sahoo, was the purchaser at a sale in execution. The sale in question took place on the 9th September 1872, and the estate was sold to the respondent for the sum of Rs. 55,000, he being the highest bidder at the auction. On the 1st October 1872 the judgment-debtor, under the provisions of Act VIII of 1859 s. 256, made objections to the sale. The 256th Section says, "No sale of immoveable property shall become absolute until the sale has been confirmed by the Court. At any time within 30 days from the date of the sale application may be made to the Court to set aside the sale, on the ground of any material irregularity in publishing or conducting the sale; but no sale shall be set aside on the ground of such irregularity unless the applicant shall prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." The judgment-debtor, therefore, under this Section was bound to show that some material irregularity in publishing or conducting the sale had taken place, and that he had sustained substantial injury by reason thereof.

One of the objections which the judgment-debtor made to the sale was that the attachment *purvannah* showed "the amount of the decree to be Rs. 51,677, and the Government revenue of the mouzah sold to be Rs. 8,146; contrary to this the amount of the decree has been specified as Rs. 54,000, and the Government revenue as Rs. 3,000 in the sale notification. This is wrong and contrary to the real facts." Now, instead of the proclamation stating the Government revenue to be Rs. 8,146, it stated it to be Rs. 3,146, the irregularity occasioned being, in all probability, the substitution of the figure 3 for the figure 8. The case came on to be heard upon the petition of the appellant before the Subordinate Judge, who says, "Whereas there is no reason to decide the sale to be irregular, it is ordered that this petition be rejected." Having rejected the petition and treated the objections as insufficient, he ought to have done something further; he ought to have proceeded under s. 257 to pass an order confirming the sale. That Section says, "If no such application as is mentioned in the last preceding Section be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale; and in like manner if such application is made, and if the objection be allowed, the Court shall pass an order setting aside the sale for irregularity. If the objection be allowed, the order made to set aside the sale shall be final; if the objection be disallowed, the order confirming the sale shall be open to appeal." If the Subordinate Judge had followed the directions of the Act, and having disallowed the objections had made an order for confirmation, that confirmation would have been appealable to the High Court. But the Judge not having made an order of confirmation, the judgment-debtor applied to the Subordinate Judge to review his decision under s. 376 of the Code of Civil Procedure. That Section speaks merely of decrees, and not of orders. But even admitting that a review of judgment in this case could have taken place, the auction-purchaser was never summoned. He had no opportunity of showing cause against a review of judgment. S. 378 of the Act says: "Provided that no review of judgment shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which a review is solicited." The order passed upon the review was this: "This petition has been filed anew under the provisions of s. 376 Act VIII of 1859. It appears that the judgment-debtor has put in the entire amount of the decree Rs. 54,232-2-1½ pie, hence there is no necessity for the holder to get the sale confirmed;" the word "holder" meaning the decree-holder; but he says nothing as to the right of the auction-purchaser to come in and have it confirmed; he says, "Hence there is no necessity for the decree-holder to get the sale confirmed. It appears that the sale has not been as yet confirmed, and the judgment-debtor has also paid the interest of the consideration money for the auction-purchase. From these facts it appears that the judgment-debtor has really sustained a great loss by this sale, and has paid the decretal amount, together with the interest of the purchase-money. The

property sold is the ancestral estate of the judgment-debtor, and seems to have been sold at an inadequate price; and on reference to the record there also appears to be some mistake in the account. It is therefore ordered that the sale be set aside, that the decretal amount paid by the judgment-debtor be paid to the decree-holder, that the purchase-money paid by the auction-purchaser be returned to him, and that the interest on the purchase-money paid by the judgment-debtor be also paid to him." Upon that order being made, the auction-purchaser came in; and on the 11th November 1872 he petitioned, and said, "1. When the objections of the judgment-debtor to the sale were disallowed, my right for the confirmation of the sale became absolute and perfect. Against that order only an appeal could be preferred to the High Court. 2. The order rejecting the objections in respect of the sale cannot, under the provisions of s. 376 Act VIII of 1859, be held to be in the nature of a decree, hence the review of such an order is out of the jurisdiction of the Court. 3. If for the sake of argument it be granted that such an order is fit to be reviewed, it was nevertheless necessary to have carried out the entire provision of the law in respect of review, and it was necessary to issue a notice under s. 378 Act VIII of 1859 to me, the petitioner, and it was proper to hear my pleader's arguments regarding the disallowing of the review. 4. The grounds under which the Court has set aside the sale are not sufficient according to law. For this reason I beg to file this petition, and pray that the order of the 9th November *idem* being set aside, the sale be confirmed and a certificate of sale be granted to me." Upon that the Judge refused to confirm the sale or to grant the certificate. He says, "In the notification the sum of Rs. 3,146-11 has been specified in the place of the sum of Rs. 8,146-11." Therefore he alludes to the mistake in the proclamation which he had already overruled. He says, "There is no doubt that this estate has been sold at a very low price, for Baboo Koonj Lal, the gomastha of Baboo Hurde Narain, the auction-purchaser, himself admitted to me that the estate sold by auction is leased on a *jumma* of Rs. 18,000 or 19,000."

The sale having been effected at a low price would in itself be no ground for refusing to confirm the sale. But it appears that under s. 249 of Act VIII of 1859 it was necessary to state correctly in the notification of the sale what was the amount of the Government revenue assessed upon the estate. The Subordinate Judge having refused, under his order of the 11th November 1872, to confirm the sale or to grant a certificate of confirmation, an application was made to the High Court, not by way of appeal, but under the provisions of the 24 and 25 Vic., cap. 104, s. 15, which enacted that "Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction." The Subordinate Judge then having refused to confirm the sale, he having disallowed the objections, it was competent to the High Court, by a proceeding in the nature of a *mandamus*, to order the Lower Court to do that which it ought to have done, namely, having rejected the objections to the sale, to confirm it; and the High Court proceeded upon that Section and made the order. But the High Court did not merely treat the judgment of the Subordinate Judge upon the application for review as a nullity; they entered into the question as to whether the objections to the sale were valid or not valid. In fact they treated the case in their decision as if the Lower Court had actually confirmed the sale, and there had been an appeal to them—against that confirmation. Their Lordships think that they may look at the case now in the way in which the Judges looked at it then, to see whether there were really any objections to the sale which would have been a ground for setting aside the confirmation of the sale, if the Subordinate Judge when he rejected the objections, had passed an order confirming it.

Now the only material objection to the notification of the sale was that to which allusion has already been made, namely, that the *sudder jumma* was

stated to be Rs. 3,000 odd instead of Rs. 8,000 odd. Section 249 directs that the notification of the sale shall state the amount for the recovery of which the sale is ordered, specifying the time and place of sale, the property to be sold, and the revenue assessed upon the estate. Not specifying the amount of the revenue correctly was an irregularity for which the sale might have been set aside, provided the judgment-debtor had satisfied the Court that he had sustained a substantial injury in consequence of it. The Subordinate Judge says, that in the notification the sum of Rs. 3,146-11, was specified in place of Rs. 8,146-11, and that there is no doubt that the estate has been sold at a very low price. The High Court deals with that objection. They say, "What are the alleged irregularities?" One of the objections is the mistake with regard to the Government revenue, which was payable upon the estate. Then they say, "The error as to the *sudder jumma* was, if an error at all, and of this there is no evidence, an error in favor of the judgment-debtor, for if the *sudder jumma* was quoted at a lower figure in the proclamation than the recorded *sudder jumma*, it was not a material error likely to depreciate the bids, but rather to stimulate the bidders at the sale, for intending purchasers could refer to the *touji*; moreover, this objection was overruled by the Subordinate Judge." Their Lordships do not agree in this reason which was given by the High Court. If an estate is said to be held at a certain Government *rumma*, the auction-purchaser may not know what the real value of the estate is, or what are the rents which are receivable from it. He may, perhaps, have had no opportunity before coming into the auction room and bidding, to refer to the *touji*; if the Government revenue were stated to be much less than it really was, he would suppose that the estate was a much less valuable one. In the ordinary mode of assessing the value of estates for the purpose of paying stamp duty or court fees upon the institution of a suit, it was formerly taken that three times the amount of the Government revenue of a permanently settled estate was a fair estimate of the value of the estate; but that was found to be much too low; and in the Court Fees Act VII of 1870, it was enacted that in assessing the value of estates for the purpose of suits, the value of the estate should be taken as ten times the amount of the Government revenue; and in those cases in which there was no Government revenue, that 15 years' purchase of the actual rents should be treated as the estimated value of the estate. Therefore it appears to their Lordships that the High Court was not correct in holding that the error was in favor of the judgment-debtor; they think that the error might have been against the interest of the judgment-debtor; and that if the sale had been confirmed, and he had proved that he had sustained actual damage by the irregularity, it would, in an ordinary case, have been a sufficient ground for setting aside the confirmation upon an appeal against it.

But their Lordships must look to another portion of this case. It appears at page 21 of the Record that the sale was fixed for the 5th August; that the judgment-debtor applied to the Court to postpone the sale, and stated that he wished to raise the money, and added, "Under such circumstances it is prayed that a postponement of one month be granted, *the attachment and the notification of sale being maintained.*" Now the notification must have been stuck up at the Court House, and he must have had an opportunity of seeing what the real notification was; and if there was a clerical error in inserting Rs. 3,146-11 as the Government revenue instead of Rs. 8,146-11, he ought at that time to have made objection to the notification, and not to have consented to allow the notification to remain and be maintained as the notification under which the sale was to take place. Upon that petition an order was passed which was as follows: "It is ordered that the postponement be granted; that in case of non-payment of the decretal amount the property of the judgment-debtor be sold, *without the issue of a second notification of sale*, on the 2nd September 1872; and that a copy of the notification be suspended in a conspicuous place of the Court House." So that on

the application of the judgment-debtor himself the sale was postponed, he agreeing that the attachment and the notification of sale should be maintained.

Their Lordships think that the judgment-debtor could not properly take objection to that notification by stating that there was an error in it. The petition amounted to an admission on his part that the notification was correct, or that at any rate there was no such mistake or irregularity as would be likely to mislead. Under these circumstances their Lordships think that the High Court was right in ordering the confirmation of the sale.

But it is said that the High Court had no power themselves to confirm the sale. Although the learned Judges in their judgment say, "We reverse the order of the Subordinate Judge, dated the 9th November 1872, and confirm the sale;" the order merely directs that the order of the Lower Court be reversed, and the sale confirmed. Their Lordships interpret the order of the High Court as meaning that the sale be confirmed by the officer who ought to confirm it, namely, by the Subordinate Judge, who ought to have confirmed the sale when he disallowed the objections. That is the mode in which the Subordinate Judge himself interpreted the order of the High Court; for upon the order being sent to him he passed an order confirming the sale.

Their Lordships see no reason to interfere with the order of the High Court, and they think that this appeal ought to be dismissed. The case must take the usual course, and the appeal will be dismissed with costs.

The 20th May 1876.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Practice—Appeal to Privy Council (upon the Merits)—Decree of High Court
(Questions as to Form of).*

On Appeal from the High Court of Judicature at Fort William in Bengal.

Lala Sham Soondur Lal

versus

Sooraj Lal and others.

Parties appealing to the Privy Council upon the merits ought not to take the general decree which the High Court may have given, without asking the High Court to condescend upon the details of it, if they mean to object that the general judgment is not sufficient to found the proper execution.

A suit for possession and redemption, in which a third party intervened upon the claim that the plaintiff had conveyed to him one-half of the property in dispute, was dismissed. On appeal by the plaintiff, in which the intervenor did not appear, the Lower Appellate Court merely reversed the decree of the first Court, and the High Court affirmed the decree of the Lower Appellate Court. The Privy Council in remanding the case to the High Court to amend their decree in conformity with their judgment, by declaring affirmatively what the plaintiff was entitled to recover, observed that the question ought to have been raised in the High Court.

In this case their Lordships think that upon the merits of the appeal the judgment of the High Court must be affirmed. The question upon the merits turns entirely upon the findings on certain issues in fact, which were directed by the High Court upon remand. Those issues were found in favor of the plaintiff by the Judge of Gya, and the High Court have affirmed his decree. Mr. Doyne, who appeared for the plaintiff, admitted at the bar that there are no exceptional circumstances in this case to take the appeal out of the general rule acted upon by this board, that where there are concurrent judgments of two Courts below on a

question of fact, their Lordships without such circumstances will not go into the evidence upon which the Courts have decided.

But Mr. Doyne has raised a question upon the proper form of the decree. In the first place their Lordships desire to say they think that question ought to have been raised in the High Court. Parties appealing upon the merits ought not to take the general decree which the High Court may have given, without asking the High Court to condescend upon the details of it, if they mean to object that the general judgment is not sufficient to found the proper execution. But the point having been raised, it will be necessary to call attention shortly to the proceedings.

The suit is brought by the mortgagor of some property held on a *mokurruree* lease against the mortgagee and against the representative of the zemindar who had granted the *mokurruree*. The suit is brought for recovery of the possession of the property and also for the redemption of the property. It charges that the defendants, in collusion with one other, are not willing to give up possession or to pay the surplus which shall appear to be due after taking the mortgage accounts. The questions in the suit arise in this way: The mortgagee remained in possession for some time and the zemindar then brought a suit against him and against the present plaintiff, the mortgagor, to cancel the *mokurruree* lease, on the ground that the rent had not been paid. It has been found that notice in this suit was not served upon the plaintiff, and that the defendant, the mortgagee, instead of giving notice to the mortgagor, or really defending that suit, colluded with the zemindar, and allowed a decree to pass, not for the sale of the *mokurruree*, but for its cancellation. It has been found by the two Courts that the zemindar and the mortgagee acted in collusion, and concurred in a collusive suit for the purpose of destroying the *mokurruree* grant and depriving the plaintiff of his property. It seems that there was some arrangement made between the zemindar and the mortgagee that the mortgagee should remain in possession; and there can be no doubt that the two were acting together to dispossess the plaintiff of this property. The Principal Sudder Ameen dismissed the present suit, thinking that the decree which the zemindar had obtained bound him. That judgment was appealed from; and the Judge of Gya, to whom the appeal went, reversed the decree. The present appellant appealed from that judgment to the High Court, and the High Court, thinking that the case of collusion was not sufficiently raised nor a sufficient case of collusion made to set aside the decree, remanded the case, settling five issues, upon which they directed that evidence should be taken, and a report made to them of the findings of the Judge upon them. Those issues raised the questions whether there was collusion between the zemindar and the mortgagee, and whether the decree had been fraudulently obtained by means of such collusion. Those are the issues which it has been already stated were found in favor of the plaintiff. The Judge of Gya, in returning the case to the High Court, says, "Looking, then, at the facts as elicited by the fresh evidence in this case, I am of opinion that the plaintiff, Sooraj Lal, has established his claim;" and the High Court, in the judgment which they gave, affirmed that finding, and dismissed the appeal. The decree they drew up is this: "It is ordered and decreed by the said Court that the special appeal be dismissed, and the decree of the Lower Appellate Court be affirmed." The decree of the Lower Appellate Court, which was affirmed, was a decree merely reversing the decree of the Principal Sudder Ameen. In this state of the record there is nowhere to be found an affirmative decree setting forth the rights to which the plaintiff is entitled. Mr. Doyne suggested that in this state of things he is entitled to ask this tribunal to define the rights of the plaintiff which the High Court in its judgment ought to have affirmed as to the mesne profits; and also to decide another question, namely, the right of a person who intervened in the suit. On this latter question the facts appear to be these: One Nirban Singh intervened in the suit upon a claim that the mortgagor, the plaintiff, had sold and con-

veyed to him, four years after the *zur-i-peshgee* mortgage, one-half of the *mokurruree*; and it seems that an issue was framed upon his right, and that evidence was given upon it. But the Principal Sudder Ameen having dismissed the suit altogether, there was of course an end not only of the plaintiff's right, but of any derivative title which could be claimed through him. The zemindar, the present appellant, appealed, but Nirban Singh did not appeal, and throughout the subsequent proceedings does not appear to have interfered in the litigation. Their Lordships think that in this state of things they cannot possibly affirm that he has established his right to the one-half of this *mokurruree*, and so cut down what the plaintiff may be entitled to recover in this suit.

Their Lordships apprehend that there is nothing in this record to conclude any question which may hereafter arise between Nirban Singh and the plaintiff, although it may be that Nirban Singh not having appealed, and not having taken any further part in this suit, may be barred from any claim against the zemindar.

Their Lordships will therefore humbly advise Her Majesty to dismiss this appeal, and to affirm the judgment of the High Court; but will remand the cause to the High Court with directions to amend their decree in conformity with their judgment, by declaring affirmatively what the plaintiff is entitled to recover. The appellant must pay the costs of this appeal.

The 24th May 1876.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Review of Judgment—Act VIII of 1859 ss. 376, 378—Registration—
Act VIII of 1871—Jurisdiction.*

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Reasut Hossein

versus

Hadjee Abdoollah and another.

The power to admit a review, which is given by Act VIII of 1859, s. 376 *et seq.*, applies to an order rejecting an application for registration.

The District Courts mentioned in Act VIII of 1871 must be taken to be the ordinary Zillah Courts over which the High Court has power of superintendence.

With reference to ss. 376 and 378, there is not an absolute defect of jurisdiction in a Judge to entertain an application for review, whenever the parties have failed to show that there was either positive error in law, or new evidence to be brought forward which could not be brought forward on the first hearing.

This appeal called into question the power of a Subordinate Court to revise its own orders. The facts of the case are set out sufficiently in the judgment of the Judicial Committee, and may be stated shortly as follows:—An order had been made by the District Judge of Gya refusing registration of a deed, a review of which order was admitted by his successor in office. The appeal was from an order of the High Court, passed in the exercise of its extraordinary jurisdiction, setting aside the last-mentioned order of the District Judge as made *ultra vires*, and without jurisdiction.

Mr. Doyne for Appellant.

Mr. Bell and *Mr. C. W. Arathoon* for Respondents.

* From an order of Phear and Anslie, JJ., passed on the 2nd April 1873,—*See* 19 W. R. 303.

Sir James Colville delivered the judgment of the Judicial Committee as follows:—

This is an appeal against an order of the High Court of Calcutta, dated the 2nd April 1873, by which that Court, in the exercise of its extraordinary and statutory jurisdiction of superintendence over the inferior Courts, set aside an order of the Judge of Gya, dated the 4th January 1873.

The contest between the parties related to the registration under the provisions of the Registration Act 1871, of a deed purporting to have been executed by a Mahomedan lady of the name of Beebee Noorun in favor of her grandchildren, on the 19th November 1871. She died on the 18th December 1871, and on the 5th January 1872 the appellant, as the father and guardian of the donees, presented the deed for registration in the registrar's office at Gya. The respondents, who were the heirs-at-law of the alleged donor, were cited in the usual way, and came in and denied the execution of the deed. It is admitted to be one which can have no force or validity, or be capable of being produced in any court of justice in evidence, unless it be registered; and the heirs of the party who is alleged to have executed it, having denied the execution of it by her, the registering officer was under the Act bound to refuse to register it. The Act gives an appeal from the sub-registrar to the principal registrar, but, as he was equally bound to refuse registration of an instrument of which the execution was thus disputed, such an appeal would have been obviously unfructuous; and the appellant accordingly took the course of applying, under the 73rd and following Sections, to the Zillah Judge at Gya, for an order upon the registrar to register the deed.

The Judge proceeded under the Act, and several witnesses were produced and examined in support of the deed. No witnesses were tendered on the other side. The Judge disbelieved the witnesses called, and for the reasons given in his judgment, rejected the application made to him; and consequently the deed was not registered.

Within ninety days after the date of this order, Mr. Taylor, the Judge who rejected the application, was succeeded as Judge at Gya by Mr. Craster; and an application was made to the latter to review his predecessor's order. That application in terms purported to be made under ss. 376 and 378 of Act VIII of 1859, and the counter petition filed by the respondents seems to admit that the application was so made, that a review of such an order might be had under those Sections upon proper grounds, although it contends that what the petition sought in the particular case was in the nature rather of an appeal than of a review within the meaning of the Act.

Upon hearing the parties Mr. Craster made an order admitting the review. His judgment was in these words: "I consider this case may be admitted for argument. According to the general practice a Court is at liberty to hold a review of the order passed by it. The argument which is now made does not show me any reason to believe that this Court has no power to have a review of its order in this case, although there is not any particular rule laid down for such a proceeding in the law according to which the above order was passed." The law to which he refers is obviously the Registration Act. After the order admitting the review was passed, but before the case was re-heard in pursuance of it, the respondents applied to the High Court, invoking its extraordinary jurisdiction; and that Court granted a rule to show cause why the order of the 4th January admitting the application for the review and directing it to be placed on the review file for argument, should not be set aside, on the ground that it was made without jurisdiction; staying, pending the rule, all further proceedings under the order. The case was then argued in the High Court, the judgment under appeal was pronounced, and the rule for setting aside the order of the Judge as made *ultra vires* and without jurisdiction was made absolute.

A point was taken, though not very strongly pressed, at the bar, to the effect

that this order of the High Court was itself *ultra vires*, inasmuch as the order which it set aside must be taken to have been made, not by one of the ordinary Zillah Courts, over which the High Court has an unquestioned power of superintendence, but by a District Court created by the Registration Act, over which it has no such power. Their Lordships can see no ground for this contention. It appears to them, looking at the Act of 1871, that although power is there given to the Government to appoint districts and sub-districts for the purpose of registration, the District Courts mentioned in the Act (except where the High Court is said to be, when exercising its local jurisdiction, a District Court within the meaning of the Act), must be taken to be the Courts exercising the ordinary civil jurisdiction within that district; and therefore, in the case of a regulation province, to import the ordinary Zillah Courts.

Another question raised was whether under the 76th Section (of which the final words are, "no appeal lies from any order made "under this Section"), an order against which no appeal can be preferred must not be taken to mean only one by which the Judge directs the registrar to register a deed, and whether there may not be an appeal from an order like that passed by Mr. Taylor rejecting the application for registration. Their Lordships would have great difficulty in saying that an order of rejection does not fall within the term "an order made under this Section;" because if the Judge does not make his order of rejection under the 76th Section, it is difficult to see what other Section gives him jurisdiction to make it. They do not, however, think it necessary to decide the question, because it is obvious that, whether an appeal lies from the order or not, the right, if it exists, of reviewing an order may co-exist with the liberty to appeal; and, consequently, that the question whether the power of the Judge of first instance to review his order exists cannot be affected by the consideration whether an appeal lies from that order.

Another question raised, which it is equally or perhaps still more unnecessary to decide, is that suggested by Mr. Arathoon, *vis.*, that, although a final order rejecting the application for registration may be made in this summary way, it would still be open to the parties benefited by the deed to propound it in a regular suit, and to obtain its registration by means of such suit. Their Lordships conceive that it will be time enough to decide this question when it arises. They only desire to observe that the case of *Futteh Chund Sahoo v. Leelumber Singh Doss and others*, 14 Moore's I. A., p. 129,* is no authority upon it. In that case the suit was for the specific performance of an unregistered agreement for sale, and sought to have, not the agreement, but the conveyance to be executed in pursuance of it, registered; and all that was decided was that the agreement not having been registered could not be given in evidence in the suit.

The principal question which their Lordships have to decide upon this appeal is whether the power to admit a review which is given by the Act of 1859 (ss. 376 to 378, and the following Sections) does exist in such a proceeding as that under consideration, as it would unquestionably exist in a regular suit. If the general power is found to exist, a subordinate question may arise, whether if the exercise of the power is not in strict accordance with the provisions of those Sections, the order admitting the review can be quashed as one made wholly without jurisdiction.

Their Lordships are disposed to think that an order rejecting an application for registration under the Act of 1871 must be taken to be so far in the nature of a decree within the meaning of Act VIII of 1859 as to fall within the operation of the Sections in question. The proceeding may be what is technically called in India, a miscellaneous proceeding, or it may be a summary suit; but the order made upon it is, so far as concerns the matter in dispute, final between the parties. Whether it is subject to appeal or not, it is, so far as the Court pronouncing it is concerned, a final order of adjudication between the parties.

* 16 W. R. 26; 2 Sath. P. C. R. 467.

But it seems to their Lordships that the determination of this question does not depend upon the mere construction of Act VIII of 1859, because by s. 38 of the amending Act of 1861 it is expressly enacted, "that the procedure described by Act VIII of 1859 shall be followed as far as capable in all miscellaneous cases and proceedings which, after the passing of the Act, shall be instituted in any Court." This provision, their Lordships conceive, expressly makes applicable to a proceeding to compel registration under the Registration Act the whole procedure of Act VIII of 1859, including the power of admitting a review. And this was in fact almost admitted at the bar by Mr. Bell, when he was contending that the right of appeal to the High Court would, under the 23rd Section of the Act of 1861, have existed in this case.

It is argued, however, that if the 376th and following Sections of Act VIII of 1859 do apply to an order rejecting an application for registration, they do not justify the particular exercise of jurisdiction in this case. The 376th Section says: "Any person considering himself aggrieved by a decree of a Court of original jurisdiction from which no appeal shall have been preferred to a superior Court, or by a decree of a District Court in appeal, from which no special appeal shall have been admitted by the Sudder Court, or by a decree of the Sudder Court, from which either no appeal may have been preferred to Her Majesty in Council, or an appeal having been preferred, no proceedings in the suit have been transmitted to Her Majesty in Council, and who from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or for any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree. The application is to be made within ninety days of the date of the decree, unless the party can show just and reasonable cause for having delayed his application. Then s. 378 enacts: "If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application; but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review, and its order in either case, whether for rejecting the application or granting the review, shall be final." And then follows a provision that the opposite party is to have notice. And the respondents contend that the order admitting a review in this case, though not the proper subject of appeal, was liable to be quashed, on the ground that the Judge had no jurisdiction to entertain the application, inasmuch as there was before him no distinct allegation of an error of law, nor any suggestion of the discovery of new evidence.

Their Lordships, looking to the original application to review, are by no means satisfied that it does not contain enough to give the Judge cognizance of the matter upon the strictest construction of Act VIII of 1859. They allude particularly to the ninth ground of the petition, which refers to certain deeds and to certain evidence which seems to have been tendered in the course of the enquiry before Mr. S. H. C. Taylor, and rejected by him as unnecessary. That evidence, if not very material to the general question, was by no means immaterial with reference to one ground which the learned Judge gave for rejecting the application, because he dealt with the fact of one deed being for consideration, whereas that which was propounded was not for consideration. Therefore, if he allowed that matter to influence his judgment, it seems to be reasonable that the parties should have the opportunity of explaining those circumstances, and of having that evidence which he refused to admit brought before the Court upon a review; the evidence in fact would be in the nature of evidence which they had been from some cause prevented from adducing on the original hearing.

Their Lordships, however, do not rest their decision upon that narrow ground, because looking to the extreme generality of the terms used in these Sections,

particularly to these terms: "other good and sufficient reason" and "necessary to correct an evident error or omission," or is otherwise "requisite for the ends of justice," they are not prepared to say that there is an absolute defect of jurisdiction whenever the parties have failed to show that there was either positive error in law, or new evidence to be brought forward which could not be brought forward on the first hearing. They do not consider that the case in the *Indian Jurist* (*Nusserooddeen Khan v. Indernarayan Chaudhry*, *Indian Jurist*, p. 147*), and the other cases cited only limit the discretion of the Court in saying what reason is good and sufficient, or what may be so far requisite to the ends of justice as to support an application for review. Upon an appeal, where an appeal lies, it may be open to the Court of Appeal to say that the Judge ought not to have admitted a review; but that is a very different thing from ruling that he has acted wholly without jurisdiction. In the first case the Appellate Court reverses the order because the Judge has erred in the mode in which he has exercised a judicial discretion: in the latter case it quashes the order because there was no discretion at all to be exercised.

Their Lordships for these reasons, are of opinion that the order of the High Court which is under appeal cannot be supported, and they must humbly advise Her Majesty to allow this appeal to reverse the order of the High Court, and in lieu thereof to order that the rule to show cause why the order of Mr. Craster should not be set aside be discharged, with the usual costs in the High Court.

The appellant who had been obliged to come here must of course have his costs of this appeal.

The 30th May 1876.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Oudh Talookdars—Act I of 1869—Joint Hindoo Family—Grant to one Member
—Will—Mitacshaira—Custom—Judge (Private knowledge of)—New Case—
Fresh Evidence—Conflicting Evidence—Conduct of Parties—Adjournment.*

*On Appeal from Oudh, Consolidated Appeals, and from the North-
Western Provinces of Bengal.*

Hurpurshad and others, *Appellants*,
versus

Sheo Dyal and others, *Respondents*;

Ram Sahoy, *Appellant*,

versus

Sheo Dyal and others, *Respondents*;

Balmokund, *Appellant*,

versus

Sheo Dyal and others, *Respondents*;

Ram Sahoy, *Appellant*,

versus

Balmeo Koond and others, *Respondents*.

The property in dispute was amassed by an undivided Hindoo family carrying on business as bankers. The property, which is situated in Oudh, came within the terms of Lord Canning's Proclamation of 1858, confiscating to the British Government the proprietary right in the soil of the Province. It appeared that the family in question had rendered good services to the British Government during the mutiny, and as a reward their lands had been exempted from the confiscation, and other forfeited lands were transferred to their possession.

HELD that the grant of this property was made to one member of the family for the joint benefits of all the members; that Act I of 1869 conferred title in landed property; that the grantee acquired a permanent, heritable, and transferable right in the property; that he had by an alienation *inter vivos* transferred the property to the family, to be held by them as joint property, and that the property was divisible among all the members of the family *per stirpes* which was the prevailing mode, according to the Mitacshara law, in the absence of a family custom.

A custom is a rule which, in a particular family or in a particular district, has, from long usage, obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly.

A Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts.

It is always dangerous (and more especially so in the Mofussil Courts in India) to allow parties to make a new case and to call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it.

In a case of conflicting evidence of witnesses who do not commend themselves by the manner in which they give their evidence, it is a safe rule to look to the conduct of the parties.

If a Court intends to call for fresh evidence, it ought to record its reasons for so doing.

A Court ought not to adjourn a case for the production of a document; much less (when it does so) to allow witnesses and several of the parties who were interested in the result, and who had been previously examined, to be recalled and to add to and vary the evidence which they had previously given, in order to prove a case which they had not set up.

Mr. Mayne and Mr. J. H. W. Arathoon for Hurlpurshad and others.

Mr. Bell for Ram Sahoy.

Mr. Cowie, Q.C., and Mr. Doynce for Balmokund.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Sheo Dyal.

Sir Barnes Peacock gave judgment as follows:—

The first three of the above-mentioned appeals are from a decree of the Judicial Commissioner of Oudh, in a suit commenced in the Court of the Deputy Commissioner of Lucknow, in which the respondent, Sheo Dyal, was the plaintiff; and the fourth is from a decision of the High Court of Judicature for the North-Western Provinces, in a suit commenced in the Court of the Subordinate Judge of Cawnpore, in which the appellant, Ram Sahoy, was plaintiff.

The former suit will hereafter be referred to as the Oudh Suit, and the Record in the first three appeals as Record No. 1. The other suit will be referred to as the Cawnpore Suit, and the Record in the appeal in that suit as Record No. 2.

The parties, both plaintiffs and defendants, were members of an undivided Hindoo family, of which Koonhoo Lall was the common ancestor. He left three sons, Chundun Lall, Moonnoo Lall, and Gunga Pershad. About the year 1832, Moonnoo separated from his two brothers, Chundun and Gunga Pershad, who continued undivided, lived in commensality, carried on business as bankers, and thereby acquired and amassed considerable property.

Chundun had five sons: 1. Chotay, who died in the lifetime of his father; 2. Gouree Shunkur; 3. Beharee Lall; 4. Kunhya Lall, the father of Sheo Dyal, the plaintiff in the Oudh Suit; and 5. Jankee Pershad. Chundun died in 1854; Gunga Pershad died in Chundun's lifetime, having had three sons, Sheo Pershad, and Ram Sahoy, who survived him, and Ram Pershad, who died without issue in his father's lifetime. Sheo Pershad died without issue in 1863, leaving his brother Ram Sahoy, the plaintiff in the Cawnpore Suit, his heir, him surviving.

Chotay Lall, the eldest son of Chundun, had three sons: 1, Balgobind, who died some years ago; 2, Balmokund; and 3, Banee Pershad, of whom the last two were defendants in both suits.

Gouree Shunkur, the second son of Chundun, also had three sons; Hurlpurshad, Ramchurn, and Bisheshur Pershad, defendants in both suits, and appellants in the first appeal.

There were other descendants of Chundun through his sons Chotay Lall, Beharee Lall, and Jankee Pershad respectively, to whom it is not necessary to refer more particularly. They are shown so far as is necessary in the genealogical table set out in the case of the appellants in the first appeal (p. 4).

It appears from the above statement that the family consisted of two branches; the descendants of Chundun, and the descendants of Gunga Pershad.

Sheo Dyal, the plaintiff in the Oudh suit, which was commenced on the 14th December 1869, claimed as the representative of Kunhya Lall, one of the five sons of Chundun, one-fifth of the whole property in suit by excluding altogether Ram Sahoy, the sole descendant of Gunga Pershad (Record No 1, p. 2); whilst Ram Sahoy, who intervened in the Oudh suit, and was the plaintiff in the Cawnpore Suit, which was commenced on the 21st December 1869, claimed, as the sole descendant of Gunga Pershad, one-half of all the property.

It was contended that Ram Sahoy had separated before the commencement of the suit, and had received twenty-seven villages and other property as his share. It was, however, considered by the lower Courts that that fact had not been proved. Their Lordships are of opinion that there is no sufficient evidence of the fact, and that the decision was correct. That point may be treated as having been disposed of. It was also considered by the lower Courts, and admitted by the learned Counsel for the appellants in the first appeal, that although Chundun was the active member of the family, and the property was acquired principally through his ability, energy, and exertions, no part of it could be considered as his "self-acquired property," that is to say, as having been acquired within the meaning of the Mitacshara, through his own exertions alone and without the use of any part of the family funds.

Their Lordships are of opinion that the above view is correct, and their judgment will proceed upon the basis that the family was an undivided Hindoo family, and that no portion of the property was the self-acquired property of Chundun or of any other members of the family within the meaning of the Mitacshara.

The most important questions raised in the Oudh Suit are what was the effect of Lord Canning's well-known proclamation of March 1858, of the sunnud to Gourree Shunkur, of the summary settlements, of Act I of 1869, and of the documents called Gourree Shunkur's will, upon that portion of the property which was included in the above-mentioned sunnuds and summary settlements.

It was contended on behalf of the sons of Rajah Gourree Shunkur, the appellants in the first appeal, that all the estates included in the sunnud and summary settlements, whether previously joint property of the family or not, became the separate self-acquired property of Rajah Gourree Shunkur, that he was the sole *malgoozar* thereof, and that he and his sons were the sole beneficial owners of it; that he had no power to transfer it by will or by alienation *inter vivos*; and as to the twenty-seven villages, it was stated that although in April 1858, the summary settlement with regard to them was made with Kunhya Lall (p. 211), there was afterwards a mutation of them into the name of Rajah Gourree Shunkur (395, l. 45).

It was also stated on their behalf that many, but without specifying which, of the villages included in the sunnud and summary settlements were never part of the joint family property.

By the 8th paragraph of the proclamation it was declared amongst other things that Chundun Lall, zemindar of Mourawan, and five other persons therein mentioned, were thenceforward the sole hereditary proprietors of the lands which they held when Oudh came under British rule; and it was further declared by the 9th paragraph that, with those exceptions, the proprietary right in the soil of the province was confiscated to the British Government (Record No 1, p. 12).

It was held by the Judicial Commissioner, in his judgment before remand,

that the words Chundun Lall in that paragraph (probably the words used were Chondi Lall, as stated by the Judicial Commissioner, Record 1, p. 140)—were used as the generic name of the undivided Hindoo family (*id.*, p. 142, l. 15), and that the title of the constituent members of that family, as it existed in 1858, to whatever landed estates were held by them or their agents, directly or indirectly, on the 13th February 1856 (the date of the annexation of Oudh), was maintained to them, and was not conferred upon Rajah Gouree Shunkur, notwithstanding any wording of the sunnud, or the fact of his executing a kubooleut for the estates between the 1st April 1858, and the 10th October 1859, but that the remaining portions of the estate rested on a different basis (*id.*, p. 142, l. 34; p. 381, l. 11). As to those portions he was of opinion that they "must be held to have been *prima facie* the sole property of Rajah Gouree Shunkur, and that as a consequence of this (confirmed by s. 4 Act I of 1869), he had power to alienate it by act *inter vivos* or to bequeath the whole or any part of it" (p. 142, lines 42 and 48; p. 381, l. 28).

The former portion, he held, would follow the custom of the family, whilst the other portions would be regulated by the bequest of Rajah Gouree Shunkur, if he had made one, or, failing that, by Act I of 1869. "The succession," he adds, "to the personal property is independent of all special considerations, and must be regulated by Hindoo law and by family custom" (Record, No. 1, p. 143, l. 9). Again he says, "So far as concerns the ancestral estate of personal moveable property the will has no effect, for, over that, Rajah Gouree Shunkur had no testamentary power" (*id.*, 144, l. 19).

The same views are expressed in the judgment under appeal (*id.*, 380, 381).

Their Lordships concur with the Judicial Commissioner that the 8th paragraph of the proclamation applied to that portion of the estates of Mourawan which belonged to the family at the time when Oudh came under British rule, notwithstanding Chundun's name was inserted in that paragraph. Chundun died in 1854, long before the mutiny. He personally could not have been referred to in the 7th paragraph of the proclamation as one of those whom the Governor-General declared it to be his intention to reward for their steadfast allegiance at a time when the authority of Government was partially overborne, and who had proved it by the support and assistance which they had given to British officers. But Gouree Shunkur was one of those who had given support and assistance to Government, and not only Gouree Shunkur, but also Sheo Pershad and other members of the joint family. The gomasthas of the several banking firms of the family were also loyal, and rendered good service to Government (Record 1, p. 279, l. 10).

It can scarcely be supposed that the Governor-General intended to injure any member of this loyal family, and by confiscation and regrant to transfer the beneficial interest in the joint estates of the whole family from the several members of it to a single member of the family for his own sole benefit.

As regards, therefore, the estates which were exempted from confiscation, the sunnud and summary settlements were a mere grant by Government to one member of the family of property which belonged to the family jointly. They could not of themselves affect the rights of the family.

As regards that part of the property granted to Gouree Shunkur which, if any, was not previously part of the family estates, it cannot be held to have been the separate, self-acquired property of Gouree Shunkur within the meaning of Hindoo law. It was granted as a reward for loyalty and for the support and assistance rendered to British officers; such services as those referred to in Gouree Shunkur's petition (Record No. 1, 279) could not have been rendered without the use of funds which must be presumed to have been those of the joint family.

This point, however, is not very material, for even if some part of the

property was self-acquired by Rajah Gouree Shunkur, he, according to their Lordships' views, hereafter stated, transferred it to the family.

With regard to Act I of 1869 the Judicial Commissioner held that it did not confiscate or confer title in landed estate (Record 1, p. 379, l. 36). He says: "The preamble expressly recites that the title in taluquas has already been conferred: the Act declares what in the sight of Government are 'talukas,' regulates the order of succession to such; and defines, and perhaps creates, certain special interests." Their Lordships, however, cannot concur with the Judicial Commissioner in his view that the Act did not confer title.

By s. 2 the word "talukdar" is defined; it is declared to mean "any person whose name is entered in the first of the lists mentioned in s. 8." Rajah Gouree Shunkur's name was entered in that list (Record No. 1, p. 122, l. 3; *id.*, supplement, p. 3, No. 19, p. 9, No. 2), and s. 10 made the list conclusive evidence that he was a talukdar within the meaning of the Act.

By s. 3 it was enacted that every talukdar with whom a summary settlement of the Government revenue was made between the 1st April 1858 and the 10th October 1859, or to whom, before the passing of the Act and subsequently to the 1st April 1858, a talukdari sunnud had been granted, should be deemed to have thereby acquired a permanent, heritable, and transferable right in the estates comprising the villages and lands named in the list attached to the agreement or kubooleut executed by such talukdar when the settlement was made, subject to all the conditions affecting the talukdar contained in the orders passed by the Governor-General of India on the 10th and 19th October 1859, and republished in the first schedule thereto annexed, and subject also to all the conditions contained in the sunnud under which the estate was held.

Section 4 is as follows:—

"Every person whose lands the proclamation issued in Oudh in the month of March 1858, by order of the Governor-General of India, specially exempted from confiscation, and whose names are contained in the second schedule hereto annexed, shall be deemed to possess in the lands for which such person executed a kubooleut between the 1st day of April 1858 and the 1st day of April 1860, *the same right and title which he would have possessed thereto if he had acquired the same in the manner mentioned in s. 3; and he shall be deemed to hold the same subject to all the conditions affecting talukdars which are referred to in the said Section, and to be a talukdar for all the purposes of this Act.*"

Gouree Shunkur's name was not contained in the 2nd schedule annexed to the Act, but Chundun's was.

Summary settlements were made with Gouree Shunkur between the dates specified in s. 3; and a talukdari sunnud was granted to him before the passing of the Act, and subsequently to the 1st April 1858, *viz.*, on the 11th December 1859, by which the Government bound itself to maintain him and his heirs as sole proprietors of the estate (Record No. 1, p. 21).

Chundun did not enter into a kubooleut for the lands to which the suit relates, but Gouree Shunkur did. It therefore appears to their Lordships that Gouree Shunkur came within s. 3 of the Act. If he did not, he came within s. 4. It makes no difference, however, in the result which is the Section within which the case falls, for both Sections confer the same right and title.

Their Lordships are consequently of opinion that Gouree Shunkur must, in consequence of the Act, be deemed to have *acquired a permanent heritable and transferable right* in the estates to which the suit relates, being those which comprised the villages named in the lists attached to the agreements, or kubooleuts executed by him when the settlements of the different portions of the estates were made; and this, as regards both the villages which were, and those, if any, which were not, previously part of the family property.

They are, however, also of opinion that Gouree Shunkur had power by will

or by alienation in his lifetime to transfer the estates which, by virtue of the Act, were not merely heritable but transferable.

By s. 11 it was enacted that, subject to the provisions of the Act, and to all the conditions under which the estate was conferred by the British Government, every taluqdar and grantee, and every heir and legatee of a taluqdar and grantee, of sound mind and not a minor, should be competent to transfer the whole or any portion of his estate, or of his right and interest therein, during his lifetime, by sale, exchange, mortgage, lease, or gift, and to bequeath by his will to any person the whole or any portion of such estate, right, interest, etc.

The remainder of that Section, and ss. 12 and 13, contain provisions relative to such transfers which do not apply to the present case.

Section 14 enacted that if any taluqdar or grantee shall *heretofore have transferred or bequeathed*, or if any taluqdar or grantee, or his heir or legatee, shall hereafter transfer or bequeath the whole or any portion of his estate, to another taluqdar or grantee, or to a person who would have succeeded according to the provisions of this Act to the estate, or to a portion thereof, if the transferor or testator had died without having made the transfer and intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same condition and to the same rules of succession as the transferor or testator.

Then comes s. 15, *which is very important*, and which enacts that—

“If any taluqdar or grantee *shall heretofore have transferred or bequeathed* to any person not being a taluqdar or grantee, the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof, if the transferor or testator had died without having made the transfer and intestate, the transfer of, and the succession to, the property so transferred or bequeathed, *shall be regulated by the rules which would have governed the transfer of, and succession to, such property, if the transferor or legatee had bought the same from a person not being a taluqdar or grantee.*”

The next question is how and to what extent Rajah Gouree Shunkur exercised the power of alienation conferred by the Act.

All the Courts in the Oudh suit, as well as the Subordinate Judge of Cawnpore, have given effect to the documents called the will of Rajah Gouree Shunkur; but they put different constructions upon them.

The following is a translation of one of the documents, dated 7th February 1860. Record No. 1, page 28, l. 19:

“I, Rajah Gouree Shunkur, Taluqdar and Zemindar of Hurha, Targaon, etc., in the district of Oonao, who have received from the British Government the proprietary right of Hurha, Targaon, etc., in the district of Oonao, in perpetuity, have been requested by Government to submit an application on the subject of primogeniture, with a view that the Taluqah may not be split into pieces, as I would wish. Now, the custom that has been followed in my family, for generations past, is this—that the eldest member of the family continues to be the head, while the others remain obedient to him; but every one possesses a share in the Taluqah. Under the custom of the family the other brothers are at liberty to have their share separated, should they wish it. The head has no power, under the old custom, to alienate the estate without consulting every sharer. I, therefore, wish that the old custom of maintaining the share of each shareholder be preserved, in opposition to the one in accordance with which one member of the family is allowed to succeed.”

The other documents applicable to property in other districts are similar in effect, though not in the identical words. (Record No. 1, page 28, l. 44, and page 29, and *id.*, p. 438, etc.)

Other material documents are those called the tabular statement and Chundun's Chit.

The document called the tabular statement, and the letter in which it was submitted, are at pages 30 and 31 (Record No. 1). The following are translations of the letter and tabular statement :—

"To the Tehsildar,

"Sir,

"I received your former letter, together with the form of a statement of succession, desiring me to fill in the columns, and also your latter communication, calling for the statement. As directed by you, the statement is herewith submitted, duly filled in.

"Pray make no objection to the entry, sons of Lallah Chotay Lall, and son of Lallah Jankee Pershad, deceased.

"The object desired is attainable by such an entry.

"Yours faithfully,

"(Signed) RAJAH GOUREE SHUNKUR,
"Banker of Mourawan."

"May 13, 1860.

STATEMENT INCLOSED.

Name of Taluqa.	Number of Persons in the Family fit to succeed.	Jumma of the Estate.	Name of Persons in favor of Succession of one Member of the Family.	Name of persons against the Succession of one Member of the Family.
Jabroulee, etc.	<p>Sons of Lalla Chundun Lall, deceased :—</p> <ol style="list-style-type: none"> 1. Son of Lallah Chotay Lall, deceased ; 2. Rajah Gouree Shunkur ; 3. Lallah Beharee Lall ; 4. Lallah Kunhya Lall ; 5. Son of Lalla Jankee Prosad. <p>Sons of Lalla Gunga Prosad, deceased :—</p> <ol style="list-style-type: none"> 1. Lallah Shiva Prosad ; 2. Lallah Ram Sahoy. 			Rajah Gouree Shunkur.

"Remarks.—The following rule has prevailed with regard to succession in the family of Rajah Gouree Shunkur :—The eldest son in the family is regarded as the head, with the consent of all the sharers, and the others remain subject to him ; but all the sharers retain their shares, and in case of disagreement between them, each sharer is at liberty to have his share separated."

The translation of Chundun's Chit is at page 10 (Record No. 1). It is as follows :—

"Let documents be drawn out, under the instructions herein conveyed, and then you will be at liberty to live together or separate from each other. Each sharer will take his share, half in money, and half in gold, silver, and debts due from parties. Any member of the family may take me to live with him, or all the members may manage it, so that they may divide among themselves the expenses which may be incurred on account of the necessities of my life.

"My brother Gunga Prosad	...	...	20,000
"Chotay Lall will get double share	...	...	30,000
"Gouree Shunkur	...	...	15,000
"Beharee Lall	...	...	15,000
"Kunhia Lall	...	...	15,000
"Jankee Prosad	...	...	15,000

"All the females and children should certainly go to the Ganges and bathe there. They may go either to Nujuf Gurh or Cawnpore, or Bruhmawart.

"Any members wishing to live together may do so, while others may live separate, and pursue their occupation. Each member will supply his own family

with food, clothing, and jewels. Marriages, etc., should be celebrated after consultation with all the members.

"Koonwar Soodee, 10th 1892 Sumbut, or 1243 Fuslee."

In the Cawnpore suit the High Court held that none of the documents amounted to a will.

They said, "We have no hesitation in assenting to the contention that neither the reply as to the custom of primogeniture, nor the tabular statement which followed it, can be regarded as testamentary. They contain no devise or bequest, nor any language from which a devise or bequest can be inferred." And again: "It cannot be supposed that in replying to the enquiries made by the Deputy Commissioner the taluqdars of Oudh set themselves to make their wills. It appears to us that the Rajah Gouree Shunkur intended no more than to inform the authorities of the custom of inheritance prevailing in the family of which he was a member, and to indicate the persons interested as sharers of the family property. *Moreover, whatever may have been the power of disposal which the Rajah possessed over the property in Oudh, which point it is not necessary for us to determine*, he neither had, nor does it appear that he assumed to have, any power to dispose of the property in suit," that is, the property in the North-Western Provinces. These remarks were very appropriate in the case before the High Court in the Cawnpore case. It is clear that the documents had no reference to property in the North-Western Provinces, and that they did not contain a bequest or testamentary disposition of any part of such property. But with regard to that part of the property in Oudh, to which they related, the case is very different. That which was not a will in the ordinary sense of the word, might, in their Lordship's opinion, have amounted to a will within the definition of Act I of 1869. By s. 2 of that Act it is declared that the word "will" means "the legal declaration of the intention of the testator with respect to his property *affected by this Act*, which he desires to be carried into effect after his death." It appears to their Lordships that the document of the 14th February 1860, and the other documents, which were very similar, did declare the intention and wishes of Gouree Shunkur, which he wished to be carried into effect after his death with respect to all the estates which the Government had assumed to confer upon him by the sunnud, etc., including that part which was ancestral, as well as that which was granted to him for the first time. Gouree Shunkur, as an honest and just man, and as a conscientious Hindoo, did not wish that after his death the property which belonged to the family jointly should pass to his eldest son as his heir, and continue to descend according to the rules of primogeniture. He wished things to go on as before, and that that which had been joint family property should continue joint family property.

It appears from the judgment of the Judicial Commissioner, that documents, such as those which have been called the will of Rajah Gouree Shunkur, have been treated and spoken of by the taluqdars of Oudh as their wills.

He says, Record No. 1, p. 381, l. 38:—

"In ordinary cases this could hardly be construed as a 'will,' for there is no direct allusion to the death of the executor, nor can it be said that there is a distinct direction as to the devolution of his property after his death.

"But in Oudh it is a matter of notoriety that the letter to which these documents are answers were expressly intended to elicit and register the wishes of each taluqdar as to the descent of his landed estate after his death, and the replies are to this day spoken of by taluqdars as their will *when no other has been made*.

"Its form is immaterial *as it was made prior to the passing of Act I of 1869*, and the power of Hindoos to make even nuncupatory wills has been decided in repeated judgments submitted by the Lords of the Privy Council.

"I find that this document correctly described the intention of the Rajah in

respect to the devolution of his taluqa after his death, and that it is correctly described as a 'will.'

Their Lordships concur in this view. They go further, however, and are of opinion that the declaration in those documents of the wish of Gouree Shunkur, acted upon as it was by him and by the other members of the family in his lifetime, and coupled with the tabular statement, was evidence sufficient to prove an alienation *inter vivos*, which in Gouree Shunkur's lifetime transferred the property to the family, to be held by them as joint family property. No evidence was given to show that the rents and profits of the estate did not continue, even during the life of Gouree Shunkur, to be brought, like the other assets of the family, to the family treasury, for the use of the undivided family. In the Cawnpore case, Mohun Lall, one of the sons of Chotay, said, "Every one used to take out of the profits as much as he required." (Record No. 2, p. 145.) In the tabular statement sent in in May 1860 Rajah Gouree Shunkur entered his own name not alone, but with the other members of the family, as the persons fit to succeed: he could not have intended to devise to himself by a will or codicil—he clearly meant, by entering his own name as one of the sharers, to express his wish and intention that the estates should be held jointly during his own life as well as after his death. (Record No. 1, pp. 30, 31.)

Their Lordships are of opinion that the transfer of the property to the joint family was complete in the lifetime of Gouree Shunkur, and that it was acted upon in his lifetime as well as after his death. Beharee Lall, and Kunhya Lall, and the other members of the family succeeded to the estates, not by inheritance, for they were not Gouree Shunkur's heirs, but by survivorship, and Beharee Lall and Kunhya Lall respectively became managers, according to the custom of the family, and as they would have done if no change had been effected by Lord Canning's Proclamation, etc. The beneficial interest continued in all the surviving members of the joint family.

In his petition, dated 28th June 1867, Rajah Beharee Lall stated that all the present members of the family acquiesced and consented that the tabular statement (in one part of the petition called a "testament," and in another "an instrument"), which was filed during Rajah Gouree Shunkur's incumbency, was binding and effectual. (Record No. 1, p. 323.)

No special mode of transfer is required by the Hindoo law, even a verbal transfer is sufficient.

It may be urged that s. 16 of the Act enacts that no transfer of any estate, or of any portion thereof, or of any interest therein, made by a taluqdar or grantee, or by his heir or legatee, *under the provisions of this Act*, shall be valid unless made by an instrument in writing signed by the transferor and attested by two or more witnesses. But that Section was not intended to be retrospective, or to affect transfers made previously to the passing of the Act. Ss. 14 and 15 speak of transfers "heretofore made," and it never could have been the intention of the legislature to render void sales or transfers made before the passing of the Act, by one taluqdar to another taluqdar under s. 14, or by a taluqdar to any other person under s. 15, if not made by writing signed by the transferor in the presence of two or more witnesses. If Gouree Shunkur had in his lifetime sold the estate and conveyed it by deed to another taluqdar, Act I of 1869, passed after Gouree's death, would not have rendered the sale void. Ss. 17 and 18 are clearly not retrospective, and s. 19 applies only to future cases, and it provides expressly that nothing shall affect wills executed before the passing of this Act. Section 16 applies to transfers, and s. 19 to wills, but both Sections use the words "*made under the provisions of the Act*;" they cannot be held to apply to a transfer made by deed, will, or otherwise, nine years before the Act was passed.

For the reasons above stated, their Lordships are of opinion that the claim

of the sons of Rajah Gouree Shunkur to exclude the other branches of the joint family from any share in the taluqdari estate cannot be supported, and that the conclusion of the Judicial Commissioner in his first judgment to the effect that the same law of succession must be applied to the entire landed estate, and to the moveable property, is correct. It is hardly necessary to remark that Ram Sahoy, if he seeks to take the benefit of the ruling must bring into the common stock the taluqdari property which was ostensibly granted to his brother, Sheo Pershad, or which stands in the name of Sheo Pershad or of himself.

The next question is, what is the rule of succession to be applied.

Upon the first hearing before the Deputy Commissioner, he rejected the claim of Ram Sahoy altogether, and awarded to the plaintiff one-fifth share of all the property as that to which he was entitled under the will of Rajah Gouree Shunkur. Upon appeal the Commissioner modified that decree, and putting a different construction upon the so-called will, awarded to the plaintiff a one-seventh share of all the property, moveable and immoveable.

Upon special appeal to the Judicial Commissioner he remanded the case for the trial of certain issues of fact, of which the only important ones to be considered are the 6th and 7th. They are as follows:—

"6. What is the measure of the share of each party. In the personal property? In the estate now found to be ancestral? In the acquired estates?"

"7. What is the family custom as to succession?"—(Record No. 1, p. 145.)

Under those issues fresh evidence was given as to Chundun's chit, which had been found by the Deputy Commissioner not to have been proved.

It is always dangerous to allow parties to make a new case, and to call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it, and more especially is it so in the Mofussil Courts in India. But the parties not only gave fresh evidence upon the issue as to Chundun's chit, but they were allowed to set up an entirely new case, and to enter into evidence to prove that Ram Sahoy and other members of the family had actually signed copies of the letter, and had agreed to be bound to take, upon partition of the immoveable estate, shares corresponding in extent with those specified in Chundun's chit, as to the Rs. 110,000 therein mentioned. That was a new case altogether, which had never been suggested or raised by any of the parties in either of the lower Courts in Oudh, or even before the Judicial Commissioner on appeal, and in support of that case witnesses, who had been examined upon the first trial, were examined *de novo*, and materially altered and added to their former evidence.

As the ultimate decision of the Judicial Commissioner, after the remand, turned upon Chundun's chit, their Lordships will proceed to consider the evidence given with reference to that document. Before doing so, however, it will be well to go back and refer with more particularity to the proceedings in the Oudh suit.

The plaintiff claimed one-fifth of the whole property, moveable and immoveable, basing his claim on the will of Gouree Shunkur.

Hurpurshad claimed to be entitled, as the eldest son of Gouree Shunkur, to succeed to the whole of the Mourawan estate (Record No. 1, p. 75, l. 20), whilst the other sons of Gouree Shunkur contended that the wishes of Gouree, as expressed by the document (in one place called by them a will, and in another a deed), were that the property should be divided amongst all of his sons (*id.* p. 76, l. 9 and 11). The only parties in the Oudh suit who relied upon the paper called Chundun's chit, were Rugburdyal, Mohun Lall, Ram Dyal, and Kashee Pershad, grandsons of Chotay Lall, and great-grandsons of Chundun, and Balmokund and Baneer Pershad, sons of Chotay and grandsons of Chundun. They said that the talooka could not, under the will of Beharee Lall, be broken up (p. 77, l. 12), and they set up Chundun's chit merely as to the moveable

property, houses, and gardens. They never stated or alleged that any of the members of the family had signed copies of it, or had assented to, or agreed to be bound by it. It was contrary to their case that it was intended to apply to any part of the immoveable estate. Their pleader, Kali Pershad, stated in the fifth ground of their defence as follows :—

“According to a letter of Lalla Chundun Lall, Chotay Lall was entitled to one-third of the moveable property, houses, and gardens. Plaintiff is therefore entitled to one-sixth.” (Record No. 1, p. 77, l. 13.) This was by putting Ram Sahoy out of the case altogether, and claiming to divide the moveables amongst the five sons of Chundun and their descendants, and giving Chotay a double share under Chundun's chit. In this way they reduced the plaintiff's share in the moveable property from a fifth to a sixth, and set up a claim for Chotay's descendants in the moveables, houses, and gardens, to two-sixths or one-third, being a double share. Balmokund, by the same pleader, stated that he, and not the sons of Gouree Shunkur, was entitled to succession, meaning, no doubt, that he was entitled to the whole of the immoveable estate as talookdar. (Record No. 1, p. 77, l. 44.) That claim, however, has since been abandoned.

Ram Sahoy, the descendant of Gunga Pershad, contended that the plaintiff, as representing one of the five sons of Chundun, was entitled to a one-tenth share, that is to say, to one-fifth of a half, only, he himself claimed the other half, as representing Gunga Pershad's branch of the family. He was not originally made a defendant in the Oudh suit, but he intervened and was allowed by the Deputy-Commissioner to contest the plaintiff's claim only so far as it related to a share in the twenty-seven villages which stood in his name, leaving him the option of making good by a separate suit any further claim he might have (Record No. 1, p. 86, l. 41).

The only issue in the Oudh suit in the Court of the Deputy-Commissioner which raised any question as to Chundun's chit was the 11th (Record No. 1, page 87), and this had reference to the moveable property only. The issue was as follows :—

“Are the descendants of Chotay Lall entitled to one-third of the moveable property, houses, and gardens?” and the onus of this issue was stated to be on the descendants of Chotay Lall.

Upon that issue the Deputy-Commissioner found that the alleged chit was not genuine, and very properly so upon the evidence then before him, for the original had been withdrawn and was not produced. It has already been stated that the Deputy-Commissioner in his judgment before remand awarded the plaintiff one-fifth of the property, and that upon appeal by Ram Sahoy to the Commissioner that decree was modified and one-seventh awarded to the plaintiff.

The judgment of the Commissioner was delivered on the 7th May 1870, in Ram Sahoy's appeal only. On the 6th May, only the day before the Commissioner gave judgment in Ram Sahoy's appeal (Record No. 1, page 120, l. 26), the defendant Balmokund and other descendants of Chotay, including Mohun Lall, presented another appeal (*Id.* 108), and on the 12th May 1870, five days after the judgment of the Commissioner, the defendants Ramchurn and others preferred a third appeal (Record, page 118), both of the last two appeals being against the decision of the Deputy-Commissioner of the 28th March 1870. The appeals appear to have been out of date (Act VIII of 1859 s. 333) unless there was great delay in granting a copy of the decree appealed against. Be this, however, as it may, the appeal of Balmokund and others was admitted, and judgment was pronounced upon it by the Commissioner, who upheld the judgment he had given on Ram Sahoy's appeal.

One of the grounds of appeal by Balmokund and other descendants of Chotay, including Mohun Lall, to the Commissioner from the decision of the Deputy-Commissioner was, not that upon the evidence the Deputy-Commissioner ought to

have found in favor of Chundun's chit, but that they had had no opportunity of proving Chundun's chit put in evidence by them on the first hearing of the suit. (Record No. 1, p. 109, l. 34, and p. 121, l. 21.)

The Commissioner expressed no opinion upon the point though he stated generally that nothing had been advanced to shake the propriety of his decree in the other appeal, which in fact gave no effect to Chundun's chit.

From that decision a special appeal was preferred to the Judicial Commissioner by Balmokund, Mohun Lall, and others, in which they set up a ground of appeal as regards Chundun's chit similar to that which had been stated in their appeal to the Commissioner (Record No. 1, p. 136, l. 4); but they still claimed in their appeal the right for Balmokund, as the eldest member of Chundun's family, to succeed to the whole of the immoveable estate (*Id.* p. 135, l. 37). With regard to the custom of the family and Chundun's chit, they said, "The appellants have had no opportunity to produce evidence *with reference to the custom of the family, the will of Rajah Beharee Lall, and the writing of Chundun, and to file the latter*" (Record No. 1, p. 136, l. 4). The Judicial Commissioner expressed no opinion with reference to that ground of appeal, though he ought to have done so. If he had expressed a judgment upon the point, he ought to have held on special appeal that, as a matter of law, there was nothing in the objection. The appellants had not, nor had any one of the parties to the suit, set up a custom in the family with regard to the extent of shares to which brothers and the descendants of deceased brothers were entitled on partition of immoveable estate. They had every opportunity to do so if they wished, and to prove it if they could. With regard to Chundun's chit, they not only had an opportunity of filing it, but they actually did file it in the Court of the Deputy-Commissioner, but they afterwards withdrew it before the hearing (Record 1, p. 96, l. 15); and they also gave such evidence as they thought fit respecting it, but did not produce the original.

Sheo Churn, on the first trial before the Deputy-Commissioner, stated that two copies of the letter, that is, Chundun's chit, had been made and signed by Hurlpurshad, Beharee Lall, Ram Narain, Kunhya Lall, and Madho Pershad, and he afterwards added, and by Baboo Ram Sahoy (*Id.* p. 84).

Mungul Sing said (*Id.* p. 84) :—

"I was sitting near the Baradurree one morning in Magh, 1275 F., Rajah Beharee Lall, Ram Churn, Beni Pershad, Mohun Lall, Hurlpurshad, Ram Sahoy were there; Balmokund was having his hair dressed at a little distance. They all agreed to abide by Lalla Chundun Lall's letter, and went away. A Hindoo chit was written (he does not say a copy of Chundun's chit was made) by Rajah Beharee Lall, and Kunhya Lall, Ram Sahoy, Beni Pershad, Hurlpurshad, Ram Churn, Madho Lall signed it. I cannot write or read.

"*Cross-examination.*—Hurlpurshad took this letter away. Beni Pershad took the original of Chundun Lall. Ram Sahoy took away another. I was there by chance. I never was sent for before."

As regards the evidence given after the remand respecting Chundun's chit, their Lordships consider that the Deputy-Commissioner was correct in stating that, with the exception of the testimony of Beni Pershad and Deenanath, the additional evidence (*Id.* p. 351 to 357), merely goes to show the existence of the document (*Id.* p. 373, l. 3). That fact is now admitted. Deenanath's evidence is at p. 358.

He says at l. 17 : "I have seen with Beni Pershad and with Hurlpurshad a chit purporting to be written by Chundun Lall a year before I entered his service. I saw the letter during Chundun's life, and he spoke to me about it, and said he wished Gunga Pershad's sons to get Rs. 20,000, Chotay Lall's, Rs. 30,000; and the others Rs. 15,000 each" (Oudh Record, p. 358, l. 18).

This shows that Chundun's intention when he wrote the document was that the several members of the family should each receive the particular amount set

opposite to his name. Chundun, certainly, according to that evidence, does not appear at that time to have inserted the amounts as expressing the proportions in which the property of the family was divisible by custom or was at all times in future to be divided if partition should take place. Deenanath, however, added that the conversation was casual, and in answer to the Court, said, "In the conversation above described, I understood from Chundun Lall that he meant the whole property to be divided amongst the kinsmen in those proportions; the word 'Ursalha' was used by him. The conversation arose at the time of Golam Ali Khan driving the family across the Ganges in 1255 Fuslee." That was about the year 1848, and the conversation applied to the property as it existed at that time.

The statement as to what the witness understood from Chundun in 1848 to be his meaning is too loose and unsatisfactory to be acted upon; it was never mentioned, or even alluded to either in his examination or cross-examination at the first trial; is quite at variance with the statement in his examination in chief that Chundun had told him that he wished Gunga Pershad's sons to get Rs. 20,000, Chotay Lall's Rs. 30,000, and the others Rs. 15,000 each, coupled with his statement in cross-examination that Chundun's property consisted of Rs. 400,000 or Rs. 500,000 when the paper was written.

The Deputy-Commissioner in his judgment, referring to this statement of Deenanath, says:—"This evidence is not sufficient to justify the Court in attaching to the document a meaning different from that on the face of it," and their Lordships entirely agree with him.

Deenanath did not, on his examination after remand in the Oudh suit, speak to the fact of copies having been made or signed by other members of the family. His evidence was given on the 19th August, and it will be seen that, when examined before the Subordinate Judge in the Cawnpore suit on the 10th March 1870, he swore not only that copies had been made and signed, but that after finishing the copy the following sentence was added thereto: "Every one should divide and take his share, according to the letter of Lalla Sahib." (Record No. 2, p. 148.) He is the only witness who spoke to that fact. Beni Pershad, one of the sons of Chotay, who was interested in acquiring a double share for his branch of the family, said:—"Two copies of the letter were made by Beharee; one copy was given to Ram Sahoy, and the other to the descendants of Chundun;" but he did not state that any sentence was added thereto, or that the copies were signed by any of the members of the family, though he is one of the persons who was said by Mungul Singh to have signed them. He went on:—"The chit of Chundun should regulate the partition of the property of every description" (368, line 28). But this was mere matter of opinion. He did not at that time state that any agreement to the effect was ever entered into by the family, and it is quite at variance with the defence which he had set up.

The Deputy-Commissioner, in his judgment on remand, found that there was no ascertained custom as to partition (Record No. 1, p. 369, line 5), and putting Chundun's chit out of the question their Lordships are of opinion that that finding was correct.

With respect to Chundun's chit, the Deputy-Commissioner, after giving his reasons in detail, and amongst others that the original document had not been produced, said:—"I am still of opinion that the proof of the genuineness of the document is insufficient; and even admitting its genuineness, I cannot set any value upon it." He said:—

"It has been found that Chundun Lall and Gunga Pershad were a joint undivided family, and hence Chundun Lall had no legal power to deal with more than his own share, i.e., one-half of the joint property.

"For these reasons I set aside altogether the so-called writing of Chundun Lall. It has been found above that no ascertained family custom respecting

partition has been established, and I find, in consequence, on the issue, that the measure of the share of each party *in the personal property* is Hindoo law, under which *Baboo Ram Sahoy will take one-half ($\frac{1}{2}$), and the sons of Chundun Lall, or their representatives, each one-tenth ($\frac{1}{10}$)*. In the ancestral estate, and that acquired up to the 14th February 1856, I find that the measure of the share of each party is also Hindoo law, and that under it Baboo Ram Sahoy will take one-half, and the sons of Chundun Lall, or their representatives, each one-tenth. I find that in the acquired estate of Baboo Sheo Pershad, *i.e.*, Bunthra taluqa, Baboo Ram Sahoy is entitled to the sole ownership, the measure of his share being Act I of 1869, and in the acquired estate or 'grant' of Gouree Shunkur, as previously explained, I find that the measure of the share of each of the parties is the will of Rajah Gouree Shunkur, under which the sons of Chundun Lall, or their representatives, and Baboo Ram Sahoy, will each take one-sixth."

The finding of the Deputy-Commissioner, taken on remand, afterwards went before the Judicial Commissioner. He found that Chundun's chit was genuine, not that all or any of the parties had signed a copy or copies of it, or had agreed to be bound by it; but he considered that the document set forth the custom under which the ancestral estate had been held, and to which both Rajah Gouree Shunkur and Baboo Sheo Pershad in their wills, and Rajah Beharee Lall, in his petition, alluded.

The following is an extract from his judgment, p. 384, l. 23, Record 1 :—

"The Court of First Instance would apply to the ordinary Hindoo law, but it appears to me that such a ruling would not only be in direct contravention of the repeated declaration of this family for many years, that the joint estate was subject to family custom; but in direct opposition to the expressed wishes of the two grantees, Rajah Gouree Shunkur and Baboo Sheo Pershad, in respect to the estates over which they respectively had a power of testamentary disposition.

"Had these latter intended that their grants should be divided according to Hindoo law, nothing could have been easier or more natural than for them to say so. But what they do say is, 'We have a custom under which we now hold family property, and by that custom we wish the succession to our acquired estate to be regulated.'

"I think it impossible for any member of the family to say that the division should be by law, rather than by family custom.

"The difficulty is to decide what is that custom.

"The two instances of separation in previous generations do not assist us, for they are evidently not regulated by a common law, but were friendly agreements, the amounts given off being determined amicably, and based probably on facts known to the parties concerned, and to no one else.

"It is hardly disputed that the greater portion of the property held prior to the recent grants was acquired by Chundun Lall and his eldest son, Chotay Lall; *and I myself can speak, from many years' experience, to the veneration in which the Burra Lalla (Chundun Lall) was held by the joint family, and to the fact that all agreed that though the family lived and hoped to continue as undivided, yet that Chundun Lall had made a division prior to his demise, which was preserved in the family archives, and recognized by them.*

"A paper, purporting to be a copy of the record of the division so made in Chundun Lall's own handwriting, has been produced in this suit, and it is admitted that it is a copy of the document filed in the Court of Cawnpore.

"Some ridicule has been cast upon this paper, and the Court of First Instance deemed it unnecessary to enquire into its genuineness or its validity.

"The ridicule was misplaced, for the points which, to the ignorant, appear ridiculous, are precisely those which prove the paper to be a genuine production of the patriarchal head of an undivided Hindoo family.

"In this Court there has been no real attempt to deny its genuineness, nor

evidence offered to refute it, and as it has been found by the highest Appellate Court to be genuine in a suit between some of those parties in respect to properties held by them in the North-Western provinces, and not subject to the special law of Oudh, I think it unnecessary to remand this case again for trial of that issue, and, under my special power of review, I find that the document produced as Chundun Lall's is genuine.

"Finding that, I have no doubt but that that document sets forth the custom under which the ancestral estate has been held, and to which both Rajah Gouree Shunkur and Baboo Sheo Pershad in their wills, and Rajah Beharee Lall, in his petition, allude."

He then declared his finding on the several issues directed on the remand, and on the 6th and 7th. He said, on the 6th, "I find that the measure of the division of the personal property, the ancestral and the several acquired estates, including the Bunthra taluqu, is the custom of the family; and on the 6th, that the family custom is set forth in the writing of Lalla Chundun Lall, and that by it there falls of the entire estate divided into 22 portions, to the heirs of Gunga Pershad, 4 portions; to the heirs of Chotay Lall, 6 portions; to the heirs of Rajah Gouree Shunkur, 3 portions; to the heirs of Rajah Beharee Lall, 3 portions; to the heirs of Kunhya Lall, 3 portions; to the heirs of Jankee Pershad, 3 portions."

And he concludes thus:—

"I therefore find that plaintiff, Sheodyal, as the only son of Lalla Kunhya Lall, is entitled to a share equal to three out of twenty-two equal portions of the entire estate, and cancelling the decrees of the Commissioner of Lucknow, dated 7th May and 2nd June 1870 (as before), I amend, as above, the decree of the Deputy-Commissioner of Lucknow, dated 28th March 1870, said share to be enjoyed by said Sheodyal, subject to and in accordance with the will of Rajah Gouree Shunkur, deceased; and, considering the courteous and liberal manner in which the advocates of all parties have in this Court consented to the arrangement which enables the interests of all concerned to be determined in one judgment, I rule that when finally taxed in this Court all the costs in all the Courts in this case shall be costs against the estate."

The finding upon the 7th issue is altogether at variance with the cases set up by the several defendants in the suit, none of whom, as before observed, with the exception of the descendants of Chotay Lall, ever relied upon Chundun's chit, and they, only as regards the moveable property.

The genuineness of the document is now admitted, but it does not of itself prove a custom.

A custom is a rule which in a particular family, or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly. But Chundun's chit did not allude to or prove a usage in the family, or profess to lay down a certain definite rule which could be applied to any other state of facts than that which existed at the time it was written. It was not, and could not be, acted upon or applied to all cases of partition amongst brothers or descendants of brothers. It was a mere proposal for the division of Rs. 110,000 amongst certain then existing members of the family. What general rule can be extracted from it? Is it that in all cases where there are two brothers, the eldest having five sons, shall take nothing (for that was the case as to Chundun, by his own chit), that his eldest son shall take six twenty-seconds or three-elevenths, the rest of his sons three twenty-seconds each, and his brother four twenty-seconds, and what is to be the case where there are more than two brothers or the descendants of more than two? Their Lordships are of opinion that Chundun's chit did not declare, was not intended to declare, and was not evidence of, a valid family custom. There was no evidence in the Oudh case of an agreement by which the parties bound themselves to act upon it on any future partition of the

family property, moveable or immoveable. The Judicial Commissioner did not rest his judgment upon the fact that an agreement between the parties had been proved, but upon the fact that Chundun's chit set forth a custom under which the ancestral estates had been held, and to which he stated Rajah Gouree Shunkur by his will alluded. He referred to his own experience with regard to the veneration in which Chundun was held, and to his knowledge that the family had recognized a division which Chundun, prior to his demise, had made.

It ought to be known, and their Lordships wish it to be distinctly understood, that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. If the means of knowledge of the Judicial Commissioner of the facts spoken to by him in his judgment as depending upon his own knowledge, were capable of being tested, it would probably turn out that it depended upon mere rumour or hearsay, and that his evidence as to those facts would not have been admissible if he had been examined as a witness. But even if the Commissioner's statement of facts from his own knowledge be taken as evidence, Chundun's chit did not establish a custom as to the extent of shares upon partition, especially as regards immoveable property. As to such property the terms of it were not applicable. It expressly says, "Each sharer will take his share half in money and half in gold, silver, and debts due," and if the translation in the Cawnpore case is to be relied upon, it says, "half the estate consists of cash, and the other half of silver, gold, and debts" (Record 2, p. 94); which shows that it was intended to apply only to property of that description.

The Judicial Commissioner not only found that Chundun's chit set forth the custom as to the shares in which the family property was divisible, but he interpreted the documents called Gouree Shunkur's will, and the tabular statement, as referring to a family custom by which the extent of the shares of the different members of the family was regulated. Their Lordships do not put that construction upon those documents. No such custom was set up by any of the parties to the suit in answer to the plaintiff's claim. The custom referred to in the documents called a will was merely that "the eldest member of the family continues to be the head;" "that every one possesses a share; that the other brothers are at liberty to have their shares separated if they wish it; that the head has no power to alienate without consulting every shareholder;" and a wish was expressed that the old custom of maintaining the share of each shareholder should be preserved in opposition to the rule of primogeniture. But there is no allusion to any custom under which the different members of the family were entitled upon partition to shares other than those provided by the rules of the Mitacshara.

Deenanath, in his evidence, says, "The custom of the family was that the eldest member had the direction." Gouree Shunkur did not state in the tabular statement, any more than in the documents called a will, that there was a custom as to the extent of the shares to which the several members were entitled upon partition. In the tabular statement he divides the members of the family fit to succeed under two heads, "the sons of Chundun" and "the sons of Gunga Pershad." He does not number them from one to seven; but he numbers Chundun's sons from one to five under one heading, and Gunga's sons one and two under the other; he puts himself down as one of the five, and inserts grandsons in the place of deceased sons, thus: "The sons of Chotay Lall, deceased," and "the son of Lalla Jankee Pershad, deceased." He does not state that Chotay's sons will take two shares, but puts them down as representing their father as one of the sons of Chundun; and he also puts down Jankee Pershad's only son as representing his father, as another of the sons of Chundun.

The entry is as follows:—

Sons of Lalla Chundur Lall, deceased:

1. Sons of Lalla Chotay Lall, deceased.

2. Rajah Gouree Shunkur.
3. Lalla Beharee Lall.
4. Lalla Kunhya Lall.
5. Son of Lalla Jankee Pershad.

Sons of Lalla Gunga Pershad, deceased :

1. Lalla Shiva Pershad.
2. Lalla Ram Sahoy.

See also tabular statement, Record No. 1, p. 71, in which the words "descendants of Chotay Lall" are used instead of the words "sons of Chotay Lall."

Their Lordships consider that the proper interpretation of that document is that Gouree Shunkur considered, represented, declared, that it was his wish and intention that the property should be divisible *per stirpes*, and that is clearly the mode in which, in the absence of a family custom, the property being joint, would have been divisible under the Mitacshara. See the "Mitacshara" on Inheritance, ch. 1 s. 5 par. 12.

It is not likely that Gouree Shunkur, who had had the sunnud granted to him, and been allowed to engage for the Government revenue, intended to say, and it is clear that he did not say, that it was his wish that his nephews, Chotay's sons, as representing their father, were entitled, by custom or otherwise, to a share double the amount of that to which he himself was entitled. He certainly did not refer to Chundun's chit, and he could not have referred to the copies which are alleged to have been made and signed after his death.

The Judicial Commissioner's judgment as to what was the nature and extent of the custom is founded entirely on Chundun's chit. The custom spoken of by Rajah Gouree Shunkur in the documents called his will, is a custom said to have existed in his family for generations past. There certainly was no evidence of any partition in the family in which the property had been divided in the proportions specified in that document. The evidence, such as it was, was all the other way. It showed, so far as it went, that upon the partition between Chundun and Gunga Pershad and Moonnoo each took one-third. See Runjeet Singh's evidence (Record No. 1, p. 352, l. 7; *Id.*, l. 20, p. 353). Ram Sahoy swore that Rajah Beharee Lall told him that the documents showed that upon the separation of Moonnoo two-thirds of the property was reserved for Chundun and Gunga Pershad (Record No. 2, Supplement, p. 4). Deenanath, in his evidence, says, "when Jubboo separated, he got a 4-annas share, and Chundun 12 annas of joint property. I have often heard this. When Moonnoo separated, out of 4 annas he got 1 anna 3 pie; Gunga, 1 anna 3 pie; and Chundun, 1 anna 6 pie. The 12 annas was not divided, it was left to meet expenses of the business.

The evidence in the Oudh suit cannot be supplemented by that which was given in the Cawnpore suit in December 1870, long after the final decision of the Judicial Commissioner of October 1870 was pronounced.

Reliance was placed upon Ram Sahoy's letters as showing his own admission that he had no right to any share in the family estate. It cannot now be disputed that he is entitled to a share, though the extent to which he is entitled is a matter in dispute. Their Lordships agree with the view which the High Court took of those letters. They consider that, regard being had to the circumstances, an admission that he was not entitled to anything cannot be fairly drawn from them. He probably was under the impression at the time they were written that by virtue of Lord Canning's Proclamation, and the sunnud which had been issued, his beneficial interest as a sharer had been confiscated, and that Beharee was the beneficial owner of the whole of Mourawan. The letters, if they amount to an admission at all, amount to an admission that he was not entitled to any portion of the Mourawan estates, they certainly cannot be evidence to show that he was entitled to only two-elevenths of it.

Their Lordships having decided that the property which was granted to

Rajah, Gouree Shunkur by sunnud, etc., was transferred by him to the family to be held as joint family property, the whole of the property in dispute in both the suits must be governed by the same rules. Their Lordships are of opinion that neither by custom, usage, contract, nor by any other means, has the property in dispute in the Oudh suit at any time become divisible upon partition in any other manner or in any other shares than according to the rules of the Mitacshara. They are of opinion that the finding of the Judicial Commissioner on the sixth and seventh issues, that the measure of division of the personal property, the ancestral and the several acquired estates, including the Bunthra estate, is the custom of the family, and that that family custom is set forth in the writing of Chundun Lall, and his decree founded upon that finding, are erroneous, and that the property must be divided according to the rules of the Mitacshara. There is not sufficient evidence to warrant a finding that Ram Sahoy was to take the Bunthra estate and the twenty-seven villages as his share of the property; and their Lordships are of opinion that the twenty-seven villages must be held to form part of the joint family estate, and must accordingly be divided as part of it.

It was agreed at the hearing of the appeals that their Lordships should decide whether the Bunthra estate is part of the joint family property, and is divisible in the same manner as the Mourawan estate. They are of opinion that it is. Sheo Pershad to whom it was granted, having signed documents similar to those which were signed by Gouree Shunkur as to the Mourawan estates (Record No. 1, page 27, l. 30), Bunthra became part of the undivided family estate.

With regard to the property which is the subject of the Cawnpore suit, their Lordships are of opinion that Chundun's chit does not apply to it; and that it is not satisfactorily proved that the members of the family ever agreed that, upon partition, it should be divided in the proportions specified in Chundun's chit with respect to the Rs. 110,000 therein mentioned.

Beni Pershad's evidence in the Cawnpore suit, given on the 19th December 1870. (Supplemental Record in that suit, page 2), is very different from that which he had previously given on the 23rd August 1870, in the Oudh suit after the remand.

He was greatly interested in the result as one of the descendants of Chotay Lall, and his evidence in the Cawnpore suit was given after the last judgment of the Judicial Commissioner had been pronounced on the 29th October in that year.

He then stated for the first time that copies of Chundun's chit were signed by six members of the family, that is to say by the eldest son of each stock.

But even that would fall short of proving that they had agreed that upon any future partition of immoveable property, their shares should be adjusted in the same proportions as those in which the Rs. 110,000 mentioned in Chundun's chit were to be divided. None of the witnesses corroborated the evidence of Deenanath given in the Cawnpore suit (Record No. 2, page 148), that an additional sentence was added to the copies of Chundun's chit which the parties are said to have signed.

Chundun's chit had reference only to moveable property, and, without some addition, could not be applied to the partition of immoveable property.

Beni Pershad went on to say that the signed copies were delivered, one to Hurlpurshad, and one to Ram Sahoy (Supp. Record Cawnpore case, p. 2, l. 18), the persons above all others whom it was necessary to bind by them. The story is most improbable. Ram Sahoy (Record No. 2, Supplement, page 4) swore that an arrangement was come to by which Bunthra and other property was to be taken by him as his share, and in this he was corroborated by Beni Pershad. The latter, after stating that copies of Chundun's chit were signed, said, "After this Ram Sahoy got the 27 villages in Oudh, and took the profits. Ram Sahoy took

the 27 villages in accordance with the arrangement. The chitta on account of the whole estate was not made up, but these villages were given to Ram Sahoy to receive the full profits, while the remaining villages continued to be attached to the Koothee at Oonao (*Id.* Supplement Record, page 2, l. 25, etc.).

Further he, said Rajah Beharee, did not sign the paper which I have deposed was drawn up in his lifetime, he wrote the copies and his son signed it. (*Id.* p. 3, l. 1.)

Again "at the meeting of the family at which the document executed by all of us was prepared, there was no mention made of any other paper but the document of Chundun."

Hurpurshad denied that a copy of Chundun's chit was signed by the family. (Record No. 2, page 180.)

Ram Narayan said he did not know whether he had ever signed such a paper. He said, "If I see the paper I can say," but none was produced.

Mohun Lall who was interested in obtaining a double share for the descendants of Chotay, of whom he was one, on his first examination before the Subordinate Judge (Record No. 2, page 143), did not corroborate the other witnesses as to the delivery of the signed copies to Hurpurshad, and Ram Sahoy respectively, but he corroborated Ram Sahoy and Ram Pershad as to an agreement having been come to by which Ram Sahoy was to take the 27 villages, etc., in lieu of his share. He said in his evidence, taken 18th March 1870 (Record No. 2, page 146, line 3), "About two and a half or three years ago Rajah Beharee Lall, Hurpurshad, and Ram Pershad were looking at the document—i.e., Chundun's chit—and I was present there," but he does not say that copies were made or signed by any of the family.

Deenanath in his first deposition in the Cawnpore suit (Record No. 2, page 148), said the copies were signed in 1274 Fuslee, which would be about the time above mentioned by Mohun Lall. In his deposition in the Oudh suit after remand (Record No. 1, page 358) he speaks of the chit, and not of the copies. In his examination before the High Court after adjournment, he said the copies were made in 1275 Fuslee.

Mohun Lall in his deposition taken on the 7th December 1870, after the adjournment, says, "I first saw it about three years ago," that would be in 1867.

Further, in his first examination in the Cawnpore suit, Mohun Lall, speaking of Chundun's chit, said (Record No. 2, p. 143, l. 29):—"It is in the handwriting of Chundun;" and he went on—"Subsequently in the time of Rajah Beharee Lall a partition deed was executed by the members of the family, and signed by all of them. Rajah Kunhya Lall, Baboo Ram Sahoy, Lalla Balmokund, Madho Pershad, Hurpurshad, and Ram Narayan attached their signatures to the document. It is probably with some of the members of the family" [here some of the words are omitted, probably "it was agreed that the family"] "should divide the property according to the directions of Lalla Chundun Lall, contained therein." Here he speaks of a deed of partition, which was probably with some of the members of the family. He could not refer to the copies of Chundun's chit which, in his examination after adjournment by the High Court he said were given, one to Hurpurshad and one to Ram Sahoy (Record No. 2, p. 182). He proceeded:—"Leaving out the property in Oudh, the plaintiff, that is Ram Sahoy, is entitled to those estates which are situate in Cawnpore and Futtehpoore districts, and in respect of which his name is entered in the register. I mean, that the plaintiff's share is equal to all the estates in respect of which his name has been recorded in conformity with the letter executed by Lalla Chundun Lall. The plaintiff's share in the firm is, in my opinion, equal to two-elevenths, according to the letter referred to above," etc. Again he says (p. 144):—"In the petition of Rajah Beharee Lall, bearing order dated the 14th January 1868, which was presented to the Deputy-Commissioner of Oonao, it is stated that the entry of the names should be effected in conformity

with the memorandum of Lalla Chundun Lall. The memorandum referred to therein is the document marked C (Chundun's chit), and *the Razeenamah of Agreement mentioned therein is the Agreement of which I have spoken above.* It was in conformity with this petition of Beharee Lall, that is, in compliance with the provisions contained therein, that the plaintiff caused his name to be entered in column 9 of the Revenue Register of the district of Oonao in respect of the twenty-seven villages."

The High Court, in their first judgment, speaking of the agreement mentioned in the petition of Beharee Lall of the 9th February 1868, say :—

"There is other evidence to show that such an agreement was made. Mohun Lall deposed that a deed of agreement was drawn up in the lifetime of Beharee Lall, and signed by the members of the family, including the plaintiff. Deenanath, the head gomashtha of the firm at Mourawan, states that Beharee Lall sent to Hurlpurshad, who had the key of the cash room, for the paper drawn up by Chundun Lall in October 1835, and had a copy made of it which was signed by all, it being agreed that a division of the property should be made in accordance with its provisions. Sheo Churn Lall states that the copy was made in his presence, and signed by all the members of the family. Shunkur Buksh deposes that he heard from the plaintiff that Beharee Lall had recently written a paper which was signed by all parties; and Mahadeo deposes that the plaintiff informed him on two occasions that he would take his share in accordance with the paper written by Chundun Lall."

Again—

"It is much to be regretted that the Court of First Instance did not examine the plaintiff as to the making of the agreement to which the witness referred; and if the Court had been satisfied that such an agreement was in fact made and reduced to writing, it should have called upon the parties to produce it, for it would have had a material bearing on the plea of the defendants, that the plaintiff had assented to the arrangement" (see Record No. 2, p. 178, l. 36; and p. 179).

Further they say :—

"There remains only the question,—Was the principle of division indicated in the paper written by Chundun Lall assented to by the plaintiff, or those from whom he claims, or was there any other arrangement assented to, with respect to the division of the property, at variance with the ordinary rules which govern the partition of joint property? This issue was not distinctly raised in the Court below; and although there is some evidence on the record on which we might determine it, to enable us to do so satisfactorily, we deem it essential *that the agreement to which reference has been made by several witnesses as having been prepared in the lifetime of the Rajah Beharee Lall, should be called for, and, if it exists, be put in evidence.* At present we have only secondary evidence of its contents, and, although no objection was taken to its admission in the Court below, we hesitate to act upon it until we are assured that no better evidence exists. We, therefore, call upon the defendants to *produce the document to which we have referred, and to give proof of its identity with that spoken to by the witnesses;* and if the plaintiff desires to contradict the evidence of the execution of the document, which may be adduced by the defendants, he is at liberty to tender himself for examination."—(Record No. 2, p. 279, l. 21).

The evidence of Mohun Lall (Record 2, p. 143) and of Beni Pershad appears to refer to a document containing an arrangement by which Ram Sahoy was to take the twenty-seven villages, etc., and probably, according to Beni Pershad, Bunthra and other property as his share. The document may have referred in terms to Chundun's chit, and for these reasons copies of it may have been made and signed by the family for identification. If the parties intended that all the property should be divided in the proportions mentioned in Chundun's chit, it is improbable that they should have signed only copies of the chit when it referred

to specific moveable and not to immoveable property. In their second judgment, delivered on the 21st August 1871, the High Court say: "We adjourned this case in order to obtain the production of the copies of the document alleged to have been written by Lalla Chundun Lall in October 1835, which, as we observed in the former part of our judgment, was deposed to by several witnesses. We have, however, failed to obtain its production."

In their former judgment the Court stated that they adjourned for the production of the agreement spoken to by Mohun Lall, not merely for the production of the copies of Chundun's chit. The defendants did not produce the deed of agreement, nor either of the copies of Chundun's chit, which were said to have been signed; nor did they sufficiently account for the non-production of them if they existed. The High Court did not find that it was out of the power of the defendants to produce the agreement or the alleged copies of Chundun's chit, and unless that was the case there was no excuse for Chotay's descendants not producing them if they existed. The issue as to whether a rule for partition of the joint family property, other than that provided by the Hindoo law was agreed upon, was entirely new. None of the defendants set up as a defence that a special rule for partition had ever been fixed by custom or agreement, or that any arrangement had ever been come to by the family to divide the property in the proportions fixed by Chundun's chit with reference to the Rs. 110,000 mentioned in it. Chotay Lall's descendants set up quite a different case, viz., that the property was all Chundun's, and that Chundun had by his chit voluntarily assigned to Ram Sahoy a two-elevenths share in some of the property. Hurlpurshad and others of the defendants also set up that, excluding the estates granted by Government, which belonged to those to whom they were granted, the descendants of Chundun were entitled to the whole of the property, and that the plaintiff, Ram Sahoy, had no right to any share in it. (See Record, No. 2, pp. 10, 11, 12.)

The High Court, although they had failed to obtain production of the copies of Chundun's chit, or the agreement spoken to by Mohun Lall, to which they alluded in their first judgment (Record, No. 2, p. 178) allowed several of the parties and other witnesses to be examined not merely for the purpose of accounting for the non-production, but as to the fact that such documents had been executed. It was the interest of Hurlpurshad to show that Ram Sahoy was not entitled to a half share, and for that purpose to produce the document, if it ever existed, and had been delivered to him. But he upon his oath denied it altogether.

The High Court remarked that they could not say that any of the witnesses gave their evidence in a manner which impressed them very favorably.

In a case of conflicting evidence of witnesses who do not commend themselves by the manner in which they give their evidence, it is a safe rule to look to the conduct of the parties. In the present case the High Court did not attach sufficient weight to the conduct of the parties, nor confine them to the defences set up by their written statements, but they suggested a rule for the partition of that of which the parties alleged that the plaintiff had no right to a share (Record No. 2, pp. 11, 12, etc.). They not only did that, but they allowed witnesses who had been examined before, to be recalled and examined *de novo*, and thereby enabled them to amend their former evidence. If all the heads of the several branches of the family, including Ram Sahoy, the plaintiff in the Cawnpore suit, Sheodiyal, the plaintiff in the Oudh Suit, Hurlpurshad, who claimed the whole of Mourawan, and Balmokund, who made a similar claim, had in 1868 agreed that the whole property, moveable and immoveable, should be divided in the same proportions as the Rs. 110,000 mentioned in Chundun's chit, their conduct in making claims and setting up defences such as they did in the Oudh case in 1869, and in the Cawnpore case in 1869 and 1870, and in endeavoring to exclude Ram Sahoy from any share in the property, was wholly inconsistent with the alleged agreement. If the Court intended to call for fresh evidence, they ought to have recorded their reasons

for doing so. This is a rule laid down by Act VIII of 1859, and is one which this tribunal has frequently held ought to be strictly adhered to. But the Court did not adjourn the case for the purpose of taking further evidence and allowing witnesses who had been examined to be recalled and to amend their former evidence, but simply for the production of a document, with liberty to call witnesses to prove its identity. Even this was a course which ought not to have been adopted. The case set up was entirely new, and there was no reason to give the parties an opportunity of producing a document upon which they had not relied in their claims or defences, and which, if they had relied upon it, they ought, according to the provisions of Act VIII of 1859, to have filed with their other exhibits, unless they could prove that the document was not in their possession.

Their Lordships are of opinion that the High Court was in error, after adjourning the case, as they did, for the production of a document, in allowing witnesses and several of the parties who were interested in the result, and had been previously examined, to be recalled, and to add to and vary the evidence which they had previously given, in order to prove a case which they had not set up.

Their Lordships also think that the conclusion at which the High Court arrived upon the evidence, in the absence of the production of the documents for the production of which they had adjourned the case, was also erroneous.

Upon the whole their Lordships are of opinion that there was no custom in the family nor any agreement proved which disentitled the several members of the family to receive, on partition of the joint family property, the shares to which they were entitled under the Mitacshara. According to that law, the property was divisible *per stirpes*. (See The Mitacshara on Inheritance, chap. 1, s. 5, para. 12).

The plaintiff in the Cawnpore suit, as the sole descendant of Gunga Pershad, was consequently entitled to one-half, and the sons of Chundun and their descendants respectively each to the fifth of a half, or, in other words, to one tenth of the property in that suit, according to the rules of the Mitacshara.

Their Lordships are of opinion that the parties are entitled to those shares in all the property moveable and immoveable in both suits, and also in the twenty-seven villages and in the Bunthra estate; and they will humbly recommend Her Majesty to reverse the decrees of the Judicial Commissioner and of the High Court respectively, and to decree to Ram Sahoy, the plaintiff in the Cawnpore suit, one-half of the property in that suit, and to decree to Sheo Dyal, the plaintiff in the Oudh suit, a fifth of one-half, or, in other words, one-tenth of all the property in that suit, including the twenty-seven villages, and also to award and direct that the Bunthra estate be divided in the same proportions as the other property, that is to say, *per stirpes*, one-half to Ram Sahoy, and one-tenth to the descendants of each of the five sons of Chundun respectively, according to the rules of the Mitacshara.

Their Lordships will not interfere with the decree of the Judicial Commissioner so far as it relates to the costs in the Courts in Oudh. They are of opinion that they should be paid out of the property to which the Oudh suit relates. They are also of opinion that, under the circumstances, the costs in both the Courts in the North-West Provinces ought to be paid out of the property to which the Cawnpore suit relates.

They will therefore further humbly advise Her Majesty that the costs in all the Courts below, both in the Oudh suit and in the suit in the North-West Provinces, be ordered to be paid out of the property to which those suits respectively relate.

The costs of all the parties in these appeals will be taxed here, and must be paid out of the properties to which the suits respectively relate.

The 21st June 1876.

Present:

Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier,
and Sir Henry S. Keating.

*Partnership—Managing Partner (payment of by Commission, not Salary)—
Dissolution—Compensation—Construction.*

On Appeal from the High Court of Judicature at Bombay.

Cowasjee Nanabhoy

versus

Lallboy Vullubhoy and others.

Where, by a contract of partnership, one of the partners was to manage the business, and his remuneration was not to be by salary, but by a commission upon the sales during his lifetime; and on its being found that the concern could not go on except at a loss, and the Company had to be wound up by an order of Court; the Privy Council, acting upon the distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission, and upon a careful construction of the whole agreement, came to the conclusion that, by no fair and reasonable implication, could it be inferred that the partners relinquished their right of dissolving or applying to have the Company dissolved under the circumstances, or that they agreed, if they did exercise this right, to pay the managing partner compensation for the loss of commission not earned.

This was an appeal against an order of the High Court of Bombay. The appellant was appointed manager to a certain cotton twist manufactory at Bombay. The Company was wound up after a brief period of unsuccessful efforts; but the mill and machinery, which had only cost Rs. 550,000, when sold by the liquidator, realized Rs. 731,000, and again six months later Rs. 1,250,000. By the articles of agreement the material provisions of which are fully set out in the judgment of the Judicial Committee, the appellant was to have the management of the concern during his life with a commission on sales effected. On the sale of the property he took legal proceedings to recover damages for the consequent loss of this commission.

Mr. J. Pearson, Q.C., and Mr. Whitehouse for Appellant.

Mr. Leith, Q.C., and Mr. Parke for Respondents.

The following authorities were cited by the Counsel for the Appellant :—

*Inchbold v. The Western Neilgherry Plantation Co.**

MacIntyre v. Belcher.†

Forwood v. Rhodes.‡

Yelland's Case.§

Exparte Clark.||

Exparte Logan.¶

*Exparte Maclure.***

Patent Floor Cloth Co., Ltd., Dean and Gilbert's Claim.††

Hartland v. General Exchange Bank.‡‡

Burton v. Great Northern Railway Company.§§

Taylor v. Caldwell.||||

Pilkington v. Scott.¶¶

* 17 C. B. N. S. 733.

† 14 C. B. N. S. 654.

‡ 33 Law Times Rep. N. S. 314 ; L. R. 1 App. Ca. 256.

§ L. R. 4 Eq. 350.

|| L. R. 7 Eq. 550.

¶ L. R. 9 Eq. 149.

** L. R. 5 Ch. Ap. 737.

†† 26 Law Times Rep. N. S. 467.

‡‡ 14 Law Times Rep. N. S. 863.

§§ 9 Ex. 507.

|||| 3 Best and Smith, 826.

¶¶ 15 M. and W. 657.

*Hartley v. Cummings.**
The Queen v. Welch.†
Whittle v. Frankland.‡
Prickett v. Badger.§
Sterling v. Maitland.||

The judgment of the Judicial Committee was delivered as follows by:—

Sir R. Collier.—The circumstances under which this appeal arises are as follows:—

On the 10th June 1857 Cowasjee Nanabhoy entered into an agreement with a number of persons, who were to form a partnership with him for the purpose of establishing a factory for the manufacture of cotton twist. As the terms of this agreement are very peculiar, it is as well to read *in extenso* the material parts of it. The beginning of the agreement is to this effect:—"To Parsee Cowasjee Nanabhoy Dawar, written by us the undersigned (who) do give in writing to you as follows:—You are establishing a factory for the manufacture of 'water' cotton twist. For the same there have been made 100 allotments, *i.e.*, 100 shares each; one share has been fixed at about Rs. 3,000, *viz.*, three thousand. Relative to the same, we have given in writing to you this instrument, agreeably to the particulars written below. The first clause is this:—For the above mentioned factory (ground is to be procured), and a building is to be erected, and machinery is to be sent for from Europe, and the same is to be set up here. In regard thereto, whatever business may have to be transacted, *i.e.*, the employment of persons, and whatever outlays may have to be made for the said factory, the whole management thereof, all we the undersigned shareholders having agreed, have entrusted to you that management, do you duly carry on during your lifetime, and the entire authority for signing and carrying on the entire management of the said factory belongs to you, and after the decease of you, Cowasjee, the whole of the shareholders are to approve of such agent or trustee as the shareholders, having held general meeting, may appoint." The second clause runs thus: "Out of the above 100 allotments, *i.e.*, shares, as many shares as we have taken we have made known below in writing in the place of the signature of each of us, and at the time of signing this agreement, having paid you a deposit at the rate of Rs. 500, *viz.*, Rs. 500 for each one share, a receipt bearing your signature was obtained." The third is in these terms:—"For the above purpose, whatever may have been expended for a building and machinery, and whatever other outlays may have been made and may hereafter be made, all those we the shareholders are duly to pay in equal portions agreeably to our shares, the calls which you make in respect of the same as there may be need, we are duly to pay within 15 days' time. If within the said time of 15 days we should not pay the amount of each call of those calls which you may make, then the share or shares subscribed by us shall become forfeited, *i.e.*, there shall not remain on the part of those who may not pay the calls, any right to the deposit to the amount of Rs. 500, *viz.*, Rs. 500 paid per share, and the call or calls which may have been (already) paid, and the money paid for the same shall be credited to the profit account of this Company; and hereafter should any shareholder of the shareholders who have signed below sell or make over his share or shares to any individual, the party or parties purchasing the same hereafter, is or are also duly to act up to this agreement." The fourth runs thus:—"All we shareholders having agreed to make this agreement or settlement (*viz.*), that in return for the trouble you have been at in getting up this factory, we have appointed you for your life the agent or broker of this factory, as to that it is to be understood as follows:—Wherever cotton may have to be purchased for this factory do you purchase, and whatever yarn may be made in this factory all

* 5 C. B. 247.

† 2 E. and B. 357.

‡ 2 Best and Smith 49.

§ 1 C. B. N. S. 296.

|| 5 Best and Smith 840.

that you do sell, and for whatever you may sell on account of the factory do you duly receive from this Company the commission at the rate of Rs. 5, viz., 5 per cent. during your lifetime, but upon purchases you are not to receive anything from the Company; yet on goods which you may purchase from merchants and sell, you yourself having received a percentage, also agreeably to custom, do you duly give credit for the same to this Company," and so on. The fifth relates to sending for machinery on behalf of the Company, and setting up the machinery, and so forth. The sixth relates to the calling of meetings, and the remaining provisions do not for the present purpose appear to be material.

Cowasjee took a number of shares in the Company, some of which he held up to the time of the winding up. He was undoubtedly a partner with these persons. He called up the full amount which was contemplated by this agreement, namely, Rs. 3,000 on each share, all the shares having been taken. Some time afterwards he called up another Rs. 1,000 on each share, and he also borrowed a sum of Rs. 150,000; he borrowed it indeed upon his own credit, but he charged it to the Company, and he made another call of Rs. 500 per share. Upon this the shareholders became dissatisfied; meetings were called, and they came to the conclusion that the Company could not be carried on profitably with the capital which had been subscribed, or which they were bound to pay, and under these circumstances they filed a bill, praying, among other things, for a dissolution and winding up of the company. The order for the dissolution was made by the High Court of Bombay, and the reasons for making it are stated in the judgment of the High Court, of which it is not necessary to read more than the following passage: "Supposing the partnership to be for a definite period, or one which is not dissoluble at the will of the majority of the members, we are of opinion that a state of things has arisen which requires the Court to decree a dissolution. It is impossible for the business of the company to be carried on without making further calls on the shareholders, the debt is accumulating, and it appears that even with the capital subscribed the business could not be carried on." An appeal was preferred against this judgment to the Queen in Council. The judgment was affirmed by the Queen upon the advice of this Board, but entirely without prejudice to the question whether or not Cowasjee was entitled to compensation. Subsequently the High Court of Bombay decided that he was not entitled to any compensation, and from this last decision the present appeal is preferred.

This question arises upon the construction of the contract. It is to be observed, as was properly called to their Lordships' attention by the Counsel for the appellants, that this is not a contract between master and servant, nor between principal and agent,—at all events, not a contract pure and simple between principal and agent,—but it is a contract between a partner and his co-partners. It is further to be observed that the remuneration of Cowasjee is not to be by salary, but by a commission upon sales. The distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission is obvious. The man who is paid by a salary is not necessarily affected by the prosperity or adversity of the company, or even by its dissolution. He may be entitled to his fixed salary whatever may happen. But a man who agrees to be paid by a commission upon sales, to a certain extent speculates on the prosperity of the company; the more the company sells the more he gets, the less it sells the less he gets, and if he sells nothing he gets nothing. This distinction, which indeed is implied by the very terms used, is one which has been recognised in several cases which have come before the Courts.

The question is, whether from the whole of his agreement, it is to be inferred by necessary or reasonable implication, that all the co-partners of Cowasjee bound themselves to carry on the business at all hazards, or at whatever loss, at least during his life, or in other words whether they agreed to renounce their right of dissolving the company if they found that it could not be carried on except at a

loss, or whether as an alternative to either of these two cases they agreed to pay him compensation. The part of the agreement which has been most pressed upon their Lordships is that contained in the 4th clause, wherein this is said (and indeed the same expression is used in the first clause), "You are to receive commission for what you sell on our account during your lifetime." Certainly it appears to their Lordships that the effect of this provision would be to give Cowasjee a right to commission during his lifetime, provided that the company was carried on and any commission was earned. It may also be contended, though it is not necessary to decide whether correctly or not, that these terms import an agreement that the partnership should be carried on at least as long as Cowasjee lived; but that would not be enough for the appellants, for they would have further to show that the partners relinquished the inherent right they would possess notwithstanding that the partnership were established for the life of Cowasjee, or even for a definite term, of winding it up, or applying to have it wound up, in the event of its not being able to be carried on with success. This right is stated in Mr. Justice Lindley's book on Partnership, at page 243 of the last edition, in which he says:—"In a more recent and important case, however, the Court recognised the fact that expectation of profit is implied in every partnership, and held that if a partnership is entered into for a term of years, and the capital originally agreed to be furnished has been all spent, and some of the partners are unable or unwilling to advance more money, and at the same time the concern cannot go on, except at a loss, unless they do, the partnership will be dissolved by a Court of Equity. Under such circumstances as these it is unimportant whether the concern is already embarrassed or not. After everything has been done which was agreed to be done, and certain loss is the only result of going on, any partner is entitled to have the concern dissolved, although he may have agreed that the partnership should continue for some definite time, and that time has not yet expired." So even putting it in the light most favorable for Cowasjee, that the partnership was originally intended to exist at least during the time of his life, it remains to be shown that there is any provision in the agreement from which it can be fairly inferred that his co-partners relinquished the right which they would have of applying to the Court for winding up the business if it could not be carried on at a profit, or, in the event of their exercising this right, undertook to pay him compensation. In this case the company has been wound up on almost precisely the grounds which are indicated in Mr. Justice Lindley's book, and the order for winding up has been affirmed by this tribunal.

Their Lordships, after giving their best attention to the whole of this agreement, have come to the conclusion that by no fair and reasonable intendment can it be inferred that the partners relinquished their right of dissolving or applying to have the company dissolved under the circumstances mentioned, or that they agreed, if they did exercise this right, to pay Cowasjee compensation. For this reason they are of opinion that the case of Cowasjee fails.

Many cases have been called to their Lordships' attention, decided upon the terms of particular contracts, and more or less bearing upon the present, but inasmuch as the decision of this case rests upon the words of this contract, which is of a very peculiar character, their Lordships do not think it necessary or advantageous to pass those cases in review. They think it enough to say that the conclusion they have come to, that no such term as has been contended for is to be imported into this contract, appears to them in conformity with the current of decisions which have been quoted, and more especially with the last case of *Rhodes v. Forwood*, decided by the House of Lords.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court of Bombay be affirmed, and that this appeal be dismissed with costs.

The 22nd June 1876.

Present :

Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier.

Decree without Execution—Right of Action—Procedure.

On Appeal from the Court of the Judicial Commissioner, Oudh.

Mirza Mahomed Aga Ali Khan, Bahadoor
versus

The Widow of Balmakund and others.

A judgment-creditor has, by virtue of the judgment, without execution, no right to the property of the judgment-debtor, and is not entitled to recover it from the persons in whose hands it is. The procedure prescribed is to proceed to execute the judgment by attachment and sale if necessary, and not to proceed by action.

Mr. Doyle for Appellant.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Respondents.

Sir Barnes Peacock gave judgment as follows :—

This is an action brought to recover Rs. 12,420, being the value of a one-seventh share of Jaidyal, a judgment debtor, in the property left by Ishri Dass, his father. The allegation in the plaint is that this amount is due from the defendants, who hold the property. The claim is based on a decree which the plaintiff obtained in the Civil Court at Lucknow on the 20th November 1863, for Rs. 14,460, against the aforesaid Jaidyal, who died, leaving the decree against him unsatisfied ; and the plaint alleges that that decree gives the plaintiff a right to institute the present suit. The plaint states that : “The property of the judgment debtor being one-seventh share in the legacy of his father, Ishri Dass, is in possession of the defendants, his brothers. Bisheshoor Pershad, one of the brothers of the judgment debtor, the defendant No. 5, realised the debts due to the saltpetre firm of his father to the amount of Rs. 14,280. 6, and the plaintiff obtained a decree from the Civil Court of Lucknow on the 7th September 1866, for Rs. 2,040. 0. 10, equivalent to one-seventh share of the judgment debtor, in the collections made by defendant No. 5, and recovered the amount of this decree. This decree was confirmed by the Judicial Commissioner on the 16th March 1867.” The original judgment therefore was reduced from Rs. 14,460 to the amount sought to be recovered. The plaint proceeds : “The plaintiff now sues the defendants, who hold the property of the judgment debtor in their possession, for that portion of the decree against Jaidyal which has not been satisfied, and prays that, after a due enquiry, adjustment of accounts, and the determination of the value of the legacy of Ishri Dass out of the share which may be found due to the deceased judgment debtor, the amount claimed may be decreed to plaintiff with costs of the Court, and interest up to the date of realization.” The defendants put in written statements ; one of them stated that the plaintiff was not the legal representative of Jaidyal, and therefore could not sue, and the other said that there was no privity. The real question in this case is, whether the decree gave the plaintiff a right to institute the present suit ; in other words, whether a judgment creditor has by virtue of the judgment, without execution, a right to the property of the judgment debtor, whether it consists in lands, in moveable property, or in debts. The plaintiff contends that by virtue of this judgment he became entitled to the property of his judgment debtor, and was entitled to recover it from the persons in whose hands it was.

The Civil Judge who tried the cause in the first instance dismissed the suit. Upon appeal to the Commissioner, he held that the suit was maintainable, and

awarded to the plaintiff the amount claimed, on the ground that certain books had not been produced, and that he was entitled in consequence, under s. 170 of Act VIII of 1859, to give a decree to the plaintiff for the full amount claimed.

The case afterwards went before the Judicial Commissioner, who reversed the decision of the Commissioner. He held that the decree of the Civil Judge in the instance was the correct one; and that the judgment which the plaintiff had recovered against Jaidyal did not vest in him the property of Jaidyal, or the value of it. Their Lordships are of opinion that the view taken by the Judicial Commissioner was correct, and that a judgment does not vest in a judgment creditor any portion of the property of his judgment debtor. It gives him a right to have the judgment executed, but until execution, the property of the judgment debtor does not vest in the judgment creditor simply by virtue of the judgment. That is so according to the law of this country, and it is also the case under the Code of Civil Procedure, Act VIII of 1859, which is the law in force in India. By s. 206 it is enacted that no moneys which are payable under a decree are to pass into the hands of the judgment creditor except through the intervention of the Court. It is expressly provided that "all moneys payable under a decree shall be paid into the Court whose duty it is to execute the decree, unless such Court or the Court which passed the decree shall otherwise direct." A judgment debtor is not justified in paying the money to the judgment creditor unless the Court makes an order to that effect; but he is bound to pay it into Court, so that there shall be no dispute afterwards as to whether the money has or has not been paid over to the judgment creditor. Further, it is enacted that "no adjustment of a decree in part or in whole shall be recognised by the Court unless such adjustment be made through the Court or be certified to the Court by the person in whose favor the decree has been made or to whom it has been transferred." And it has been held upon that Section that if a judgment debtor chooses to pay the money otherwise than through the Court, he must take the risk of being compelled to pay it over again.

Now, if this suit could be maintained, how is the money to get into Court? If the judgment of the Commissioner be upheld, the plaintiff would be entitled to levy the amount against the defendants in the suit, and the money would never pass through the Court at all. Therefore, even looking at that Section of the Act alone, it would be clear that this suit cannot be maintained. But the Act provides (s. 201) that if "the decree be for money, it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary." Therefore, the decree is to be satisfied, not by bringing an action against the debtors of the judgment debtor, or those who hold his property, but it is to be enforced by the attachment and sale of the property of the judgment debtor. Then the Act points out the mode in which the property is to be attached, and the different classes of property which are liable to be attached. By s. 205, "the following property is liable to attachment and sale in execution of a decree, namely, lands, houses, goods, money, bank notes, cheques, bill of exchange, promissory notes, Government securities, bonds or other securities for money, debts, shares, and so on." It is not clear what the one-seventh of the legacy alleged to be in possession of the defendants was: whether it consisted of lands or of money. If it was land or money, it was liable to be attached under s. 205, and if it was a debt due from the defendants to Jaidyal it was also liable to be attached. The Act having stated what property is liable to attachment, goes on specifically to point out the mode in which the property is to be attached. If it is land, it is to be attached in a particular manner; if it is goods, it is to be attached in another manner; if it is a debt, it is to be attached in the manner provided by s. 236. By s. 236, "Where the property shall consist of debts not being negotiable instruments, the attachment shall be made by a written order, prohibiting the creditor from receiving the debts, and the debtor from making payment thereof to any person whomsoever, until the further order of the Court." Having described the property liable to be

attached, and the mode of attachment, the Act proceeds to point out how sales are to be conducted.

It has been pointed out by Mr. Leith in the argument that if an action such as this could be supported, all the provisions of the Code would be frustrated.

By s. 216 of the Act it is provided that "if an interval of more than one year shall have elapsed between the date of the decree and the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of an original party to the suit, the Court shall issue a notice to the party against whom execution may be applied for, requiring him to show cause, within a limited period to be fixed by the Court, why the decree should not be executed against him."

Now the decree against Ishri Dass was obtained as far back as the 20th November 1863. If the plaintiff had applied for execution on the same date as that on which he commenced the suit, a much longer period than a year would have elapsed between the date of the decree and the date of the application for execution. Then it would have been necessary for the Court to issue a notice to the party against whom execution was applied for, requiring him to show cause, within a limited period to be fixed upon, why the decree should not be executed against him. It would have been necessary in this case, Jaidyal being dead, to have called upon some one who was his representative, to show cause why the judgment should not be executed, because after a year it would be presumed that the judgment might have been satisfied. But then there is the provision in s. 216, that "no such notice shall be necessary in consequence of an interval of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of the last order passed on any previous application for execution." It appears that an application was made for a certificate from the Court at Lucknow, in which the decree had been passed, to the Court at Sultampur, for the purpose of having it executed. Many objections were made by the person against whom the execution was to issue, and Mr. Young, the Deputy Commissioner, on the 29th July 1868, made this order: "Judgment creditor now says Jaidyal's claim consists of debts and land; on his making proper application these can be attached; but in the event of Balmakund declining to pay, I am clearly of opinion that the only way to compel him is by regular suit, and I shall then be ready to appoint a receiver. Judgment creditor's application is refused, and case to be struck off the file of pending cases." That order was passed on the 29th July 1868, and it appears to be the last order that was passed upon an application for execution. This action was not commenced until the 25th April 1871, which was more than two years after that order had been passed. The plaintiff could not have obtained execution of this judgment if he had applied for execution without proceeding under s. 216, and having Jaidyal's representative summoned to show cause why execution should not issue. Then can he commence this action, two years and more after that last order was passed, without calling upon any one representing Jaidyal to show cause why he should not levy this money? The presumption is, that after this period the debt has been satisfied. The plaintiff could not have executed the decree until he had given notice to some one representing Jaidyal to show cause why the execution should not issue; but if this action can be maintained, then, as Mr. Leith has very properly observed, the plaintiff would be enabled to enforce his decree behind the back of and without notice to the representatives of Jaidyal.

Their Lordships are clearly of opinion that in this case the decree did not vest in the plaintiff any right to the property for which he is suing, and consequently that he cannot maintain the suit. The Judicial Commissioner has very clearly laid that down in his judgment. He says at p. 139:—"This suit, as laid, is not a suit to establish the plaintiff's judgment debtor's title to certain definite property previously attached, but is preferred on the assumption that the plaintiff, by virtue of his decree, occupies the position of his judgment debtor, and is therefore entitled

to establish his claim to a certain share of the estate left by his judgment debtor's father." In another part of his judgment he says, and their Lordships quite agree with him in that remark, that "if every decree holder could proceed by regular suit to enforce his decree, all the provisions in the Civil Procedure Code in regard to executions of decrees would be of no avail. But it is evident to the Court that where the Legislature has prescribed a particular mode of enforcing a right created by a decree, the possessor of that right is bound to follow the procedure prescribed, and no other." In this case the procedure prescribed is to proceed to execute the judgment by attachment and sale, if necessary, and not to proceed by action. If an action like this could be maintained,—if the plaintiff could recover these Rs. 12,420 from the persons in possession of the judgment debtor's property—what answer would they have if another execution creditor were to ask to attach the same property and to sell it? Could they have the property attached in their hands and taken from them when they had paid Rs. 12,420? And how could the difference be ascertained if the Rs. 12,420 should not be the full value of the property liable to attachment? How could any other creditor get the difference between the Rs. 12,420 and the actual value of the property? He must be driven to a suit or he must take the property. If he attach the property, then it would be taken from the defendants, after having been compelled to pay the Rs. 12,420; if he could not attach the property, then he must be driven to a suit, and must be deprived of his right to execution of the decree.

It appears to their Lordships that the proper mode of enforcing a decree is that pointed out by the Code of Civil Procedure, namely, by execution and attachment and sale, or by execution and attachment, and the appointment of a receiver under s. 243 to collect the property.

Their Lordships are of opinion that the Judicial Commissioner came to a right conclusion, and they therefore will humbly recommend Her Majesty to affirm his decision, and to dismiss this appeal, with costs.

The 28th June 1876.

Present:

Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Deed of Sale.

On Appeal from the High Court of Judicature at Fort William in Bengal.

Mussamut Medhi Begum and others

versus

Roy Huri Kishen and others.

The Privy Council held that the instrument of sale, which the plaintiffs sought to set aside as fabricated and fraudulent, had been executed by the principal plaintiff's grandmother, with her knowledge and by her authority, with the intention of vesting the property therein referred to in the defendants.

This is an appeal by the granddaughter of a Hindoo lady, claiming possession of certain landed property which had belonged to her deceased grandmother, and seeking to set aside a decision of the High Court of Calcutta. This decision pronounced valid an instrument purporting to have been executed by the attorney of the deceased, acting on her behalf, in favor of the infant sons of the first respondent, who, it is alleged by the appellant, was at that time the manager of the estate of the deceased lady. It appeared that the property in dispute had originally belonged to the first respondent, but that it had been pledged by him to the deceased in payment

of a debt due to her from the father of the respondent who had preceded him as manager. The High Court dismissed the appeal from the inferior Court, on the ground that the deceased never had more than the interest of a trustee in the property, but it expressed an opinion that both the original conveyance to the deceased and the reconveyance to the respondent were merely colorable transactions.

Mr. Bell for Appellants.

Mr. Leith, Q.C., and Mr. Doyne for Respondents.

The judgment of the Judicial Committee was as follows :—

This suit is brought by Mussamut Mehdi Begum, the maternal granddaughter and heir of a lady called Mussamut Fahimoonissa, and her father, Lootf Ali, against Roy Huri Kishen and his two sons. It is material in this case to refer to the plaint to see what is the nature of the claim and of the relief prayed. It is "claim for recovery of possession by adjudication of right against the defendants, and for registration of name in the Collector's office in respect of the mouzahs and shares of the mouzahs mentioned below, situated in the districts of Tirhoot and Patna, by cancelment of a fabricated and fraudulent sale-mookhtarnama, dated the 13th December 1858, purporting to have been executed by Mussamut Fahimoonissa, alias Bibi Amun, and the fraudulent deed of absolute sale, dated the 17th December 1858, which appears to have been executed on the basis of the sale-mookhtarnama, and also by cancelment of the mutation proceeding." The plaint then alleges, with some detail of circumstances, that Huri Kishen became the manager of Fahimoonissa's estates, and as such agent was entrusted with her seal and papers. It then goes on : "Your petitioners, heirs to the said lady, having obtained a certificate, dated the 4th August 1863, under Act XXVII of 1860, asked the first party, defendant, in the beginning of January 1865, to pay them rent, render an account of the amount collected from villages, and return the said Mussamut's seals and papers. But the said defendant, who, having the said lady ancestor's seal in his custody, had clandestinely and fraudulently, and through his dependent Lala Jaisuri Lal as mookhtar, prepared the fraudulent and fabricated documents sought to be set aside in the names of his sons, the second party, defendants, under his guardianship, put forward the said documents, and did not return the seal, etc., or render an account of the money collected from the villages. Your petitioners then made enquiries in the Registry office, Collectorate, etc., and became certain of the fraud and of the fabrication of the said deeds. From the time of the discovery of the fraud your petitioners' dispossession occurred." Then it alleges, "The sale-mookhtarnama and the deed of sale are fabricated and fraudulent. The said lady ancestor never executed them, nor received the consideration money."

The written statements of the defendants assert the genuineness of the deeds. Paragraph 8 states, "The deed of sale and the mookhtarnama were executed and delivered with the knowledge of Fahimoonissa, the mutation of names was effected by the 'ikrar' (acknowledgment) of the lady herself, and on the depositions of, and identification by Lootf Ali himself, the plaintiff No. 1, and Mirza Wahed Ali, the husband of the plaintiff No. 2, and the receipt of the consideration money was attested by the said person and other respectable men, and delivered. The allegations of fraud and absence of knowledge of the plaintiffs and Fahimoonissa are utterly false and incorrect. The sale-mookhtarnama has been duly attested." Then the 9th paragraph states, "Your petitioners' purchase, made entirely in good faith, and on payment of the fair consideration money, is valid."

The deeds sought to be set aside are a mookhtarnama, dated the 13th December 1858, given by Fahimoonissa to Jaisuri Lal, empowering him to sell the mouzahs to the defendants, the sons of Huri Kishen, for Rs. 71,000 ; and also a deed of sale, dated on the 17th December in the same year, executed in pursuance of the mookhtarnama. Fahimoonissa died in 1863. On the 4th August of that year, a certificate under Act XXVII of 1860, upon the petition of the plaintiff, Mehdi and her father

Lootf Ali, claiming to be the heirs of the deceased lady, was granted to them. Lootf Ali, although his daughter is really the heir, is joined with her in this suit, which was not commenced until December 1870, nearly 12 years after the transactions sought to be impeached. No demand appears to have been made on the defendants in the interval; for although it is alleged in the plaint that a demand was made on Huri Kishen to account for the rents received from the villages, none has been proved.

The case of the plaintiffs was that Huri Kishen had originally conveyed eight of the nine mouzahs in question to Fahimoonissa for valuable consideration. Two deeds were put in; one dated the 13th November 1853, by which Huri Kishen, to satisfy a debt alleged to be due to the lady, conveyed the three mouzahs which it is stated he had purchased under a decree. The other deed is dated the 26th March of the same year, by which five mouzahs obtained by Huri Kishen under similar circumstances were conveyed by him to her, also to satisfy an alleged debt. With respect to another mouzah, evidence was given to show that it was purchased in the lady's own name under a decree she had obtained against one Surroop Narain Singh and others. The plaintiff's case further was that Huri Kishen acted as the manager of the lady, received the rents of the villages, and conducted the suits relating to them. It is alleged that he became possessed, for the purposes of this agency, of her seal and papers, and was thus enabled to fabricate the deeds sought to be set aside. The witnesses of the plaintiffs say that he paid the moneys received on account of those villages to Fahimoonissa down to her death, and even afterwards.

The defendants do not rest their defence on a denial of all title in the lady to the property; and, indeed, by relying upon the deeds of sale, and asserting that they were made for a consideration which was actually paid, they virtually admit that she had some right in it. This consideration renders it very difficult to sustain the judgment of the High Court on the broad ground on which it is put, namely, that the original instruments of sale to Fahimoonissa, and the deeds of resale by her to Huri Kishen's sons, were all colorable; that the mouzahs were originally vested in Fahimoonissa as nominal owner, to be held by her benamee to protect them from Huri Kishen's creditors; that he received the rents and managed the property on his own account, and as the lady's agent, and that the reconveyance impeached was executed for the purpose of revesting them in his sons by his direction as the real owner. This is an entirely new case, not made by the defendants, nor did it form the ground of the judgment of the Subordinate Judge. Still, whatever may be the title under which Fahimoonissa held the estates, the plaintiffs who come into Court to impeach deeds duly registered, to cancel the mutation of names, and to disturb long possession, have taken upon themselves the burden of sustaining their allegation that the deeds are forged, or that, if executed by Fahimoonissa, they were obtained from her by fraud. This case is traversed by the defendants, and is directly involved in the fifth issue.

The delay in bringing the suit has deprived the defendants of the evidence of the mookhtar, Jaisuri Lall, and the attesting witnesses to the mookhtarnama, who all died before the hearing. But several of the attesting witnesses to the bill of sale were called to prove that it was in fact executed and acknowledged both by the mookhtar and the lady. It is said that it was highly improbable that it should be acknowledged by the lady herself after she had empowered Jaisuri Lall to make the sale; but it may have been thought desirable to obtain her own declaration. There are, no doubt, as pointed out in the Court below, inconsistencies and contradictions in the testimony of these witnesses, even making allowance for the lapse of time, which might have rendered it unsafe to act upon it, if it had stood alone. But it does not stand alone. It is corroborated by other authentic evidence and by the undisputed circumstances attending the transaction. The mookhtarnama was verified before registration by the Nazir of the Registrar's office of Patna, who took the deposition of the attesting witnesses, and afterwards went to Fahimoonissa's house,

and obtained her acknowledgment of it. She, no doubt, was behind the purdah ; and the witnesses who identified her may have deceived the Nazir ; but the verification was made in the usual official manner, and may be presumed, in the absence of proof to the contrary, to have been properly done.

The proceedings for mutation of names afford still stronger corroborative evidence. Another mookhtarnama, dated 26th December 1858, was given by the lady to Jaisuri Lall, empowering him to make the mutation, and was verified by the attesting witnesses at the Collector's office. On the 30th May 1859, a Nazir of the Collector's office went to Fahimoonissa's house, and took her acknowledgment that she had sold the mouzahs to the defendants. The acknowledgment is recorded in these terms :—" I have sold the whole and entire eight annas of the entire sixteen annas of the proprietary (malikana) and (altumgha) rights of each of the mouzaha," specifying them, " in conjunction with other mouzahs attached to Zillah Tirhoot, for Co.'s Rs. 71,000, the purchase money, to Roy Jai Kishen and Roy Radha Kishen, minor sons under the guardianship of Roy Huri Kishen, by a deed of sale, dated the 17th December 1858 A.D., and have received the purchase money in full. I have no objection to the name of the vendees being recorded in the Government office by the expunction of my name. *Question.* Is the seal in your possession ? *Answer.* Yes, it is." This acknowledgment is witnessed by the plaintiff, Lootf Ali, the son-in-law of the lady, and the father of the plaintiff, Mussamut Mehdi, and by her husband, Wahed Ali ; and their depositions made at the time have been produced from the records of the collectorate. Lootf Ali says : " I know and recognise Mussamut Fahimoonissa, alias Bibi Amun, vendor, who is now making a declaration as to her having sold the aforesaid mouzah for Rs. 71,000 to Roy Jai Kishen and Roy Radha Kishen, sons of Roy Huri Kishen, and received the consideration money in full, and to her having no objection to the registration of the names of the vendees by the expunction of her own name. *Question.* How did you come to know her ? *Answer.* Mussamut Fahimoonissa, alias Bibi Amun, the vendor, is my mother-in-law, and comes before me ; hence I know her."

The report of the Nazir, Hadi Ali Khan, has been produced from the collectorate, and this officer was himself examined as a witness in the suit ; he says, at page 209 of the record, " I went to the very place of Fahimoonissa in Dewan Mahalla, one of the quarters of Patna, and duly took down her admission as to her having made a sale. Fahimoonissa made an admission as to her having effected a sale, but I do not recollect of what mouzah the deed of sale was ; it is, perhaps, in my report. Syed Lootf Ali and Mirza Wahed Ali, the relatives of Mussamut Fahimoonissa, identified her ; and Mir Lootf Ali affixed the seal of Mussamut Fahimoonissa at the foot of her admission. I can recognize Mir Lootf Ali and Mirza Wahed Ali if I see them." Then he says, " I submitted a report to the Collector, after having taken down the admission of Mussamut Fahimoonissa. The copy which I now see and read in the record is copy of that report." It may be observed that Lootf Ali was summoned in this suit to be identified by the Nazir, but excused himself from appearing on the ground that he was sick. The Subordinate Judge thinks this excuse was false, and that he kept away to avoid being confronted with the Nazir. It is impossible to have better proof of the acknowledgment of a lady than this evidence affords. The officer who was deputed to take it appears to have done his duty. The Subordinate Judge says of him, " The open and candid manner in which Mirza Hadi Ali has deposed satisfies me of his veracity." The witnesses who identified the lady were her nearest male relatives, to whom she was accustomed to appear, and were at the same time those who would be concerned in protecting her property. Whilst, therefore, their Lordships are fully alive to the importance of watching with extreme care the proof of transactions relating to the property of a purdanasheen, it appears to them credit ought in this case to be given to the evidence, that the acknowledgment of the lady was in fact made as stated by the Nazir.

It further appears to be satisfactorily proved that the possession and enjoyment of the property since the date of the conveyance have been consistent with it ; and their Lordships do not believe the witnesses who say that the rents were paid to Fahimoonissa up to the time of her death. The Subordinate Judge came to the clear conclusion that the document of sale of 1858 had been executed by the authority and with the assent of Fahimoonissa ; and their Lordships see no reason to doubt the soundness of this conclusion. One of the Judges also of the High Court, Mr. Justice Phear, appears to have thought that the documents were really executed, if indeed (of which he expresses rather a strange doubt) Fahimoonissa was a real person. But both the learned Judges of the High Court agree in thinking that they did not disclose the true nature of the transaction, the lady, in their view, having been throughout the apparent, and Huri Kishen the real owner.

The statements found in the evidence of some pleaders called by the plaintiffs certainly afford support to this view. It is not, however, consistent with the case put forward by the defendants ; and if the whole issue had lain upon them, their Lordships would not have felt justified in allowing so wide a departure from that case. They think, however, as already stated, that the plaintiffs have, in the first place, taken upon themselves the onus of impeaching the instruments of sale. Now, whatever may have been the precise nature of the transactions, their Lordships are satisfied that those instruments were executed with Fahimoonissa's knowledge and by her authority, with the intention of vesting the property in the defendants. They think also that there is no sufficient ground for holding that a fraud was practised upon her by Huri Kishen in obtaining them. It would require strong evidence to support such a case when the nearest male relatives of the lady whose interest it was to preserve her property were not only aware of, but present and concurring in, her acts, and this evidence is not forthcoming.

The grounds on which it may properly be held that the plaintiffs have failed to sustain their claim are well stated in the judgment of the Subordinate Judge at page 254 of the Record : " From the first to the last everything was done with due publicity. Nothing was done in a corner. The mookhtarnama was presented and attested in the Moonsiff's Court ; the kubala was drawn up in the registry office : the kubala and the kubgoolasool were registered ; and in the dakhil-kharij cases notifications were made in the mouzahs, both in this district and in Tirhoot, and oozoordars invited, and they did appear. It might be said that the Mussamut having been a purdanasheen female could not personally have information of these things ; but this cannot be said of the plaintiff, Lootf Ali, and Wahed Ali, husband of the plaintiff, Medhi Begum, who seems to have lived on terms of close intimacy with Mussamut Fahimoonissa. They certainly would not have kept the matter from her knowledge, or been backwards in taking immediate measures for frustrating the sinister views of the defendants. The defendants took possession of the mouzahs immediately after the sale and leased three of the villages, *viz.*, Muhwa Singh Roy, Muhwa Ram Roy, and Dyalpore, to an indigo concern in Tirhoot, as shown by the registered kuboolent, dated the 20th December 1858 ; yet nothing was done by the plaintiffs for a period of nearly twelve years."

In the result their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss this appeal with costs.

The 29th June 1876.

Present :

Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.
Will—Construction—Adoption.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Nidhoomoni Debya

versus

Saroda Pershad Mookerjee and others.

Where a will was to the effect "I declare that I give my property to K. whom I have adopted," followed by the direction "my wives shall perform the ceremonies according to the Shastras and bring him up," the Privy Council held that the gift of his property by the testator to a designated person was absolute, and that the provision, "Should this adopted son die and my younger brother have more than one son, then my wives shall adopt a son of his," further indicated that the testator did not contemplate his widows having the power of cancelling the adoption of K. and ousting him from the benefit he was to take under the will by declining to perform the ceremonies, but that, whether they performed the ceremonies or not, so long as K. lived no other adoption could take place.

This is an appeal by one of the widows of a deceased Hindoo against a decree of the High Court of Calcutta pronouncing valid a power to adopt a son in the event of his decease without children, alleged by the respondent to have been executed by the deceased. The appellant sought to obtain a declaration that the alleged will of the deceased, limiting the course of the descent, was invalid.

Mr. Doyne for Appellant.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Respondent.

Sir Robert Collier gave judgment as follows :—

This appeal arises under these circumstances :—

One Doorga Pershad Mookerjee, a member of a Brahminical family, had three sons, Baman Dass, Gouri Pershad, and Anoda Pershad. Gouri had also three sons, Saroda, Grijanund, and Nilruttun. Grijanund died at the age of twenty-one, leaving two widows, and one of those widows, Nidhoomoni Debya, brings this suit as heir of her husband, for the purpose of recovering a half of his property. She also seeks to set aside a will of her husband, and a will of her husband's father. The will of her husband which she seeks to set aside was dated on the 21st January 1865, a day, or a short time, before his death. The effect of it is to declare that he had adopted a son of his elder brother Saroda, and to devise and bequeath all his real and personal property to that adopted son, with the exception of a provision for the widows. The will of Gouri Pershad was to the effect that his three sons should take his property as joint tenants, and that upon one of them dying the residue should go to the survivors. In the event of the will of Grijanund being set aside, the defendants might possibly have availed themselves of the will of Gouri his father for the purpose of showing that the widow could not recover in right of her husband, but if the will of Grijanund is affirmed no question as to the will of Gouri arises.

The Subordinate Judge found against both the wills. That decision was reversed on appeal to the High Court, consisting of the Chief Justice and two puisne Judges. The High Court affirmed the will of Grijanund, and they rightly stated that that will being affirmed, no question arises with respect to the will of Gouri.

Their Lordships do not think it necessary to go into a lengthened examination of the evidence for and against this will. They think it enough to say that they concur with the opinion of the High Court that the will is sufficiently proved. It

* From the judgment of Couch, C.J., and Jackson and Mitter, JJ., dated 19th May 1873.

is, as the High Court observes, a will which it is highly probable that a man under the circumstances of Grijanund would make. There is a great body of evidence in support of it, which appears to their Lordships to preponderate over the evidence against it ; among the evidence in support of it is that, among others, of the family medical man, and of a relation who appeared to have the confidence of both the factions into which the family appears, unfortunately, to have been divided, and to have been required to arbitrate between them. The will was published and made known almost immediately after the death of the testator ; and the adoption of the child which he declares in the will he has made was also made public and insisted upon. It is also to be observed that other members of the family, even those who now oppose the will, recognised the adopted child Koibullo in various judicial proceedings. They brought actions in which they associated his name with theirs, and one of them, Anoda, who now opposes the will, endeavored to defeat an action on the ground that this very Koibullo ought, as the adopted son of Grijanund, to have been joined with him as a defendant.

What has been said would have been sufficient to dispose of the case but for a contention which has been set up here, apparently for the first time, there being no trace of it in the proceedings below. The passages of the will on which it is based are in these terms : " And as I am desirous of adopting a son, I declare that I have adopted Koibullo Persad, third son of my eldest brother Saroda Persad. My wives shall perform the ceremonies according to the Shastras, and bring him up, and until that adopted son comes of age, those executors shall look after and superintend all the property moveable and immoveable in my own name or benamee, left by me, also that adopted son. When he comes to maturity the executors shall make over everything to him to his satisfaction. The executors are empowered to perform the daily and occasional family ceremonies, and pay the expenses of suits, etc., after due consideration. The minor, when he attains maturity, shall be incompetent to object to anything done by them in this respect. God forbid, but should this adopted son die, and my younger brother Nilrutton have more than one son, then my wives shall adopt a son of his. If at that time Nilrutton has not a son eligible to adoption, they shall adopt another son of Saroda, and the wives and executors shall perform all the afore-mentioned acts." It has been argued that inasmuch as the testator directed that his wives should perform certain ceremonies according to the Shastras, which ceremonies (though the nature of them has been by no means defined) were necessary to the completion of the adoption, and inasmuch as these ceremonies were performed by one wife only, the adoption was not complete, and Koibullo never in any sense became the son of Grijanund.

This argument raised two questions. First, whether or not these ceremonies (whatever they may have been) were necessary for the completion of the adoption, or whether all that was necessary to it had been done by the testator, who in his lifetime received the child, the child having been given by his natural father. Secondly, whether, supposing these ceremonies to be necessary, and a power to have been given to two widows to perform them, one widow only could perform them effectually. But it appears to their Lordships that neither of these questions arises in the case, and probably it is because they did not arise that they were not discussed. The effect of the will according to their view is this : " I declare that I give property to Koibullo whom I have adopted." There is a gift of his property by the testator to a designated person. This direction follows, " My wives shall perform the ceremonies according to the Shastras, and bring him up." Undoubtedly the testator desired and expected that the wives should perform certain ceremonies. He requested them to do so. But it appears to their Lordships that it would be an altogether erroneous reading of the will to suppose that he intended the taking of his property by Koibullo to be entirely dependent on whether the wives chose or did not choose to perform the ceremonies. If they did not, it may be that the adoption is not in all respects complete, although their Lordships by no

means decide this or give any opinion on the subject. Be that as it may, the gift of the property nevertheless takes effect. The provision "God forbid, but should this adopted son die, and my younger brother Nilrutton have more than one son, then my wives shall adopt a son of his," further indicates that the testator did not contemplate his widows having the power of cancelling the adoption of Koibullo, and ousting him from the benefit he was to take under the will, by declining to perform the ceremonies. Whether they performed the ceremonies or not, it is certain that as long as Koibullo lived no other adoption could take place.

For these reasons it appears to their Lordships that the judgment of the High Court is right; that the widow has no claim under this will except whatever is given to her for her maintenance; and they will humbly advise Her Majesty that the decree of the High Court should be affirmed, and this appeal dismissed with costs.

6th July 1876.

Present :

Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier.

Partition—Putnee.

On Appeal from the High Court of Judicature at Fort William in Bengal.

Prosonno Gopal Pal Chowdry and others

versus

Brojonath Roy Chowdry and others.

The Privy Council agreed with the Lower Courts in declaring the respondent's absolute title (under a final decree in a partition suit) to an estate unencumbered by any *putnee* rights in the appellants.

This is a suit brought by Sree Gopal Pal Chowdry, Prosonno Gopal Pal Chowdry, and Brojendro Gopal Pal Chowdry. They seek to recover possession of two-thirds of a *putnee* tenure, created in 1840, in an estate called Chowrashy, and the question is, whether they, as the representatives of Nilcomul their father, are entitled to recover two-thirds of that talook.

It appears that Sohocharam Panty, the common ancestor, left three sons, Kristo Chunder, Shumboo Chunder, and Ramneedy Pal Chowdry. Kristo Chunder and Shumboo Chunder claimed the whole of the property, including the estate called Chowrashy, stating that the mother of Buddinath, the wife of Ramneedy, had conveyed the share of Buddinath, the son of Ramneedy, to them, Buddinath instituted a suit in the Supreme Court as far back as the year 1811, to have the conveyance by his mother set aside, and to have it declared that the three brothers were jointly interested as a Hindoo family in the property left by their father. A decree was passed in his favor on the 12th December 1820, declaring that the family was a joint and undivided Hindoo family, and directing an account to be taken. Subsequently, on the 3rd December 1824, Buddinath filed a supplemental bill praying for a partition of the property which had been declared in his favor to be a joint family estate. Pending the suit, and after the bill filed for a partition, Joychunder, a grandson of Shumboo Chunder, granted to Sreemunto Koondoo, benamee for Nilcomul, another grandson of Shumboo Chunder, and the ancestor of the plaintiffs, the *putnee* now in dispute. On the 5th August 1850 a decree was made by the Supreme Court, directing a partition to be made, and it was in these terms: "It is ordered that a partition be made of the said joint real estate in the schedules A and C annexed to the said Master's

report," that being the joint real estate which was the subject of the suit, and in those schedules the zemindary Chowrashy was mentioned. It was further ordered that a commission should issue, and certain Commissioners were appointed to divide the estate; they were to make a division of the estate with the appurtenances into three equal parts or shares, and to divide the same by metes and bounds where they should see occasion. It was further ordered, that the said Commissioners "should allot one equal third part or share of the premises to the complainants in that suit, to be enjoyed by them in severalty, and the remaining two-third parts or shares to the defendants, to be enjoyed by them in severalty in the manner prescribed by Hindoo law; and further, that after such partition should have been so made, the said complainants and the said defendants should convey such several one-third and two-third parts or shares of the said premises to each other respectively, to be held in severalty as aforesaid."

The Commissioners made a return to the Court, which will be found at page 126 of the Record. They stated that they had divided the estates into three equal parts or shares, or as near thereto as might be, and had, in pursuance of the said commission, allotted and appointed, and did thereby allot and appoint unto the representatives of Buddinath, who had been made parties to the suit by bill of revivor, "all and singular the following lands, tenements, and premises," describing them, to have and to hold the same unto them, and their heirs, representatives, and assigns, to be held and enjoyed by them in severalty for ever, in the manner prescribed by Hindoo law, as in the said commission was directed. Amongst the lands so described was the said estate called Chowrashy (p. 129).

Upon that an order was passed, which will be found at page 159 of the Record, the material parts of which are these: "It is ordered that the said defendants," including the representatives of Nilcomul and Joy Chunder, who were grandsons of Shumboo Chunder, Nilcomul also being the father of the appellants, "do within ten days of the service upon them respectively of the order, put the complainants in these causes into possession of the lands, tenements, and premises allotted to the said complainants, under the return, dated the 27th day of January 1853, to the commission of partition issued in these causes, on and bearing date the 18th day of August 1850, and under and by virtue of the decree made in these causes, on and bearing date the 5th day of August 1850, and which are in the possession of the said defendants or any of them, or of their servants or agents, or of the servants or agents of any of them, not disturbing the possession of any of the ryots or other tenants, but without prejudice to the plaintiff's right to sue and proceed against any ryots or other tenants by regular action or suit, or otherwise, according to the course of practice of the Courts of the East India Company." The effect of the order was that they were to put Buddinath's representatives into possession of the zemindary Chowrashy, "not disturbing the possession of any of the ryots or other tenants, but without prejudice to the plaintiff's right, to sue and proceed against any ryots or other tenants by regular action or suit, or otherwise, according to the course of practice of the Courts of the East India Company."

It has been held, and their Lordships quite agree in that view, that the defendants, the representatives of Nilcomul, were not tenants within the meaning of this order, and that, according to the terms of it, it was their duty to deliver over to the representatives of Buddinath the estate called Chowrashy, free from any incumbrances which, pending the suit, had been created in their favor. But that is not all. The defendants not having put Buddinath's representatives into possession, a proceeding was taken under a writ of execution, called a writ of assistance, to compel the defendants to put them into possession of the estate; upon which the case went to the Zillah Court of the Twenty-four Pergunnahs, the Court in whose jurisdiction the lands were situate.

Sree Gopal Pal Chowdry, who is one of the present plaintiffs, made an objec-

tion, but that had nothing to do with the present question. Sreemunto Koondoo, the person to whom the putnee tenure in the said estate called Chowrashy had been granted benamee for the appellants Sree Gopal Pal Chowdry and others, claimed that he was entitled to the putnee which had been so granted. The Judge rejected his claim and said: "The evidence leaves no doubt on my mind that this objector's claim is founded on no sufficient proof of *bond fide* possession under a *bond fide* transaction; that is, that he is not the third party he claims to be, nor entitled to hold the possession he declares himself to hold. He is not, therefore, as a third party, in possession protected by the terms of the decree or writ of assistance. I reject this petition accordingly."

Upon that, Sreemunto Koondoo appealed to the Sudder Court, and the Sudder Court upheld the decision that he was not a third party claiming under the putnee, but that he was merely holding it benamee for one of the parties to the suit. If he had established his right as a third party, and had proved that he was holding the putnee on his own behalf and not on behalf of Sree Gopal Pal Chowdry and others, the question would have arisen whether he was not bound by the decision of the Supreme Court, the putnee having been granted to him *pendente lite*. But that question does not arise, as the putnee was held benamee for persons who were parties to the suit, and they were bound by the decree of the Supreme Court. That decree was that the zemindary was to be delivered over to the representatives of Buddinath by the persons who are now the plaintiffs in this suit.

The first Court held that the plaintiffs were not entitled to recover, and dismissed the present suit. Thereupon the case came on appeal before the High Court, and Mr. Justice Norman, in delivering the decision of the High Court, says: "Looking at the terms of the return to the commission of partition, and the circumstances under which the two putnees are said to have been granted and were held benamee for Nilcomul, I think that the Commissioners for the purpose of the partition treated, and rightly treated, Nilcomul and Joy Chunder as being in actual possession of Turuff Chowrashy, altogether disregarding the putnees, and that the heirs of Nilcomul are bound by that allotment. I am of opinion that under the final decree in the partition suit, the heirs of Buddinath Pal Chowdry acquired an absolute title to Turuff Chowrashy unencumbered by any putnee rights in Nilcomul or his heirs. The result is, that in my opinion the decision of the Court below is substantially correct, and the appeal must be dismissed with costs." Mr. Justice Ainslie, who was one of the members of the Division Court to which the appeal was preferred, concurred in that judgment.

Their Lordships think that the High Court came to a correct conclusion, and that the plaintiffs are not entitled to maintain this suit. Under these circumstances they will humbly recommend Her Majesty that the decision of the High Court be affirmed with costs.

The 13th July 1876.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Arbitration—Act VIII of 1859 s. 327.

"Award" and "Sufficient Cause" (Construction of)—Miscarriage on the Part of the Arbitrators.

On Appeal from the Court of the Commissioner of the Lucknow Division.

Chowdhry Muntaza Hossein
versus
Mussumat Bibi Bechunnissa.

On an application under s. 327 Act VIII of 1859 to have an award filed in Court, it was held that the word "award" as used in the plaint must be taken to include the whole document which is scheduled to the plaint, *i.e.*, the formal judgment as well as the decree, also that the earlier Sections of the Act are not incorporated into s. 327 as they are into s. 326, and that the words "sufficient cause" in s. 327 should be taken to comprehend any substantial objection which appears upon the face of the award or is founded on the misconduct of the arbitrators or on any miscarriage in the course of the proceedings or upon any other ground which would be considered fatal to an award on an application to the Courts in England.

Both parties having agreed to the appointment of arbitrators to determine their rights in dispute according to the terms of a will, and it being contended by the appellant that it was miscarriage on the part of the arbitrators to make their award without having had the whole of the will before them, their Lordships, sensible on the one hand of the extreme impolicy of allowing parties to get out of awards upon objections which really did not affect the substantial justice of the case, and on the other hand, considering the necessity of not allowing arbitrators to act without jurisdiction by doing that which the terms of the submission to arbitration did not entitle them to do, came to the conclusion that, as the appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on and allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favorable to himself, it was too late for him, after the award had been made, and on the application to file the award, to insist on this objection to the filing of the award.

This was an appeal from a decretal order of the Commissioner of Lucknow, upholding a judgment of the Deputy Commissioner of that Division. The facts of the case are sufficiently stated in the judgment of the Judicial Committee. The point in dispute was whether the appellant was bound by the terms of an award of arbitrators who were appointed by the consent of both parties to settle a dispute concerning their rights according to the will of the appellant's late brother and of the respondent's late husband.

Mr. Leith, Q.C., and Mr. J. H. W. Arathoon for Appellant.
Mr. Cowie, Q.C., and Mr. C. W. Arathoon for Respondent.

Sir James Colville, delivered the judgment of the Judicial Committee as follows :—

This is an application under s. 327 of Act VIII of 1859 to have an award filed in Court, with the usual consequence of having its provisions enforced as a decree of Court. Some discussion was raised in the course of the argument touching the meaning of the word "award" as used in the plaint. Their Lordships have no difficulty in ruling that it must be taken to include the whole of the document which is scheduled to the plaint, and headed "Copy of the award;" that it comprehends both that which in some of the proceedings has been called the "formal judgment," and that portion of the document scheduled which is headed at page 10 with the word "Decree." If it were taken to be confined to the latter, the award would be obviously incomplete, since it would contain no finding upon many of the questions raised. The only reason for so confining it seems to have been a loose statement made by a pleader in one of the Courts.

The arbitration which resulted in this award came about in this way: The plaintiff, who seeks to have the award filed, was the widow of one Chowdhry Sarfaraz Ahmud; the defendant, who resists the filing of the award, is Chowdhry Murtaza Hossein, who was the brother of Sarfaraz Ahmud. It appears that Sarfaraz Ahmud left not only a widow, but a daughter and daughter's children, of whom one was a son; that a considerable part of his property consisted of talooks; and that he was registered as talookdar under the schedules of Act I of 1869, so as to make his talooks descendible in the case of intestacy to a single heir according to the rules laid down in s. 22 of that Statute. The effect of these was to make the talookdary property of Sarfaraz Ahmud descendible to his daughter's son, if he had been recognised and treated by the deceased as his own son, but in default of

such recognition, to his brother, in preference of his widow. The Act gives the talookdars the power of altering this law of succession by any will, made more than three months before the death of the testator, or by one of later date if made with a particular form of attestation. It is, however, an admitted fact in this case, that the will of Sarfaraz Ahmud was made within a month of his death, and was not attested in the manner prescribed by the Statute. The question raised and considered in these proceedings was in terms whether the will was valid or invalid ; but the proper issue was whether such a will was sufficient to pass talookdary property since it might be a good will according to Mahomedan law as to one-third of the testator's other property, although it was not executed according to the provisions of the Act.

In this state of things the brother, whose claim to inherit the talooks was liable to be defeated only by proof of the recognition of the grandson as a son, of which there is no question in these proceedings, was induced to enter into a submission to arbitration, the effect of which was to make his rights and the rights of the widow determinable according to the terms of the will of the testator, and therefore, for the purposes at all events of that arbitration, to recognise the sufficiency of the will. The submission to arbitration was in this form : We agree that "whereas Mr. W. Glynn, the Deputy Commissioner of Barabunki, has with our consent appointed Chowdhry Ghullam Furreed, talookdar of Barraiee, pergunnah Rodowlee, and Rughunath Singh, talookdar of Palee, arbitrators, to determine according to the terms of the will of the deceased talookdar the dispute between Chowdhry Murtaza Hossein and Chowdrain, widow of Sarfaraz Ahmud, deceased, relating both to the property specified in the will, and to that not mentioned therein, we do hereby declare and duly execute this document." The arbitrators made their award on the 16th March 1871. The suit to have it filed in Court was commenced on the 21st August 1871. Both parties seem to have made references to the Deputy Commissioner complaining of portions of the award, but the result was that the widow, at least, adopted it, and took these proceedings in order to enforce it.

In the Courts below an objection was originally taken to the form of the suit on the ground that the award was not an award within the meaning of s. 327, but a judicial award which could only be dealt with under the earlier Sections of the Act. That point has been given up, and the propriety of the suit must now be taken to be admitted.

A question, however, has been raised whether the earlier Sections of the Act are incorporated into s. 327, so as to give the Court proceeding under the latter Section the power of remitting an award which is insufficient upon the face of it back to the arbitrators for amendment : and also how far the power of such a Court to refuse to file an award is limited by s. 324, which says that no award shall be set aside except on the ground of misconduct or corruption of the arbitrators or umpire. Their Lordships are of opinion that, upon the construction of the Act, the earlier Sections are not incorporated into s. 327, as they are expressly incorporated into s. 326 ; and that the words "sufficient cause" should be taken to comprehend any substantial objection which appears upon the face of the award ; or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in this country.

The objections which were formerly taken to the admission of this award were embodied in the nine issues settled by the Deputy Commissioner of Lucknow, to whom the cause was transferred from the Deputy Commissioner of Barabunki, and are set out at page 42 of the Record. Those which are involved in the first, second, third, fifth, eighth, and ninth issues, have here been given up by the learned Counsel for the appellant as untenable. That raised by the fourth issue was relied upon ; it is in substance that the arbitrators before making their award had consulted one

Mahomed Ali, a vakeel or native lawyer. The sixth was in these terms, "Is the award, being based on an invalid will, itself invalid?" It will hereafter be considered what is embraced in that issue. The objection which it patently raises, viz., that founded on the date and execution of the will, is now no longer relied upon. The seventh was that the arbitrators were bribed. The result is that the only objections raised by the issues which are now relied upon are, the consultation of the pleader, the corruption of the arbitrators, and whatever is included in the sixth issue.

It will be convenient at once to dispose of the seventh issue by saying that the Deputy Commissioner, after hearing the evidence that was adduced before him, came to the conclusion that there was no ground for imputing corruption to the arbitrators; that the story told by the witnesses as to the bribes that were given was false; and that their Lordships see no ground whatever for dissenting from that finding. This was not the finding of two Indian Courts, because the Commissioner to whom there was an appeal thought that he was incompetent to entertain that question. Their Lordships upon the evidence unhesitatingly acquit the arbitrators of corruption in this matter.

Some objections have indeed been raised at the bar which seem hardly to be included in the issues settled in the Indian Courts. Mr. Leith contended that the award was bad on the face of it, inasmuch as it failed to deal with some of the subjects referred to the arbitrators, and in particular with the two estates Behlal and Hosseinpur. But the contention can only be supported if the award is taken to be merely that portion of the document scheduled to the plaint which is headed "decree," a point upon which their Lordships' opinion has been already expressed. If the whole document be treated as the award the arbitrators have expressly dealt with the subjects in question.

The point as to the consultation of the pleader was disposed of in the course of the argument by their Lordships, who intimated a clear opinion that the case implicating the pleader in the alleged corruption having failed, the mere fact that the arbitrators consulted a person supposed to be learned in the law was not a valid objection to their award. An objection was also founded on a passage in the Record wherein it appeared that on one occasion one arbitrator sat alone; but upon the whole their Lordships are of opinion that the final award was made by the two arbitrators, and that there is nothing in this objection which seems never to have been raised in the Courts below.

The case of the appellant is then reduced to the objection which he contends is involved, though not explicitly stated, in the sixth issue. It is in effect that, by reason of the reference in the ninth paragraph of the will which was before the arbitrators to another document described as "a will bearing the testimony of Rajah Farzand Ali Khan and Rajah Jugmohun Singh in the possession of my wife," which was not produced before the arbitrators, they cannot be said to have had the whole will of the testator before them; and ought not to have made an award without having that document produced before them, and that by reason of this miscarriage the Court ought to refuse to direct the award to be filed.

The award contains the following statement regarding the missing document: "It is worthy of observation that the Chowdrain has rendered her conduct suspicious by concealing the second will. But if it had been produced in compliance with our directions, it would not have prejudiced the Chowdrain, because we are not disposed to tolerate injury or harm being done to either party. It is regretted that the Chowdrain has, by concealing the second will, created suspicion in our minds as to the said will, and we have no reason whatever to believe that the will under consideration was in no respect similar in terms to that now before us." The arbitrators then suggest certain hypotheses as to what the will might contain, and add, "In the absence of sufficient cause being shown to the contrary, it may be suspected that it was destroyed through the foolishness or carelessness of the woman. Be this as it

may, we are not disposed to be led by suspicions in determining the case, but at any rate it shall be our duty not to lose sight of our inclination thus caused to favor Chowdhry Murtaza Hossein." From the proceedings before the arbitrators it would appear that both parties agreed that the missing document had existed. The Chowdrain alleged that the original had been taken away by the appellant, but admitted that she had a copy of it signed by the testator; the other party imputed to her that she kept back the original.

A question strongly contested before their Lordships was whether this objection to the filing of the award was sufficiently raised upon the Record. It does not appear to have been distinctly raised on the proceeding at page 41 of the Record, when the issues were settled. The sixth issue seems to have been framed upon the objection stated orally by Mr. Arathoon, which, as taken down by the Judge, is in these words: "The will was invalid, being made within a month of the 'talookdar's death, and the arbitrators were wrong in attaching any importance to it.'" The objection, however, had substantially been put forward in the petition impugning the award which the appellant presented to Mr. Glynn on the 31st March 1871; and also in a written statement tendered in this suit but rejected by the Court for want of sufficient verification, which therefore cannot be treated as part of the Record. Again, it appears that when the case came before the Deputy Commissioner the point was in a manner raised before him, and treated as included in the sixth issue. The Judge's note at page 57 of the Record after stating the sixth issue, and that the plaintiff does not care, so far as this case is concerned, to dispute the invalidity of the will, proceeds thus: "Mr. Arathoon argues that the award partly follows the will, in other parts the will is disregarded; that this is sufficient cause to refuse to file the award; but besides this there is a codicil which the arbitrators do not appear to have looked at." The Judge says, "There is nothing on the Record to show that any codicil was executed, and that point need not be considered. Had any codicil been in existence it should have been brought forward in evidence."

Now, if by the word "codicil" was meant the missing will referred to in paragraph 9 of the will produced, this mode of disposing of the objection was unsatisfactory, because in the statement of the arbitrators upon the face of the award which has been already read there is a clear *constat* that the document said to have been attested by Rajah Farzand Ali Khan and Rajah Jugmohun Singh existed. The Judge, however, went on to dispose of the question as to the effect of the invalidity of the will under the statute, but took no further notice of the question raised by Mr. Arathoon as to "the codicil."

The general principle of their Lordships is that of not dealing very strictly with the form of the pleadings if they find that a material point was substantially raised. They are disposed, though not without some little doubt and hesitation, to treat this particular point as sufficiently raised in the Courts below, and therefore to be one with which they are bound to deal upon appeal. The question which it involves appears to their Lordships to constitute the only formidable objection which can be taken to the filing of this award.

The contention is that it was miscarriage on the part of the arbitrators to make the award unless they had the whole of the will before them, which they cannot be said to have had in the absence of the document in question. Their Lordships have felt considerable difficulty upon this point. They are sensible, on the one hand, of the extreme impolicy of allowing parties to get out of awards upon objections which really do not affect the substantial justice of the case; and, on the other hand, they feel the necessity of not allowing arbitrators to act without jurisdiction by doing that which the terms of the submission to arbitration do not entitle them to do. Upon the whole, however, their Lordships have come to the conclusion that the objection is not fatal to the filing of this award. They may observe that, looking at the whole will, they are disposed to believe that this missing document was really confined to some question relating to the marriage of the eldest granddaughter,

which is the substance of the ninth paragraph, if that be treated as ending with the word "followed." On the true construction of the whole document the words "detail of expenses," and all that follows, seem to be no part of the ninth paragraph, although treated by the arbitrators, when they settled their issues, as within it.

It is, however, possible that the missing document may be something more than their Lordships suppose; and if there had been a clear *constat* that the defendant objected on this ground to the arbitrators proceeding to make an award, and that they had nevertheless gone on to make their award upon the terms of the will before them, their Lordships might have thought the objection sufficient. Looking, however, to the proceedings before the arbitrators, and particularly to the document at page 146, which is called the rejoinder, they think that, notwithstanding the knowledge that this document was withheld, the defendant did submit to take his chances of the arbitration, and that he cannot now, on the general rule upon which all Courts act with respect to awards, be allowed, having taken his chances of the arbitration, to set aside the award upon the ground of the objection taken. In the very first paragraph of this rejoinder he no doubt says: "But the arguments of the plaintiff carry no weight with them unless the other will, which forms an essential part, be produced, because in the will produced it is enjoined that a regard should be paid to the will therein referred to, which signifies that the provisions of the latter will are to be carried out and not of the former." But what is the conclusion that he draws from that? Not that the arbitrators are to abstain from making an award, for he says: "Wherefore, in the event of the other will not forthcoming, the arbitrators are, under the law, competent in every respect to determine the dispute according to the British law, according to the custom or according to Mahomedan law, and to render justice to me. But notwithstanding all the objections taken to the powers of the arbitrators, and to myself, the plaintiff has exceeded all proper bounds, and instead of giving fit answers to my objections has made frivolous statements. Although silence is preferable to the refutation of such statements, I apprehend that if I keep quiet my silence may be construed in a manner which might show that I have been unable to refute the plaintiff's statements, or that I have admitted them. I am also of opinion that, in order to obtain justice at the hands of the arbitrators, it is better for me to bring to their notice the true facts; I therefore beg to submit a rejoinder to the plaintiff's reply, in the following paragraphs." Therefore, as far as that first paragraph goes, it is not an objection to their proceeding to make an award at all because they have not the whole will before them, but it is a suggestion that they should make an award in a particular manner, namely, by declaring that, the whole will not having been produced, it is not to be operative, but that the dispute is to be determined according to the British law, which their Lordships take to be the course of succession prescribed by Act I of 1869, as to the talookdary estate, according to the custom, which is probably some supposed family custom applying to the personal estate other than the talookdary estate, or according to the general Mahomedan law. That is one alternative which is put forward by this document. The other is at page 152, where he says, "As for that part of the will which relates to Khanpur, I beg to urge that inferential, optional, and adverse constructions have been put on it suited to the interests of the plaintiff. Such constructions have not been put by any one of the community who has had occasion to read the will, except by the agents of the plaintiff, nor does that part of the will anyhow convey the meaning attached to it by the plaintiff. Then he says, "I believe the other will, which the plaintiff assiduously tries to conceal, supports this assertion of mine. Every letter and every word of a will signifies nothing less than the declaration of the intentions of the testator. This is supported by law. No one is competent to put thereon an optional or implied construction. I, however, expect that the learned (meaning, apparently, the arbitrators) will clear up the meaning of the will, and will, in consequence of

concealment of the other will, interpret the will " (that must mean the will before them) " favorably to myself and detrimentally to the plaintiff. The will produced allows maintenance only of the plaintiff and her descendants which may be born after the time the will was drawn up, out of mouzahs Shareefabad and Alapur. This does not give her any right as against myself." Therefore he goes on to treat, as still open to the decision of the arbitrators, the question of the construction of that will, and only claims a right to have presumptions drawn in favor of himself.

There was some dispute as to this rejoinder and the time when it came before the arbitrators. That it came before the arbitrators seems to be pretty clear, by the translation of the petition at page 146, but there is some confusion occasioned as to the time by the supposed date of that petition. It is clear that the petition covered the rejoinder, and it is quite clear, from the internal evidence in the rejoinder itself, that it was addressed to the arbitrators, and proceeded upon the assumption on the part of the writer that the arbitration was still open. Their Lordships conceive that that document must have been before the arbitrators, and can hardly suppose, in the absence of clear proof, that it was before them after the arbitration was closed. At all events it shows what was in the mind of the party and what were the points which he intended to raise upon the omission to produce the missing will. Again, it appears from the proceeding of the 19th February 1871 that the parties had then also, with full knowledge of the absence of the missing will, expressed their willingness to allow the case to be dealt with by the arbitrators in its absence. The statement at page 136 of the Record is:—"The parties after some discussion have expressed their willingness to give up the different footings on which they grounded their claims, i.e., they have withdrawn their claim to partition under the Mahomedan law of succession, according to custom or English law, and have agreed that those points of the will in respect of which they are at issue should be cleared up and the rest left untouched." The proceeding then goes on to frame certain issues, of which the first is one as to the real and true interpretation of that which is called the ninth paragraph, but which obviously means the detail which follows the ninth paragraph, and which deals with the different talooks, Khanpur, Shareefabad, and Alapur, which were some of the subjects of the award. This issue contains these words: "What is the real and true interpretation of the ninth paragraph of the will, and what was the real intention and object of the testator? In other words, whether the entire talooka Khanpur should be divided in equal moieties between the parties, or exclusively of Shareefabad and Alapur." Again, there is a passage in the award which reads as if the arbitrators had then before them the document called a rejoinder, and were accepting the proposition put to them by the defendant in the latter part of it. The following is the passage in question: "Be this as it may, we are not disposed to be led by suspicions in determining the case, but at any rate it shall be our duty not to lose sight of our inclination thus caused to favor Chowdhry Murtaza Hossein." On the whole, therefore, their Lordships think that the appellant having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favorable to himself, and that it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award.

Their Lordships, therefore, will humbly advise Her Majesty to dismiss the present appeal; and to affirm the order of the Deputy Commissioner, which is the operative order; but, having regard to the confusion which has been caused in a great measure by the absence or withholding of this document, for which the arbitrators, on plausible grounds, treat the plaintiff as responsible, their Lordships are of opinion that there should be no costs of this appeal. But the appeal having been decided in favor of the respondent, the appellant must pay the costs of the

respondent upon the application for leave to appeal made on the 9th March, as those costs were ordered to abide the result of this appeal.

The 21st July 1876.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Joint Hindoo Family—Partnership—Partition—Self-acquisitions—Hotch-potch—Agreement.

On Appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.

Rai Nursingh Doss

versus

Rai Narain Doss and others.

And Rai Narain Doss

versus

Rai Nursingh Doss.

It appearing that the relation between plaintiff and defendant (two brothers) could not be taken to be strictly that of the members of a joint and undivided Hindoo family, since, although they were joint as to their general concerns and in some sense joint as members of a family, yet that relation was qualified by the provision contained in a family arrangement whereby each member of the family might take out and use assets derived from a partnership firm for the benefit of his sole and separate speculations : HELD that plaintiff had failed to make out his right to throw his own and his brother's acquisitions into hotch-potch, and to claim an equal division of them.

The above arrangement being of such an extraordinary character as to leave it in the power of each member to draw to an unlimited extent upon the assets of the firm, the Privy Council declined to extend the operation of such an agreement one iota beyond its terms, and were, therefore, of opinion that the High Court was right in drawing a distinction between pledging the credit of the firm and drawing out money actually belonging to the firm.

This was an appeal from the High Court of Allahabad, affirming a decision of the District Judge of Benares concerning the partition of the joint estate of an undivided Hindoo family. The facts of the case are fully and clearly stated in the judgment of the Judicial Committee.

Mr. Doyne appeared for Appellant.

Mr. Leith, Q.C., Mr. Cowie, Q.C., and Mr. C. W. Arathoon, for Respondents.

This appeal and cross appeal have arisen out of the peculiar and somewhat complicated arrangements of a Hindoo family descended from one Rajah Putnee Mull. The Rajah had two sons, Sree Kishen and Ram Kishen. Sree Kishen was the father of the plaintiff in the suit, Rai Nursingh Doss, of Rai Narain Doss, who is the principal defendant, and of a third son, Hurree Doss, who died in his father's lifetime. Seeta Ram and the other respondents, who have not appeared on the appeals, are the descendants and representatives of Ram Kishen's branch. It may, their Lordships think, be taken to be established for the purposes of these appeals, that the descendants of Ram Kishen have become generally separate in estate ; although, in respect of certain properties, viz., the banking firm afterwards mentioned, and the other properties which remain undivided, they continue to be joint with the Sree Kishen branch. On the other hand, their Lordships think it must be taken to be also established that Nursingh Doss and Narain Doss have continued to be generally joint in estate. There is no evidence that the two brothers have

ever come to a formal partition. On the other hand, it appears that on those occasions on which there has been a partial partition of family property between the two branches of the family, the properties to be divided were divided into eight lots, of which four were taken by Narain Doss and Nursingh Doss jointly, or by Narain Doss for himself and his brother ; but that there has been no subdivision of those lots between them. It also appears that up to a comparatively recent period they messed together, and were joint in food and worship, as well as, generally speaking, in estate.

With respect, however, to the whole of the family, it seems clear that the joint family property has chiefly come out of the transactions of a certain trading or banking firm founded by the common ancestor, Putnee Mull, under the style of " Rai Sree Kishen and Rai Ram Kishen," and that the interests of the different members of the family in this firm have for a long period been upon a somewhat peculiar footing. It appears that in Rajah Putnee Mull's lifetime he either estimated the assets of the firm at four lacs, or separated and set aside that sum ; that he divided two lacs of this between Sree Kishen and his three sons, and the remaining two lacs between the four sons of Ram Kishen, who was then dead, placing to the separate account of each in the books of the firm the sum of Rs. 50,000. This is said upon the one side to have been merely an indication of the share and interest which in the event of a partition each was to take. On the other hand, it has been contended, and that contention is certainly supported by the accounts, that it was intended to give to each a separate interest, and a power of drawing upon separate account, which is not ordinarily possessed by the members of a joint and undivided Hindoo family carrying on trading transactions.

The relations of the members of the firm, however, do not depend solely on this arrangement of Putnee Mull, whatever be the effect of it. Upon the 19th May 1845, after the decease of Rajah Putnee Mull, but during the lifetime and management of Sree Kishen, a family council was held, at which the adult members of the family agreed to the document at page 165 of Record, upon which so much discussion has taken place. That document, after reciting that the general expenses of the family had hitherto been defrayed by Sree Kishen, but that objection had been taken to his extravagant expenditure upon the occasion of the tonsure of Lakhmi Chund, states, " It was consequently resolved by all that, from and after the month of June 1845, each member should bear his own expenses, and that the messing, as well as servants' charges, should at present be left as they are. Whereupon all objected that the interest of Rs. 50,000 only would not be sufficient ; they should therefore be allowed the liberty of drawing in their respective names from the firm any sum of money they liked, and getting the same entered in their respective accounts." Of course, if the instrument had stopped there, it might be supposed to relate only to sums to be drawn for private expenditure ; but it goes on, " each is at liberty to carry on his own business, and to defray each his own expenses out of the profits arising therefrom. Some discussion having taken place as to interest, it was unanimously agreed by all, that if the members were to be charged with interest at the usual rate of the firm, they would save nothing, so the interest of any sum which may be drawn should be paid at the rate of 4 per cent., as was allowed by the Rajah Sahib for the money deposited. This was agreed to, with the proviso that as each member will take the profits arising from his trade, so likewise the firm will have nothing to do with the loss sustained by any of them (the members). It shall be incumbent to repay the sum to the firm with interest. And the business of the firm shall continue as before ; but if any member, contrary to this agreement, shall engage in any business for the firm without the permission of all, he alone will be responsible for the loss, and will have to repay the money to the firm." Therefore, the effect of this agreement was to entitle each partner to draw money at his discretion out of the firm, and to employ that money in his separate trade or separate speculations, the firm not being responsible for the losses

sustained, and not being entitled to share in the profits arising from those speculations ; but, subject to this modification, all the members of the family retained the interest which they previously had as joint members of the firm. Indeed, at one of the subsequent meetings of the family, at which a partial division of jewels and other property took place, it was expressly stipulated that the firm should remain joint. That will be found at page 178 of the Record.

It has, their Lordships think, been conclusively established that this document was executed by those by whom it purports to be executed, and that it was afterwards acted upon. Two points, however, are taken by the plaintiff in the suit. He says that he, being a minor, was not a party to this document, and has more or less contended that he was not bound by the arrangement which it embodied. He further contends that if it is binding upon him at all, it is only binding upon him as a member of his branch of the family, which has continued to be joint, and for whose joint benefit the arrangement must be taken to have been made, that all that was drawn out of the firm under it by Sree Kishen, or afterwards by Narain Doss, and employed by either in separate speculation, must be taken to have been so drawn out and employed by the managing member of the joint family, consisting now of himself and his brother, and that all such separate acquisitions, no matter in whose name they stand, must be taken to be their joint property.

These are the two chief questions raised by the principal appeal. The District Judge and the High Court have concurrently determined them against the appellant, in judgments of which their Lordships think it right to remark that both are remarkably able and well considered. Mr. Henderson, the District Judge of Benares, in dealing with the first question, after showing that some of the other defendants, Bishen Chund and others, the descendants of Ram Kishen, had recognised, at all events, the practice established by the roobokaree of the 19th May 1845, though one disputed his signature to the document, says : " The plaintiff also in claiming half share of the acquisitions made with the sums drawn from the firm by Narain Doss, whether in joint names or in his own name, to the exclusion of the other members, does actually concede the fact of such an arrangement,"—an observation which seems to their Lordships to be perfectly unanswerable. He then deals with the evidence of the gomashitas and the books of the firm, which he finds to be in accordance with that view, and he ultimately finds that the plaintiff must be taken to have had full knowledge of this arrangement, and that as a member of the firm he must be taken to have admitted that it was properly acted upon. He then deals with the question between the two brothers, whether the acquisitions of the two are to be brought into hotch-potch and divided equally, and upon the evidence, he comes to a conclusion adverse to the plaintiff. These findings are more succinctly embodied and stated in the judgment of the High Court at page 906 of the Record. They say, " We therefore concur with the Judge in holding that the appellant has recognised and acquiesced in the arrangement whereby the individual members of the family engaged in transactions for their separate benefit with moneys taken on loan from the firm. It is shown from his account with the firm, that he has, in virtue of this arrangement, himself taken moneys from the firm to make purchases and carry on loan transactions of which he derived the whole benefit, and while there is evidence to show that at one time the respondent, Narain Doss, had it in his mind to make his brother a partner with himself in all his transactions, we find that so long ago as in the year 1849 he changed his intention, and asserted his right to treat the acquisitions made by him as his sole property ; and we also find that the appellant, although he had ample opportunity of informing himself of his brother's proceedings, and was, as we believe, aware of them, took no exception to them until the year 1865. Under these circumstances we hold that the appellant cannot now be allowed to maintain a claim to the acquisitions made by his brother with moneys borrowed from the firm."

Their Lordships, who, if the case of the appellant had been stronger than it is,

would have hesitated to set aside the concurrent judgments of the two Courts, upon what is very much a question of fact, feel bound to say, notwithstanding the long and able argument of Mr. Doyne, that the conclusion is one to which they themselves would have come upon the evidence to which their attention has been directed. There is no doubt in this, as in all cases arising between members of a joint family, a good deal of ambiguity as to the character of their dealings; and that ambiguity has been increased by the practice, the reason of which does not clearly appear, of using sometimes the name of one brother, when the transaction was in fact the transaction of the other. But their Lordships conceive that the relation of these brothers cannot be taken to be strictly that of the members of a joint and undivided Hindoo family; for although they were joint as to their general concerns, in some sense joint as members of a firm, yet that relation was qualified by the provision that each member of the firm might take out and use assets derived from the firm for the benefit of his sole and separate speculations. It is contended, however, that as between these brothers this must be taken to be only a provision that the brothers might do this jointly for their joint benefit. And it is no doubt shown that for a short time after, this young man, Nursingh Doss, came of age, or at all events for some short time after the father's death, Narain acted upon this footing. But then it is sworn by the gomashas, and the Judges have given credit to that evidence, that Narain afterwards determined that he would cease to do so; and thenceforward speculated on his separate account, as, according to the terms of the arrangement, he was at liberty to do. This evidence is confirmed by the fact appearing on the Commissioner's summary of the accounts, that while Narain drew out and employed money on the joint account of himself and his brother, the moneys which he so drew out were debited to the joint account of both brothers; whereas it is perfectly clear upon the evidence of the gomashas, and on the face of the accounts, that after a certain date separate accounts were opened for each brother, each being separately debited with the particular sums drawn out for the purposes of the different transactions now found to have been on his separate account. Again, it appears that one transaction was originally treated as the separate investment of Nursingh Doss; but that he, for some reason or other, did not care to retain it; that the other brother took to it; and that thereupon the accounts of the firm were corrected and the sum which had originally been debited to Nursingh Doss was transferred to the debit of Narain Doss.

Now that transfer of account if proved,—and their Lordships see no reason to doubt the truth of the evidence given to prove it—is inconsistent with the notion that the brothers used their separate accounts for their joint purposes, putting, as they saw fit, this transaction to one account and that transaction to the other account; whereas it is perfectly intelligible on the theory that the debit in the books of the firm was intended to show on whose separate account the transaction had been made.

Their Lordships, therefore, having given every attention in their power to the case, feel it impossible to dissent from the conclusion of the two Courts, that Nursingh Doss has failed to make out his right to throw his acquisitions and the acquisitions of the other brother into hotch-potch, and to claim an equal division of them; and that, therefore, the general principle upon which the account was ordered to be taken is correct.

There only remain, therefore, to be considered the points raised by the cross appeal, and though there is some little complication as to the particular transactions to which that appeal relates, their Lordships are of opinion that the High Court has taken a correct view of them. The agreement which their Lordships have found to be binding on all the members of the firm was certainly a very extraordinary one, leaving it as it did in the power of each member to draw to an unlimited amount upon the assets of the firm, an arrangement of which the abuse could only be corrected by a dissolution of partnership. Their Lordships would not be inclined

to extend the operation of such an agreement one iota beyond its terms ; and they are therefore of opinion that the High Court was right in drawing a distinction between pledging the credit of the firm and drawing out money actually belonging to the firm. Therefore, as to those profits (which do not seem to be very large or important, further than as involving a question of principle) which have been found to belong to the firm, and of which the plaintiff can only claim one-fourth, they are not disposed to disturb the decree of the High Court.

The result is that both the appeals must be disallowed ; and their Lordships will humbly advise Her Majesty to dismiss both the appeal and the cross-appeal, and to affirm the decree of the High Court ; and, considering the nature of the case, and that each party has to a certain extent failed, they think that each should bear his own costs.

The 3rd November 1876.

Present :

Sir James W. Colvile, Sir Barnes Peacock, and Sir Robert P. Collier.

Hindoo Law (Adoption)—Power of Widow to Adopt—Assent of Kindred.

On Appeal from the High Court of Judicature at Madras.

Rajah Vellanki Venkata Krishna Row

versus

Venkata Rama Lakshmi Narsayya and others.

Where an estate descends to the natural-born son of the original zemindar, and on the death of the son, the widow of the original zemindar takes it as mother and heiress of her son and not immediately from her husband, the widow may adopt a son to her husband.

A passage in the Ramnad case explained to show that all that was there intended to be laid down was that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the Hindoo widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband.

Mr. Fitzjames Stephen, Q.C., and Mr. Mayne for Appellant.

Mr. Leith, Q.C., and Mr. Norton for Respondent.

Sir James Colvile gave judgment as follows :—

The case out of which this appeal arises is a suit in which the appellant, claiming to be the adopted son of Rajah Vellanki Venkata Ramanayya Row, who was the penultimate zemindar of Gampalagudem, is seeking to recover that zemindary against the parties in possession. Those parties, the respondents, are the daughters of the above-named, whom it will be convenient to call the original zemindar ; and it seems now to be admitted that, although put in possession by the Collector after the death of his widow, they have, in fact, no title ; that they must have been so put in, either under the notion which the Government at one time entertained, that as to certain zemindaries in the Presidency of Madras they had a right to settle the succession, or under an erroneous impression that these ladies were the next heirs of the last zemindar. The impression would be erroneous, because it is clear that, the original zemindar having left a son, the whole inheritance vested in the latter, although he died afterwards an infant, and unmarried ; that the widow took as heiress to her son ; and that, failing her, his sisters, if they had a remote right to succeed as bundhoos (a question upon which their Lordships express no opinion whatever), could only so succeed after the sapindas, of whom there are several, had been exhausted. These ladies, however,

being in possession, have, of course, a right to set up a *jus tertii*, or on any other sufficient ground to question the title of the party who is seeking to oust them from possession.

Of the issues settled in the cause, the first is the only one on which any question now turns. It is in these terms: "Whether the plaintiff was adopted by the first and second defendants' mother, and whether such adoption is in consonance with law?" It embraces the two points which have been argued before their Lordships. As to the facts, there is little or no dispute. The original zemindar died in 1849. He was succeeded by his only son, the last zemindar, who lived for five years after his father's death, and died in 1854, a minor, unmarried. According to the Hindoo law his mother was his heiress, and was admitted as such, and took possession of the zemindary. It is also found by both Courts, and is not now contested, that some years after the death of the last zemindar, his mother adopted the present plaintiff; that all the ceremonies required for such a purpose were complied with; and that the consent was obtained of all the surviving sapindas of the family of the original zemindar, who concurred in and sanctioned that adoption.

The two questions that have arisen upon the first issue are, first, whether the descent having been thus cast upon the natural-born son of the original zemindar, there remained in his mother any power to adopt a son to her husband; and secondly, whether the adoption is bad upon the particular ground upon which the High Court, reversing the decision of the Lower Court, has proceeded in this case. It seems to their Lordships to be desirable to deal in the first instance with the first of these questions, since it goes to the general power of adoption.

In order to determine that question it is desirable to see what would, in such a case, be the power of a mother who had from her deceased husband an express power to adopt a son in the event of his natural son dying under age and unmarried. It has been fairly conceded that such a power would exist, and the authorities seem to be express upon the point. It is sufficient to read the following passage from Mr. Macnaghten's Principles and Practice at page 80, Vol. 1: "It is written in the Dattaca Mimansa, 'A man destitute of a son (aputra) is one to whom no son has been born, or whose son has died,' for a text of Sounaka expresses 'one to whom no son has been born, or whose son has died, having fasted for a son, etc.;' but it seems to be admitted that a man having a legitimate son may not only authorise his wife to adopt a son after his death failing such legitimate son, but also, failing the son so adopted, to adopt another in his stead; and it has also been ruled that authority to a wife to adopt in the event of a disagreement between her and a son of the husband then living will not avail, though authority to adopt in the event of that son's death would be valid." If, then, there had been a written authority to the widow to adopt, the fact of the descent being cast would have made no difference unless the case fell within the authority of Chundrabullee, reported in the 10th Moore;* in which it was decided that, the son having died leaving a widow in whom the inheritance had vested, the mother could not defeat the estate which had so become vested by making an adoption, though in pursuance of a written authority from her husband. That authority does not govern the present case in which the adoption is made in derogation of the adoptive mother's estate; and indeed expressly recognizes the distinction.

Such, then, being the law, supposing the husband had given a written authority to adopt, we have to consider what, with reference to this particular property, was the law, there being no such authority.

The estate is admitted to lie in what is known as the Dravada country, and is therefore property to which the law, as settled by the Ramnad case,† applies.

* 3 W. R. P. C. 15; 1 Suth. P. C. R. 574.

† 10 W. R. P. C. 17; 2 Suth. P. C. R. 135.

The general proposition which their Lordships, affirming the decision of the High Court of Madras, established in that case was that, according to the law prevalent in the Dravada country, a Hindoo woman, not having her husband's permission, may, if duly authorised by his kindred, adopt a son to him. The judgment of the Committee, after declaring this to be the local law, goes on to deal with the foundation on which it rests, treating it as established by positive authority rather than by some supposed analogies to other parts of the Hindoo law; and then proceeds to consider what constitutes a sufficient authority on the part of the husband's kindred—a question to which reference will afterwards be made. Assuming the general proposition to be thus established, their Lordships see no reason why it should not apply to every case in which a widow might make an adoption under a written authority from her husband. They are, therefore, of opinion there is no ground for saying that because the estate descended to the son, natural-born of the original zemindar, and the widow of the latter took it as heiress of her son and not immediately from her husband, the adoption made by her, if otherwise valid, therefore became invalid. These considerations seem to their Lordships to dispose of the first objection.

It is not necessary to consider in what way successive adoptions operate. It is sufficient to say that the law has established that they may take place.

Their Lordships will now consider the second question, being that which was really the *ratio decidendi* of the High Court of Madras. The judgment under appeal says, "We thought there was no reason to doubt the evidence of the fact of the form of adoption having been gone through, supported, as that evidence was, by written documents. . . . But we thought that it was not made out that there had been such an assent on the part of the kinsmen as to show, to quote the words of the judgment of the Privy Council in the Ramnad case, 'that the act was done by the widow in the proper and *bond fide* performance of a religious duty.'" And, then, proceeding to examine the evidence of what took place immediately after the death of the son, and to consider the correspondence, it says, "The letters of the widow seem to show that the object was to adopt the boy for the purpose of perpetuating the descent of the property in the same apparent line. The earliest letter of September 28th 1854 is not in evidence, but the letter (defendant's documents No. 1) of the 12th October of the same year, in reply to it, recites it as expressing an intention on the part of the widow to 'constitute a boy in the family as heir to' her rights. There is no appearance of any anxiety or desire on the part of the widow for the proper and *bond fide* performance of any religious duty to her husband. Her object appears to have been to hold the estate till her death, and then continue the line in the person of the plaintiff, who, as a matter of fact, did not upon adoption, nor until his adoptive mother's death, seek to assume the position of an adopted son." It appears to their Lordships that the conclusions of fact which the learned Judges of the High Court have drawn from the correspondence and the other evidence in the cause are not quite correct; and that they have also given an interpretation and meaning to what was said by this Committee in the Ramnad case, which the particular passage in that judgment does not fairly support.

If we go back to the time of the son's death, we find that almost immediately after that event his mother entertained the notion of adoption; that she was admitted heir on the 24th June 1854; and on the 28th September 1854, wrote the letter referred to by the High Court, which clearly contemplated some kind of adoption. We have not the original of that letter, we have merely what is stated in reply to it by way of recital; and taking that to be correct, the High Court have insisted on her saying that she meant to "constitute a boy in the family as heir to" her rights. Their Lordships think that in dealing with a letter of this kind, written by a Hindoo lady, it is desirable not to rest upon a minute criticism of the particular expressions used, but to look to what was the

substance of the transaction. If, as was also suggested by Mr. Leith, in an argument founded on some of the subsequent ceremonies that were said to have taken place, she intended merely to adopt an heir to herself, there was really no ground why she should have convoked a family council, or have gone to the sapindas of her husband at all. The authority of the sapindas was only necessary in order to enable her to adopt an heir in the ordinary sense of the Hindoo law—an heir who should be heir to herself and husband, and capable of performing the religious ceremonies which are supposed to be for the benefit of the souls of both.

Again, some stress has been laid upon the fact of the delay ; but, as has been already said, her first application was made as early as the 28th September 1854, and she was then told by the Collector (who seems at that time to have been considered to possess much larger powers in determining the succession to zemindaries than, as it has since been settled, he really had) that she had no power to adopt, and that she could not adopt. The purpose of adoption, however, remained in her mind, and the adoption actually took place in June 1862, for she gave the Collector notice of it as early as the 27th June 1862. Yet even then the Collector repudiated the adoption, apparently proceeding upon what is the general law of the greater part of India, and not upon what has since been established to be the law in the Dravada district. And assuming that the permission of the Government was necessary to an adoption, he wrote, "The Government passed minutes on the 14th April 1855, to the effect that your making an adoption being illegal by reason of the absence of the consent of your husband, permission for the same would not be accorded ;" and again, "Such being the case, the adoption you say you have now made being without authority, and at variance with Hindoo law and the orders of the Government, the same is of no use. This adoption will not therefore be recognized, and this is written to inform you of the same." This continued resistance of the Government authorities to the adoption may, it seems to their Lordships, constitute a sufficient answer to any argument founded upon the facts, that there was no mutation of names, and that the adopted son did not, while the adopted mother continued to live, enter ostensibly into the enjoyment of the estate or exercise those functions which, if his adoption had been recognized from the first, he would otherwise have exercised. That the non-mutation of names and the non-enjoyment of the estate by the son were contrary to the intention of the widow is shown by the letter which is set forth at page 21 of the Record, in which she writes to the boy, "By reason of your not having yet returned from Sauwarapetta, whither you went to see your natural father and mother, the course of affairs here does not progress well. It is not, therefore, becoming that you should thus neglect, in spite of my having adopted you as my son and made you the rightful heir of my estate, real and personal. You ought to come soon and enter upon the possession of your Mittah, devote your attention to largely improving the same, and at the same time maintain me and your servants, and take upon yourself all my troubles and cares. As I am a female, you should manage all affairs and abide by my instructions until you come of proper age." Her wish and intention seem to have been throughout to divest herself of her estate and to put the adopted son into the position which, upon the strictest construction of the law of adoption, he would have held. That intention was defeated by the unfortunate view which the Government authorities appear to have taken of her powers.

This being so, is there any ground for the application which the High Court has made of a particular passage in the judgment in the Ramnad case ? The passage in question perhaps is not so clear as it might have been made. The Committee, however, was dealing with the nature of the authority of the kinsmen that was required. After dealing with the *vexata quæstio* which does not arise in this case, whether such an adoption can be made with the assent of one or more sapindas in the case of joint family property, they proceeded to consider

what assent would be sufficient in the case of separate property ; and after stating that the authority of a father-in-law would probably be sufficient, they said :— “ It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence,” not, be it observed, of the widow’s motives, but “ of the assent of kinsmen, as suffices to show that the act is done by the widow in the proper and *bond fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased and not *bond fide* attained.”

Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband. If that be so, there seems to be every reason to suppose that in the present case there was such a consideration, both on the part of the widow and on the part of the sapindas ; and their Lordships think that in such a case it must be presumed that she acted from the proper motives which ought to actuate a Hindoo female, and that, at all events, such presumption should be made until the contrary is shown.

Therefore it seems to their Lordships that on neither ground can it be said that this adoption was not consonant to law, and they must humbly advise Her Majesty to allow the present appeal, to reverse the decision of the High Court, and to affirm the decision of the Lower Court, with the costs of the appeal in the High Court. They think the appellant ought also to have the costs of this appeal.

The 4th November 1876.

Present :

Sir James W. Colville, Sir Barnes Peacock, and Sir Robert P. Collier.

Mortgage—Rights of Second Mortgagees—Dispossession—Limitation.

On Appeal from the High Court at Allahabad.

Narain Singh and others

versus

Shimbhoo Singh and others.

Plaintiffs, as mortgagees, obtained a decree for possession upon their mortgage deed against defendants as mortgagors. Though this decree gave plaintiffs no title to the land as against the prior mortgagees, it gave them a right and title as against the defendants, which right and title were not destroyed by the prior mortgagees subsequently turning plaintiffs out of possession. When, however, plaintiffs paid off the first mortgage, their title, which had all along been a good title as against the mortgagors, was a valid title as against every one, and the mortgagors had no right to enter upon the possession of their land. The entry of the mortgagors upon that land, to which the plaintiffs had obtained a right under the second mortgage, gave them a cause of action against the mortgagors from the period of such entry.

In giving plaintiffs a decree for possession, their Lordships reserved the question as to the amount for which they were entitled to hold possession of the land under the mortgage, until the defendants sought to redeem the land.

Mr. Doyne for Appellants.
Mr. Graham for Respondents.

This was an appeal from a decree made by the Appellate Bench of the High Court at Allahabad, dated the 13th May 1873, reversing a decree of the Subordinate Judge of Alighur in the North-Western Provinces. The facts of the case are fully stated in the judgment of the Judicial Committee. The suit was brought by the appellants claiming as mortgagees to get possession from the respondents of a portion of a mouzah called Lallpore; and the issues were, first, in bar of suit, among others, as to whether interest for the period of dispossession should be claimed; and next on matters of fact involving suggestions of collusion and fraud. The litigation in one way or another had extended over thirty years.

Sir Barnes Peacock delivered the judgment of the Judicial Committee as follows:—

In this case the plaintiffs, as sons and heirs of Poohoop Singh, a mortgagee, seek to recover possession of 20 biswahs of the zemindary right of Mouzah Lallpore. The defendants in the suit are the representatives of the mortgagor. The plaintiffs state that they claim to establish their right as mortgagees in virtue of their title as heirs of their defunct father, Poohoop Singh, in that, under a mortgage deed, dated Phagoon Badi, 7th Sumbut 1896, Poohoop Singh, the ancestor of the plaintiffs, having obtained a decree from the Sudder Ameen's Court, was put in possession on the 31st August 1846." Most of the defendants admit the claim, but the defendants, Man Singh, Shimbhoo Girdharee, and Motee put in an answer, by the second paragraph of which they admitted that under the former decree the plaintiffs' ancestor was in possession for upwards of a year; but they set up, in the fourth paragraph of the same written statement, that "the mortgage alleged by the plaintiffs is wholly unfounded. The defendants' ancestor did not receive the mortgage money from the ancestor of the plaintiffs; and Poohoop Singh, the ancestor of the plaintiffs, was a person notorious for his expertness in court affairs. He had, with a view to deprive Asaram and Sheololl of their mortgage money, obtained by deception a decree on the mortgage deed in suit; and the defendants' father had, according to the Shasters, no right to transfer and waste the defendants' ancestral property without any legal necessity to satisfy illegal demands. Hence, under the Shasters also, the mortgage alleged by the plaintiffs is invalid, and the claim is unjust."

Now, having admitted that the plaintiff did obtain possession by virtue of a decree, and that he remained in possession for a year, the defendants also, in the same written statement, alleged that the mortgage was collusive and a benamee transaction. But although the written statement must be taken altogether, it does not necessarily follow that the whole of the defendants' statement is to be taken as proved in their favor, if they offer no evidence whatever in respect of the allegation that the mortgage was a fraudulent transaction.

It appears, then, that the plaintiffs' ancestor did get into possession on the 31st August 1846. In 1847 he was dispossessed in a suit which was brought against him by the first mortgagees, Asaram and Sheololl. He was then turned out of possession, and remained out of possession from 1847 down to the year 1870. The precise terms of the mortgage deed do not appear, but, as far as can be collected at page 33, it was a mortgage bond, by which it was stipulated that in the event of the nonpayment of the mortgage debt within five years, the mortgagors would cause a mutation of names, and the plaintiffs to be put into possession.

It appears that the plaintiffs' ancestor did get possession under that document, and it appears to their Lordships that the decree obtained upon that document gave the plaintiffs as mortgagees a title to the land as against the defendants, but it gave them no title as against the prior mortgagees, Asaram and

Sheololl. When Asaram and Sheololl turned the plaintiffs' ancestor out of possession, it did not destroy his title and right to the land. It may have given him a right of action as against the mortgagors for having mortgaged to him when they had previously mortgaged to Asaram and Sheololl, but it did not destroy the right which the plaintiffs obtained against the defendants by virtue of the mortgage and of the judgment which they had obtained upon it.

The first Court laid down certain issues:—first, whether the original mortgagors executed the mortgage deed in respect of the property in suit on receiving the full mortgage consideration, or whether it was collusively secured without payment of any mortgage consideration, and whether the mortgage deed could take effect against the defendants according to the Hindoo law. The Judge says in his judgment, "It is apparent that plaintiffs' predecessor on the former occasion obtained a decree for possession on proving the mortgage deed, and the payment of mortgage consideration; and the fact of the decree having been made is admitted by defendants. Again, all the defendants, excepting four, two of whom have made no defence, confess the claim, which is further supported by the evidence of Moulvie Inayut Alli, pleader, Choonnee Loll, putwaree, and two other persons, both named Hoolassee, witnesses for plaintiffs. The plea urged by defendants must therefore be overruled; and they have failed to refute the claim." He therefore gave a decree in favor of the plaintiffs.

Upon that an appeal was preferred by Shimbhoo alone to the High Court; and one of his grounds of appeal is that there was "no cause of action and foundation for the plaintiff's suit; neither the deed of mortgage nor the decree has been produced; the conditions agreed upon between the parties cannot be ascertained." The High Court having heard the case argued, gave judgment, and reversed the decision of the first Court. They say that "the High Court's order of the 1st April 1872 could not give any legitimate cause of action. Nor did any right of action accrue to the plaintiffs by reason of the satisfaction of the debt of Asaram and Sheololl, and the recovery of possession of the estate by the mortgagors or their heirs." It appears to their Lordships that there was a mistake on the part of the High Court in holding that no cause of action accrued to the plaintiff, by reason of the satisfaction of the debt of Asaram and Sheololl, and the recovery of possession of the estate by the mortgagors or their heirs. It appears to their Lordships that when the first mortgage was paid off in 1870 the title of the plaintiffs, which had all along been a good title as against the mortgagors, was a valid title as against every one. Then when their title became a valid and a good title the mortgagors had no right to enter upon the possession of their land. But the mortgagors did enter into possession of it, and keep the possession from the plaintiffs; and it appears to their Lordships, that having the right and title to the land when the first mortgage was paid off, the entry of the mortgagors upon that land to which the plaintiffs had obtained a right under the second mortgage gave them a cause of action against the mortgagors, the defendants. The Court proceed:—"The right of the plaintiffs or their forefather to possession was created by the mortgage deed of 1840, and was capable of being legally enforced within a period of twelve years. It was the subject of a former suit and of a decree which was fully executed." So it was; but then that decree gave the plaintiffs a title. The High Court proceeded: "The dispossession of Poochoop Singh after the execution of that decree was not an illegal proceeding." It is true it was not an illegal proceeding, because he was dispossessed by persons who had better title; namely, the first mortgagors. The Court go on: "Although he was thereby deprived of the right he had obtained, he had a remedy, of which he might have availed himself, by suing within the proper period for the recovery of the money lent by him to the mortgagors. The present suit is clearly inadmissible, and cannot be decreed even against the confessing defendants." The High Court held that the plaintiffs' suit was barred by limitation.

It appears, however, to their Lordships, that the plaintiffs having a good title when the first mortgagees were paid off in 1870, their cause of action accrued when the plaintiffs after that period entered into possession of the estate to which they had no title. It appears, therefore, to their Lordships, that there was an error in the decision of the High Court so far as it regards the question of limitation.

But it is said that there was no sufficient evidence that the decree had been obtained by Poochoop Singh, the plaintiff's ancestor. In the first place, as already stated, the written statement of the defendants admits that there was that former decree. They say that "under the former decree the plaintiffs' ancestor was in possession for upwards of a year," and then he was turned out by the first mortgagees. Again, when Asaram and Sheololl, the first mortgagee, brought an action against the second mortgagee, Pertab Singh, the ancestor of the plaintiffs, and Lulloo and others, the zemindars, the mortgagors were also made parties to that suit. And in that suit it appears that the decree of Pertab Singh against the zemindars was in evidence. The Sudder Court says, "The plaintiffs sued Lulloo and others, zemindars of the above-named village, for possession on a mortgage bond dated the 18th Kowur 1859 Sumbut; but in consequence of their having omitted to specify the nature of the tenure, they were nonsuited. Poochoop Singh also sued the zemindars on a mortgage bond, and obtained a decree, which was upheld in appeal." There was a finding then in that case that Poochoop Singh did sue the zemindars on the mortgage bond, and that he obtained a decree against them. Further, when the first mortgage had been paid off, and the plaintiffs had been dispossessed by the mortgagors, they attempted to execute a second time the decree which their ancestor had obtained against the mortgagors, and they applied to the Court for an execution of that decree. The Moonsiff decided that they were entitled to have an execution. In that suit, Shimbhoo, who is the present defendant, was one of the parties, and in that case the judgment was produced. The Moonsiff says, "The record of the case having been brought forward, it appears that the objection of the defendants, judgment debtors," that is, Shimbhoo one of the present defendants, "is that Poochoop Singh, the original decree holder and deceased ancestor of the plaintiffs, had been put in possession by the Court after the passing of the decree." It appears, therefore, to their Lordships, that there is sufficient evidence in the cause to justify the first Court in coming to the conclusion that the plaintiffs were mortgagees, and that they obtained possession under a decree founded upon that mortgage.

The judgment of the High Court being erroneous, it becomes necessary to consider whether the decision of the first Court can be maintained to the full extent.

Now the claim made in the plaint is, "to recover possession as mortgagees over the entire 20 biswahs zemindaree right of Mouzah Lallpoor, pergunnah Garee, within the jurisdiction of the Iglass Tehseelee, valued at Rs. 5,000,"—the valuation is not a matter of importance,—“the principal amount of the mortgage loan, and to recover Rs. 6,999. 15. 0. interest thereon, during the period of the mortgagee's dispossession, as per detail given below, aggregating Rs. 11,999.” Now the plaintiffs, although they were turned out of the land, might have sued for the interest. All that they are entitled to, as it appears to their Lordships, is to recover possession of the land; and when they have got possession of the land, if the mortgagors apply to redeem, the question will be, how much is due to the plaintiffs as mortgagees under their mortgage, and how much they are entitled to receive before the mortgagors can redeem. The Judge of the first Court appears to have given them a decree not only for possession of the land, but also for Rs. 6,999 interest, in addition to the possession of the land. His judgment is not very clear, but it is necessary to make the point perfectly clear as to what the judgment ought to be. He says: "Claim to recover possession as mortgagees over

the entire 20 biswahs zemindaree right in Mouzah Lallpoor, pergunnah Goree, valued at Rs. 5,000, principal of the mortgage loan, and Rs. 6,999. 15. 0. interest on the mortgage amount." Then he says:—"Ordered that plaintiffs' claim be decreed with costs against the defendants, that the pleaders get their fees." Then he says: "Subject matter of decree. Recovery of possession as mortgagees, over the entire 20 biswahs right in Mouzah Lallpoor, pergunnah Goree, valued at Rs. 5,000, the principal amount of the mortgage loan, and of Rs. 6,999. 15. 0. interest on the mortgage amount for the period of the plaintiff's dispossession; total Rs. 11,999. 15. 0." If by that decree the Lower Court intended to give the plaintiff a decree not only for recovery of the possession of the land, but also to recover Rs. 6,999 in money as interest, it appears to their Lordships that that judgment, so far as giving a decree for the money as interest is concerned, was erroneous.

Their Lordships therefore think that the decision of the High Court ought to be reversed, and that the decision of the first Court should be modified by confining the recovery of the plaintiffs merely to the possession of the land. In that case, the plaintiffs having got possession of the land, the question, as before observed, will remain open until the defendants seek to redeem the land. Then the question will arise, how much is due to the plaintiffs as the second mortgagees, and for what amount they are entitled to hold possession of the land under their mortgage.

Their Lordships, therefore, upon the whole, will humbly recommend Her Majesty to reverse the decree of the High Court, and to affirm the decision of the Lower Court, so far only as it decrees possession to the plaintiffs of the land sought to be recovered in the suit. Their Lordships are also of opinion that the appellants are entitled to the costs of this appeal.

The 25th November 1876.

Present:

Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

*Malicious Prosecution—Right of Action—Champerty and Maintenance—
Public Policy—Costs.*

*On Appeal from the High Court at Calcutta.**

Ram Coopmar Coondoo and others

versus

Chunder Canto Mookerjee.

The prosecution of legal proceedings, which are instigated by malice and are at the same time groundless, is a wrong to the person who suffers damage in consequence of them, for which an action will lie.

Although the English laws of Maintenance and Champerty are not of force as specific laws in India (whether in the Presidency towns or the Mofussil), yet contracts of this character ought under certain circumstances to be held to be invalid as being against public policy.

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy; and consequently, in the absence of malice and want of probable cause, an action cannot be maintained for costs against a third person on the ground that he was a mover of, and had an interest in, the suit.

Mr. Leith, Q.C., and Mr. Doyme for Appellants.

Mr. Cowie, Q.C., and Mr. F. H. Bowring for Respondent.

* From the judgment of Couch, *C.J.*, and Pontifex, *J.*, dated 28th May 1874;—22 W. R. 138.

This was an appeal from a decision of the High Court of Judicature at Calcutta of the 28th May 1874, reversing a decree of one of the Judges of that Court (Macpherson, J.), sitting in the exercise of original civil jurisdiction. The case will be found fully reported in 22 W. R. 138. The object of the original suit was to have the respondent made liable for all the losses and damage to which the appellants had been put in an action brought by John McQueen and his wife against them to recover possession of a piece of land and a house at Howrah, on the ground that the suit had been instigated and maintained by the respondent and carried on wholly at his expense and with a view to his own benefit. The litigation in question was conducted by the respondent under an agreement between him and the McQueens, who were poor people, by which he undertook to commence and carry through the necessary proceedings, to make all the necessary advances and disbursements, and, pending the settlement, to allow the McQueens Rs. 150 per month. For this service the respondent was in the first place to retain, and reimburse himself from the moneys and proceeds recovered, all advances and payments, with interest at 12 per cent. ; secondly, and in addition, to keep by way of remuneration for his trouble and risk one-third of the net proceeds of the litigation ; and lastly, to hand over the remaining two-thirds to the McQueens. In the result, the McQueens, in whose name the action was brought, were defeated, and they were mulcted in costs to the extent of Rs. 25,000, which they were utterly unable to pay. The appellants then instituted civil proceedings against the respondent, who, on the decree of Mr. Justice Macpherson, was ordered to pay, with interest, the damages which might have been recovered from the McQueens, had they been people of means, and had the respondent not intermeddled in the suit. That decision was subsequently reversed by the High Court on appeal, though without costs. The appellants now brought the matter before Her Majesty in Council.

Sir Montague Smith delivered the judgment of the Judicial Committee as follows :—

This suit was instituted by the appellants, who were the successful defendants in two former suits brought by one McQueen and his wife against them, to recover from the defendant, Chundur Canto Mookerjee, who was neither an original nor added party in those suits, the amount of the costs incurred by them in that litigation, and which McQueen and his wife, by reason of their poverty, were unable to pay.

The principal suit of the McQueens (the other being for mesne profits only) was brought in the Hooghly Court to recover from the present plaintiffs some lands in Hooghly, which their father had purchased of one Bebee Bunnoo.

Mrs. McQueen was the illegitimate daughter of one McDonald and Bebee Bunnoo, and she claimed the property as her father's, and as being entitled to it, after her mother's death, under his will. The defence of the now plaintiffs in that suit was that Bebee Bunnoo was either the real owner, or had been allowed by McDonald to deal with the property as owner, and that their father was a purchaser from her without notice of any other title. It appears that they and their father had held possession of the property for twenty-four years after the purchase, and had greatly improved it.

The principal Sudder Ameen held the suit to be barred by limitation, and dismissed it. The High Court (finding that Bebee Bunnoo had died within twelve years of the suit) reversed his judgment, and having retained the case, and tried it on the merits, passed a decree in favor of the then plaintiffs, the McQueens.

On an appeal to Her Majesty, the decree of the High Court was reversed, and it was ordered that the suits should be dismissed, and that the then defendants (the now plaintiffs) should have their costs in India, and of their appeal to Her Majesty.

These costs amounted to a large sum, and the McQueens were unable to pay them.

The connection of the defendant Mookerjee with the above litigation, and the facts relied on to support the present action, will now be referred to.

A special agreement was entered into between the McQueens and Mookerjee, which recited an apparently good title of the former to the property. By this agreement Mookerjee was appointed the attorney and mookhtar of the McQueens to conduct the litigation against the present plaintiffs. On the one side he undertook to manage the suit, to make all necessary advances for the purpose, and further to make an allowance of Rs. 150 per mensem to the McQueens for their support during the pendency of the proceedings. On the other side they agreed in effect that Mookerjee should have the management of the suit, they however assisting him, unless it happened that McQueen could give his whole attention to the litigation, in which case he was to have the conduct of it, "but under the control of Mookerjee."

It was stipulated that all the advances should be repaid with interest at 12 per cent., and that, as remuneration for his trouble and risk, Mookerjee should have a third part of "the clear net profits" of the suit; and, by way of security, it was agreed that he should receive all moneys, and take possession of all lands recovered, and after satisfying his own claims pay over the balance to the McQueens.

This power of attorney was made irrevocable, unless upon the terms that the McQueens should repay all the moneys advanced with interest at 12 per cent., and a further sum of Rs. 2,000 as liquidated damages.

McQueen certainly did not give his whole attention to the suits; and (although he occasionally saw the pleaders) they were really managed by Mookerjee.

It appears that after the present plaintiffs had obtained leave to appeal from the judgment of the High Court in the original suit, the McQueens obtained possession of the property. The Court having ordered the possession to be restored, unless the McQueens gave security to the amount of Rs. 12,000 to repay what would be due in case the decree should be reversed, the present defendant gave a bond to the above amount as such security.

Pending the appeal to Her Majesty, Mookerjee purchased of the McQueens all their interest in the principal suit, and the suit for mesne profits, for Rs. 22,000, out of which he was to deduct Rs. 12,000 for the advances he had made to them, and from this time he appears to have conducted the appeal in his own interest.

It should be stated that in the former suit the now plaintiffs—upon the agreement between Mookerjee and the McQueens coming to their knowledge—applied to the Judge to have Mookerjee made a party to the suit under s. 73 of Act VIII, in order that, if successful, they might make him responsible for costs (Record, page 106). The Judge refused the application. Upon the appeal to the High Court by the McQueens, the present plaintiffs raised this point in their memorandum of cross-appeal, but no notice appears to have been taken of it in the judgment of that Court.

The plaint in the present action alleges that the plaintiffs being in lawful possession as owners of the property in question, the defendant, knowing this was so, maliciously conspired with the McQueens to bring a suit in their names to take the possession from him, and in furtherance of this conspiracy entered into the agreement already described, which is set out at length. It then alleges that the agreement contains false and fraudulent recitals of a pretended title in the McQueens, and that it "savours of champerty and maintenance, and is otherwise wholly illegal and contrary to public policy," and was entered into "for the purpose of barratrously maintaining an unjust and oppressive suit against the plaintiffs" in the names of persons who had no right and were without means to pay the costs. It then avers that the former suit was brought "maliciously and

without reasonable and probable cause," and after describing the proceedings in the suit, and the facts showing the defendant's connection with them, alleges that "the litigation was instigated and carried on by the defendant at his own expense, and with a view to his own benefit, and that he was the real mover, and unlawfully used the procedure of the Court for his own benefit."

If all these allegations in the plaint, or so many of them as aver that the suit was brought or instigated by the defendant, maliciously and without probable cause, had been proved, this action would undoubtedly have been sustained, upon the principle that the prosecution of legal proceedings which are instigated by malice, and are at the same time groundless, is a wrong to the person who suffers damage in consequence of them.

This principle is thus stated by Mr. Justice Williams in *Cotterill v. Jones* (11 C. B. 735):—

"It is clear no action will lie for improperly putting the law in motion in the name of a third person, unless it is alleged and proved that it is done maliciously and without reasonable or probable cause; but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also legal damage."

In the present case, however, both the Courts below have found that neither malice nor the absence of probable cause have been proved. Their Lordships entirely agree with the Courts in India on this point, and it appears to them that the facts present a case having a wholly different aspect.

With regard to the motives of the defendant, it is not pretended that he entertained any ill-feeling or malice in any sense towards the plaintiffs. The terms of the agreement, and his large expenditure, show that he was prompted in what he did by his having formed a favorable and sanguine opinion of the title of the McQueens, and by the hope of a profitable return for his advances. Nor can the suit be said to have been wanting in probable cause, when the two learned Judges of the High Court who heard it on appeal decided in favor of the then plaintiffs. Indeed, it was properly admitted at their Lordships' bar that the case must be considered as if the allegations of malice and want of probable cause were struck out of the plaint.

These allegations being eliminated, the question is whether the action can be maintained upon either of the two grounds argued at the bar, which, stating them generally, are:—

1. That the agreement and acts of the defendant amounted to champerty, or were otherwise illegal as being against public policy, and that the plaintiffs have suffered special damage from them.

2. That the defendant was the real actor in the former suits and had an interest in them, and was, therefore, responsible for the costs of them.

The question whether the law of maintenance and champerty, or any rules analogous to that law, as it exists in England, have been introduced into and form part of the law of India, has been for a long period in controversy in the Indian Courts. A beadroll of decisions from 1825 to the present time was cited at the bar, and it certainly appears from them that the views of the Courts have not been uniform, and that great diversity of opinion has prevailed.

The earliest case referred to occurred in the year 1825. A pauper plaintiff in his petition of appeal to the Sudder Court, disclosed the fact that he had agreed to give half the estate in litigation to a third person in consideration of advances made to prosecute the appeal. The Court, after directing a search in the records for precedents of such a transaction, and none having been found, declared that the "transaction savoured strongly of gambling," and also that the contract to give half of a large estate for a comparatively small advance was "by no means fair," and ordered that unless the agreement was cancelled the appeal should not be entertained. (*Ram Gholam Sing v. Keerut Sing*, 4 S. D. A. 12.)

In 1836 the Sudder Court refused to enforce against a successful litigant an agreement he had made to give two annas of the estate if recovered in consideration of advances made to carry on the suit. They held first, that the estate being family property could not be thus disposed of; but they also held on the authority of the decision in 1835 that the transaction was of an illegal character as a species of gambling, and could not be sanctioned in a Court of Justice. (*Brijnerain Sing v. Tecknerain Sing*, 6 S. D. A. 131.)

In 1840 a similar agreement to that in the last case came before the Court: one Judge thought it was not proved; but the other, Mr. Tucker, held, following the two former decisions, that "the agreement was illegal, thus (as he said) establishing the point for future guidance in all similar cases." (*Zuhoroonissa Khanum v. Ruseck Lal Mitter*, 6 S. D. A. 298.)

In a short note of a similar case in 1849 the Court is reported to have said: "As the precedents of the Court have held that champerty is illegal, we cannot enforce any condition (of the kind) in favor of the plaintiffs." (*Andrews v. Maharajah Sreesh Chunder Raee*, 5 S. D. A., Bengal, 340.)

In the next case the current of opinion underwent a marked change.

In 1852 a case was brought before a full Sudder Court consisting of five Judges, in which the Principal Sudder Ameen had dismissed a suit because the plaintiff had obtained the funds to prosecute it by means of an agreement which he deemed to be champertous. This decision of the Principal Sudder Ameen was, in any view of the law, erroneous; but the Judges took occasion to express their opinion on the general question. Sir R. Barlow says: "There is no distinct law in our Code which lays it down to be illegal for one party to receive and another to give funds for the purpose of carrying on a suit on promise of certain consideration in the form of a share of the property sued for, if decreed to the plaintiffs." Mr. W. B. Jackson, whilst he thought the precedents of the Court (referring to the cases already mentioned) had held champerty to be illegal, says: "But the matter having been now brought up generally for consideration before the whole Court, I have no hesitation in declaring my opinion that an arrangement of the nature of champerty is not of itself illegal or void." Again he says: "I know of no law against such an arrangement, and there is certainly no reason why it should be declared illegal. Such arrangements must stand or fall according to the peculiar nature of their conditions. They are liable to question like any others where a suit is brought to enforce or avoid them." The other three Judges construe the former precedents (with one exception) as holding only "that, as between a plaintiff and a party advancing funds to him to carry on his case, the Courts will not recognize and enforce agreements which appear to be exorbitant and to partake of the nature of gambling contracts." (*Kishen Lal Bhoonick v. Pearee Soondree*, 8 S. D. A., Bengal, 394.)

This case appears to have been generally regarded as a leading decision. Mr. Justice Glover so treats it in a case which came before the High Court so late as 1868, and refers to it as deciding that champerty *per se* was not illegal (9 W. R. 490). In this same case, however, Mr. Justice Macpherson said he did not feel it necessary to decide the question; and in consequence of the opinions expressed by him and other learned Judges in India in recent cases it will be necessary to advert shortly to some of the subsequent decisions.

In *Grose and another v. Amirtamayi Dasi* (4 Bengal L.R. 1*), which was the case of a contract of a champertous character made by a Hindoo widow, Mr. Justice Phear, after a full review of the English and Indian cases, expressed an opinion that the law which renders champerty and maintenance illegal in England is in force at least within the Presidency towns; and further that agreements of that character were against the interests of society in India, and therefore, on grounds of public policy, void. Upon an appeal to the full Court, the Chief

Justice (Sir Barnes Peacock) did not adopt this ground of decision. He expressed his opinion thus:—"That the deed was not binding on the reversionary heirs, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain, and a speculative, if not gambling contract." Mr. Justice Macpherson agreed with Mr. Justice Phear in thinking that the agreement was void, as being against public policy.

Mr. Justice Holloway, in a case which came before the High Court of Madras in its original jurisdiction in 1870, expressed a strong opinion that the English statute and common law relating to champerty and maintenance prevailed in that Court, and rendered contracts bearing that character void. He also, with some vehemence of language, denounced such contracts as being contrary to public policy. The opinion expressed by Mr. Justice Holloway on the application of the English statute and common law was not necessary to the decision of the case, for the agreement sued upon was clearly extortionate, and there were other sufficient grounds for the refusal of the Court to enforce it. (*Mulla Jeffarji Tyer Ali Saib v. Yacali Kadar Bi*, 7 Madras H. C. R. 128.)

This opinion of Mr. Justice Holloway seems to be directly opposed to the view expressed by Chief Justice Scotland in delivering the opinion of the High Court of Madras in a former case (*Pitchakutti Chetti v. Ramala Nayakkan*, 1 Madras H.C.R. 153). The Chief Justice there says:—"Maintenance and champerty are made offences by the common and statute law of England, which in this respect has no application to the natives of this country, and in considering and deciding upon the civil contracts of natives on the ground of maintenance or champerty, we must look to the general principles as regards public policy and the administration of justice upon which the law at present rests. To this extent we think the law can properly be applied in perfect consistency with the Hindoo law relating to contracts. (See 1 Strange's Hindoo Law, 275.)

The passage in Strange alluded to by the Chief Justice descants upon the similarity between English and Hindoo law with regard to the invalidity of contracts which violate public policy and the interests of the community.

In a late case in the High Court of Bombay, Westropp, Chief Justice, declined to express any opinion as to the extent to which the law of champerty is applicable to the Presidency towns or in the Mofussil.

To return to the Bengal Presidency, it will be necessary to refer to one more decision only before coming to the judgments in the present suit. In the case of *Tara Soundeeree Chowdhraïn v. the Court of Wards* (20 W.R. 446), the Court (Sir R. Couch being Chief Justice) held that the agreement it was sought to enforce was void, "as being contrary to public policy, and as therefore not giving any right to sue for the property which was professed to be passed by it." The learned Chief Justice commented upon and adopted the observations of this Tribunal in the case of *Fisher v. Kamala Naicker* (8 Moore's I. A., 170).* He also referred with approval to the remarks of Mr. Justice Holloway as to the mischievous effects of such agreements in India.

It is to be observed that in none of the above cases did any question arise as to the liability of the parties who entered into the agreements to third persons.

To come to the judgments in the present suit. Mr. Justice Macpherson was of opinion upon the point now under consideration that the agreement was illegal and void as being against public policy, and he held, on the authority of the English case of *Pechell v. Watson*, 8 M. and W., 691, that the present suit might be maintained.

In the judgment of the High Court delivered by Sir R. Couch, C.J., reversing Mr. Justice Macpherson's decree, the Chief Justice says: "It has been always admitted that the English common law and the statutes as to maintenance and champerty are not applicable, and are considered as having no force in this

country. They certainly do not apply to the Mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country, is that they are contrary to public policy; or, as described by the Judicial Committee of the Privy Council (referring to the case in 8 Moore),* are considered to be immoral and against public policy and such as the law will not enforce here, and treat as void." And he held that, though such agreements were in a sense illegal, they did not amount to "an offence in India so as to give a right of action to a person who might sustain special damage from it, even if such an action might now be maintained against a person committing the offence of champerty in England."

It will now be convenient to refer to two cases before this Committee, in which the subject has been to some extent considered. In the case reported in 8th Moore, the Court below having held an agreement to be void for champerty, this tribunal thought the judgment to be wrong on the grounds that the point had not been raised by the pleadings, and also that the agreement was in no sense champertous, and, this being so, their Lordships observed: "It was unnecessary to decide whether under the law which the Court was administering those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the common law and partly by statute, are forbidden." But in the course of the judgment they made the following observations: "The Court seem very properly to have considered that the champerty, or more properly the maintenance, into which they were enquiring was something which must have the qualities attributed to champerty or maintenance by English law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive is in the same sense necessary."

It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in England; but they have been properly regarded in India as an authoritative guide to direct the judgment of the Court in determining the binding nature of such agreements there.

In the more recent case before this tribunal,† in which a suit to enforce an unrighteous and champertous bond was dismissed, the following observations were made:—

"With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in India is not the same as it is in England. The statute of champerty being part of the statute law of England, has of course no effect in the Mofussil of India; and the Courts of India do admit the validity of many transactions of that nature, which would not be recognized or treated as valid by the Courts of England. On the other hand the cases cited show that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir Barnes Peacock in the course of the argument, viz., that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bond fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation disturbing the peace of families and carried on from a corrupt and improper motive."

The result of the authorities, then, appears to be that the English laws of maintenance and champerty are not of force as specific laws in India; and the decisions to this effect appear to their Lordships to rest on sound principles. So far as concerns the Mofussil, there is no ground on which it can be contended that these laws are in force there. The question has chiefly been whether they are

* 3 W. R. P. C. 33; 1 Suth. P. C. R. 395.

† 22 W. R. 148, 152; 2 Suth. P. C. R. 977, 982.

in force in the Presidency towns, although the distinction between the Presidency towns and the Mofussil has not been always borne in mind.

It is to be observed that the English statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of state from oppressing the king's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the common law also, it was an offence for these and other persons to act in this manner. Before the acquisition of India by the British Crown, these laws, so far as they may be understood to treat, as a specific offence, the mere purchase of a share of a property in suit in consideration of advances for carrying it on, without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into, at least, comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of India, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law. The principles on which the exclusion from India of special English laws rest are explained in the well-known judgment of *The Mayor of Lyons v. The East India Company* (1 Moore's Indian Appeals, 176). It appears to their Lordships that the condition of the Presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahomedans and Hindoos by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindoo by the laws and usages of the defendant, furnish reasons for holding that these special laws are inapplicable to these towns. There seems to have been always, to say the least, great doubt whether they were in force there, a circumstance to be taken into consideration in determining whether they really were part of the law introduced into them.

It would be most undesirable that a difference should exist between the law of the towns and the Mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the Mofussil, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case.

But whilst their Lordships hold that the specific English law of maintenance and champerty has not been introduced into India, it seems clear to them upon the authorities that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circumstances which would tend to render them so have been adverted to in the two judgments of this tribunal already cited.

Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bond fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, —effect ought not to be given to them.

Such, then, being the law on this subject in India, it fails to support the

present action. It may be that the contract in this case is unconscionable, and one which ought not to have been enforced against the McQueens if their suit had been successful; but assuming this to be so, the plaintiffs, in their Lordships' view, have failed to establish that an action arises to them therefrom against the defendant for the losses and costs of the litigation. By the law of India, as above interpreted, the agreement did not constitute a punishable offence, and the action cannot therefore, as pointed out by the Chief Justice below, be sustained on the ground that where an indictable offence has been committed, and an individual has suffered special loss, a remedy by action is given to him as the party aggrieved, nor does there appear to be any other principle upon which the action, under the circumstances of the present case, can be maintained. Whatever, therefore, may be the rights of the parties to the agreement as between themselves, their Lordships think that the High Court was right in holding that the action of the plaintiffs against a third party, founded on the alleged champerty, cannot be maintained.

There remains the question whether the action can be supported against the defendant, as being an actor in the suit, and having an interest in it. It is to be observed that a suit of this kind, in the absence of malice, and of the want of probable cause, is of the first impression, no precedent for it having been found either in England or India. It may be assumed that, under the first agreement, the defendant acquired a contingent interest in the property the subject of the suit to the extent of one-third share, besides the security for his advances; that he agreed to supply all the funds required to carry on the litigation, and that he obtained the virtual control of the proceedings; for although, under certain circumstances, McQueen was to manage the suit, and in any case to assist in the management, the supreme control was to belong to the defendant, subject to a power of revocation by the McQueens on onerous terms, which was not exercised. But this state of things created no legal privity between the plaintiffs and the defendant, from which a promise can be implied on the part of the defendant to pay the present plaintiffs the costs of the former suit, on which an action of contract can be founded; nor does it establish a legal wrong, for the former suit, as already shown, was brought without improper motives, and upon reasonable cause. It has, however, been contended that it would be only in accordance with justice and equity that he who was the principal mover of a suit, and had an interest in it, should be made liable to the costs. It is obvious that a wide field of new litigation would be opened if, after the termination of the original suit, another independent suit might on such general grounds be brought against third persons. Interminable questions would arise as to the degree of meddling and assistance which would create the liability. So far as precedents exist, it is either in the original suit itself, or by the exercise of the summary jurisdiction of the Courts, that any such liability has been enforced. It is ordinary practice, if the plaintiff is suing for another, to require security for costs, and to stay the proceedings until it is given. The now plaintiffs were fully aware, during the pendency of the former suit, of the arrangement between the McQueens and the defendant; but instead of applying for security for costs, they petitioned the Court to make him a co-plaintiff under s. 73 of Act VIII. Without deciding whether this application was rightly rejected, it is enough to say that its rejection cannot give ground for an action which would not otherwise lie.

The instances in which persons other than parties to the suit have been held liable to costs in England, have been principally those of solicitors, over whom the Court exercises disciplinary jurisdiction, as in the case of *re Jones* (L.R. 6 Ch. Ap. 497). The Courts have also ordered the real parties to pay the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they have continued to exercise it in the actions substituted for that of ejectment. Again, the Courts,

it has been said, would so interfere in case of any contempt or abuse of their proceedings (See *Hayward v. Gifford*, 4 M. & W. 194). But all these cases relate to applications either in the cause itself, or to the summary jurisdiction of the Court.

A case in the High Court in Calcutta* was much relied on by the appellant's Counsel. There, in a suit brought (in the original jurisdiction) to recover possession of land by a nominal plaintiff, Mr. Justice Phear, on a motion made apparently in the suit, ordered the real plaintiffs to pay the costs. His judgment is placed mainly on the ground that the jurisdiction exercised by the English Courts in actions of ejectment was introduced into the original jurisdiction of the High Court, and was applicable to analogous actions brought to recover land there. The Chief Justice (Sir Barnes Peacock) in affirming this order on appeal, supported it not only on the ground on which Mr. Justice Phear's judgment rests, but on the circumstances of the case, which showed, as he thought, that there had been "a gross abuse of the powers of the Court, and a contempt of Court."

It is obvious that there is nothing in these judgments which gives support to the contention that an independent action will under such circumstances lie.

It was lastly insisted for the plaintiffs that if the costs in India were not recoverable, the action ought to be sustained for those incurred in the appeal to Her Majesty, subsequently to the purchase made by the defendant, pending that appeal, of all the rights of the McQueens in the property and the suit. Undoubtedly the McQueens after this purchase became nominal appellants only, and the claim of the plaintiffs to recover these latter costs is as strong as a case of the kind can be. But even so, it is not stronger than many cases of ordinary occurrence, as, for instance, trustees suing on behalf of those beneficially interested, or the assignors of choses in action on behalf of their assignees; and in these and similar cases which have long been familiar to the Courts, whilst modes, such as requiring security for costs, have been devised for reaching the real party, no independent action for the costs against a stranger to the record has ever been sanctioned. Their Lordships therefore think that no distinction can properly be made between the costs of the appeal and the rest of the costs.

It results from what has been stated, that by English law an action cannot be maintained against a third person on the ground that he was a mover of, and had an interest in the suit, in the absence of malice and want of probable cause. Consequently, if that law governs, the second ground on which it is sought to support the present action fails. And if the law administered in the Mofussil is to be resorted to, the absence of all precedent in a case of such common occurrence affords an irresistible presumption that no such action is maintainable there. In answer to the suggestion that if no precedent exists, it should now be made, it has been already pointed out that where there is neither privity of some kind nor a wrong, the principle upon which actions are ordinarily sustained is wanting. When it is urged that the claim should be decided upon general principles of justice, equity, and good conscience, it is to be observed, in addition to the considerations already adverted to, that these principles are to be invoked only in cases "for which no specific rules may exist." Now it appears to their Lordships to result from what has been already observed, that rules may properly be considered to exist which define the character of actions of this kind, and the circumstances under which alone they can be brought, and that it would be out of place to resort to these general principles in dealing with such actions. The consequences of such a resort in cases of this character would be to make the law utterly uncertain, to raise, as before observed, interminable questions as to the degree of interference which would sustain the action, and mischievously to multiply and perpetuate litigation after the termination of the original suit.

* 14 W. R. O. J. 1.

Their Lordships, therefore, feel constrained to hold that in the absence of circumstances to convert the prosecution of the former suit into a wrong, the present action cannot be maintained.

It has been a misfortune to the plaintiffs that security was not obtained for the costs in the course of the former suit. Their Lordships also think the defendant was to blame in not coming forward as the real party in the former appeal. Under these circumstances, whilst they must humbly advise Her Majesty to affirm the judgment appealed from, they will make no order as to costs.

The 28th November 1876.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Act VIII of 1859 ss. 102, 103, and 208 (when applicable)—Transferee of Decree—Contest as to Equitable Interest in Decree—Questions of Legitimacy of Heir—Act XXIII of 1861 s. 11—Party to Suit—Jurisdiction—Consent.

On Appeal from the High Court at Calcutta.

Abidunnissa Khatoon

versus

Amirunnissa Khatoon.

Act VIII of 1859 s. 102 refers to cases of substitution, in the case of the death of a sole plaintiff or surviving plaintiff, of a legal representative of such plaintiff, where there is no dispute.

S. 103 has reference only to a state of things existing before the hearing or at the hearing of the suit.

No one can be a transferee of a decree within the terms of s. 208, if the decree was not transferred to him by assignment, or if no incident had occurred (*i.e.*, no death, no devolution, or no succession) on which the law could operate to transfer any estate to him.

S. 208 was not intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree, nor was it intended to enable them to try an important question, such as the legitimacy or illegitimacy of an heir.

There must be two conditions to give the Court jurisdiction under Act XXIII of 1861 s. 11—the question must be between parties to the suit, and must relate to the execution of the decree. A person, by merely applying for execution of the decree, does not constitute himself a party to the suit.

Consent to the exercise of jurisdiction cannot be assumed, even if consent would have given jurisdiction in the case.

Mr. Doyne for Appellant.

Mr. Leith, Q.C., and *Mr. C. W. Arathoon* for Respondent.

This was an appeal from a decree of the High Court of Judicature at Calcutta. The facts of the case are fully stated in the judgment of the Judicial Committee. The litigation was a sequel to, and wholly arose out of, a previous suit in which the parties were interested, and which was finally disposed of by the judgment of their Lordships in January 1875. The question now arising was whether the respondent should have been allowed to maintain the present action while prosecuting the former appeal, or whether she had not, by her success in that appeal, deprived herself of all *locus standi* to put in issue the illegitimacy of Wajed Ali, the son of the appellant. Both Courts had decided against the legitimacy of Wajed Ali, and against their decision and on the points alluded to the appellant now sought the intervention of the Queen in Council.

Sir Robert Collier delivered judgment as follows :—

The facts necessary to the understanding of the question which arises in this appeal may be thus shortly stated :

Wahed Ali brought a suit against his father Abdool Ali to recover the possession of a considerable quantity of landed property, and it may be enough for the present purpose to describe the subject of contention between them thus: The father had executed certain hibbanamahs in favor of his son when that son was an infant. It was alleged on the part of the father that the son had subsequently executed certain ikrarnamahs, whereby he divested himself of the benefit which he derived under the previous hibbanamahs. The Court of First Instance dismissed the suit of the son, with the exception of that part which related to some property which he derived from his mother, and about which no question arose. Upon that, Wahed appealed to the High Court. Pending the appeal, Wahed died; and thereupon the High Court, as it appears to their Lordships, under the powers given them by s. 103 of Act VIII of 1859, substituted his widow Abidunnissa for Wahed for the purpose of prosecuting the appeal. The appeal was prosecuted; the High Court found the ikrarnamahs to have been invalid, and reversed the decision of the Court below. The Court observe that since the death of Wahed "disputes have arisen, and litigation is now pending concerning his proper legal representative; and for the purpose of prosecuting this appeal we have admitted his widow Mussumat Abidunnissa Khatoon to be his legal representative." At the conclusion of the judgment they thus express themselves: "The decree of the Court below is reversed, with costs. Confining ourselves to the matters in issue in the present suit, our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents. We shall declare that Moulvi Wahed Ali was, in his lifetime, and that those who are now by law his heirs and representatives are, entitled to a decree for setting aside the documents relied upon by the respondents, and for the recovery of the property sued for." It is to be observed that the decree drawn up in pursuance of this judgment does not conform to that portion of the judgment in which it is said that the representatives of Wahed are entitled to a decree for the recovery of the property sued for. The decree is in these terms:—"It is declared that the several ikrarnamahs and miras pottahs, dated respectively the 29th Falgoun 1259, 16th Aughran 1263, 6th Jeyt 1264, and the 15th Aughran 1263, were of no effect and void against Moulvi Wahed Ali in his lifetime, and are void against his lawful representatives. And it is further ordered and decreed that the defendants, respondents, who appeared in this appeal, do pay to the plaintiffs, appellants, "the sum of Rs. 3,000." So, in fact, all that could be executed under this decree is the order for costs, the rest of the decree being declaratory only.

It has been argued, however, that the decree ought to be taken to be in conformity with the judgment. Their Lordships are by no means satisfied that this decree *improvide emanavit*. If it were necessary, they would be disposed to take it as it stands, and to declare that the rights of the parties were determined by it. But in the view which they take of the case it is not necessary to decide this point; and it may be assumed for argument's sake that the decree is in conformity with the latter words of the judgment which have been read.

An appeal was preferred from this judgment to Her Majesty in Council, and in 1875 the judgment was reversed.* In the meantime, however, pending the appeal, certain execution proceedings were taken. The widow Abidunnissa applied for execution on behalf of herself, and also, in a different character, as guardian of an infant son, Wajed Ali, whom she alleged to have been born to her husband after her husband's death. The legitimacy of this child was disputed by Abdool Ali. Certain other parties also applied for execution, Messrs. Wise and Dunne; but as nothing appears to turn on the proceedings taken by them, no further mention will be made of them.

The Judge of Dacca, before whom the case originally came, appears to have held that he had no jurisdiction in a mere execution proceeding to determine such

* See 23 W. R. 208; and *ante* p. 87.

a question as the legitimacy or the illegitimacy of Wajed Ali, the son whom the widow had put forward as being legitimately born to Wahed. Unfortunately, we have not the original judgment of the Judge of Dacca before us. But we come to the conclusion that the Judge so decided, from the first order of the High Court on remand and what proceeded from the Judge upon the remand. The High Court, in remanding the case, made these observations: "The Lower Court has assigned no good reason whatever for not entertaining and disposing of the application for execution made in this case. Under ss. 102 and 103 and s. 208 of Act VIII of 1859, the case may, so far as anything has been shown to us to the contrary, be perfectly well disposed of without a separate regular suit." And thereupon they remanded the case to be disposed of by the Judge of Dacca, and directed him to determine the question of the legitimacy of Wajed Ali. After a second remand, this question was heard and decided by the Judge of Dacca and decided against the widow, the Judge holding that Wajed Ali was supposititious. Subsequently, on appeal, the same matter came before the Court; and two Judges of the High Court reversed the judgment of the Judge of Dacca, and held that Wajed Ali was the legitimate son of Wahed. They refer to the proceedings in this manner: They state: "The question that is now before us is, whether the person who goes by the name of Wajed Ali is or is not a posthumous son of the said Wahed Ali; and whether, therefore, one Abidunnissa who is admittedly the guardian of Wajed Ali, if there is such a person in reality, is entitled to execute the said decree partly in her own right and partly as mother and guardian of the said Wajed Ali,"—and they decree,—“that Abidunnissa be declared entitled to execute the whole of her decree against the judgment debtor before us,”—that is, in her two capacities, partly for herself and partly in her new capacity of guardian of Wajed Ali. It appears to their Lordships, that she, in her character of guardian of Wajed Ali, became a new party in these proceedings, just to the same extent that Wajed Ali would have become himself if, after he had come of age, he had appeared by his attorney.

Upon this, Abdool Ali having died, his widow Amirunnissa instituted the present suit for the purpose of setting aside the last judgment which has been referred to mainly upon two grounds; in the first place, that in an execution proceeding it was not competent to the Court to entertain such a question as the legitimacy of Wajed; and secondly, upon the merits. On the other hand, Abidunnissa contends that the suit is not maintainable, because the very question has been decided between the same parties in a previous suit by a Court of competent jurisdiction. In other words, she pleads *res judicata*, and she also joins issue upon the merits.

As far as the merits are concerned, both Courts have found that Wajed was not the son of Wahed; and the sole question before their Lordships is this, whether this question is *res judicata* or not. There is no doubt that in the execution proceeding, which has been referred to, the very same issue was tried between the same parties. The sole question is, whether the Court had jurisdiction in such a proceeding to try it.

Some attempt was made to establish that Abdool had originally consented to the exercise of this jurisdiction, but their Lordships cannot assume this. The inference appears to them the other way. They have not the record of the first proceeding before the Judge of Dacca; but the Judge of Dacca decided that he had not jurisdiction to determine the question in that suit. It appears to their Lordships that it ought not to be assumed that he would have come to that conclusion unless the objection had been raised; the assumption would be the other way. They cannot, therefore, assume consent even if consent would have given jurisdiction in such a case.

The question, whether the jurisdiction existed or not, depends entirely upon the construction of certain Sections in two Acts which have been referred to; the

the part of the plaintiff, but a very strong presumption arising from the conduct of the parties in the suit, that the property in question was not dewuttur as alleged by the plaintiff.

The plaintiff relied upon certain statements in a mourosee pottah and a bill of sale as an admission which estopped the parties to them from asserting that the lands therein mentioned were not dewuttur. But their Lordships held that the statements must be taken as a whole, and so taking them it would appear that, granting that the lands were dewuttur, the sale would be justifiable, the statement being that the sale was made for the purpose of the repair of the temple of the idol.

A shebait has the same or an analogous right to that of a manager of an infant heir, and has authority to raise money for the benefit of the estate.

The grant of a mokurrusee pottah cannot be said to be an improvident way of raising money, if it were necessary to do it at all. It still left a rent for the sustentation of the idol; and if the transaction be *bond fide*, the subsequent sale of part of the rent was justified by the imperious necessity of furnishing the temple which had been commenced.

If only part of the money raised was required for the repairs of the idol, the deeds would not be wholly void by reason that some of the money was raised for another purpose. The plaintiffs should have offered to reimburse the *bond fide* purchasers so much of the money as had been legitimately advanced.

*Mr. Leith, Q.C., and Mr. Williamson for Appellant.
Mr. Cowie, Q.C., for Respondents.*

This was an appeal from two decrees of the High Court at Calcutta, reversing a decree, in the appellant's favor, of the Officiating Subordinate Judge. The original suit was instituted by the appellant, claiming as shebait, or custodian, of an idol to have possession of real property alleged to belong to the idol, and to set aside certain deeds conveying away that property. The first Court gave the appellant a decree for the relief asked for. The High Court decided that the property was not dewuttur land, and that the alienation of the property was valid, and that the plaintiff had no right to it.

Sir Montague Smith delivered the judgment of the Judicial Committee as follows:—

This is a suit brought by the appellant Konwur Doorganath Roy to set aside certain alienations of two thirds of an ancestral mehal called Gopejan, made by his grandmother Rani Rashmoni, on the ground that the mehal had been dedicated to the worship of an idol Radha Mohun Thakoor. The respondents are the successors of the original grantees, or persons deriving title from them. To show the position of Rashmoni at the time she made the alienations in question, and that she may have acted not merely as the widow and heiress of her deceased husband Roy Bijoy Krishna, an *anumati-patra* has been put in, which gave her, undoubtedly, special powers. The *anumati-patra*, or so much of it as is material, is as follows:—"You are my wife. You have no children born to you. I am now very ill in body. I have no hope of life. On my death there will be no one to perform the ancestral *debkisti* (worship of the gods), etc., and offer the *jolpinda* (funeral cake and libations of water) of my ancestors. For the observance of all these rites, and of the *jolpinda* to the ancestors, as well as the preservation of the zemindaris, lakeraj, dewuttur, etc., I in my sound mind give you permission on my death to keep possession of my zemindaris, dewuttur, etc., recording your own name in the Collectorate Sherishta, to remain in enjoyment of the profits, and to defray the expenses of the *debkisti* during your lifetime, and to adopt one or two sons born in the family of true Brahmans. On your death, that adopted son will succeed to all properties; and on the said adopted son attaining his majority, you will, if you should desire it, get his name recorded in the Zemindari Tahoot, and surrender the entire management to him;" and then there is this statement: "Now I am a debtor to mahajuns (creditors). Some mehals of the zemindari are in mortgage on account of those debts. If there should be no other means of liquidating the debts, you will either sell a small portion of the zemindari or make conditional sale of it, as appears necessary, and liquidate the debts."

Now, undoubtedly, there is a reference to dewuttur property in this document, but this document itself creates no endowment; and it is necessary for the

plaintiff to show *aliunde* that there was an existing endowment in favor of this particular idol to which the word dewuttur may be referred.

With regard to the position of Rashmoni under the *anumati-patra*, it would seem that she took a life interest in the properties, and that power was given to her by it to adopt a son. It must, of course, be admitted that this document gave no authority to Rashmoni to alienate the estate; but she had, as the manager of the estate, power, if it were dewuttur dedicated to the idol, to alienate so much of it as was necessary to keep up the temple and worship of the idol; and if it were secular, to alienate it if it became necessary to do so to preserve the rest of the family estate.

That being her position, she made the two alienations in question. The first is a mourousee mokurruree pottah, which she granted to two persons, Nimai Soondur Roy and Ram Soondur Sen. This pottah describes the estate thus; Turruf Wargopjan alias Gowaljan, which is admitted to be the estate Gopejan, "the patrimonial dewuttur rent free land of Bijoy Krishna Roy, my late husband, the boundaries of which are on the east the Ganges," and so on, "is the dewuttur property of the Sri Sri Iswar Radhamohun Thakoor of Ramnuggur, which is in my possession and enjoyment as shebait of the idol." Then the grantor notices the fact that 120 beegahs, or one-third of that mehal, had been decreed to Bhagiruthi Debi, the widow of one of her husband's brother's, Ram Krishna Roy. "With the exception of 120 beegahs of mathan land decreed in the suit of Bhagiruthi Debi, widow of the late Ram Krishna Roy, the eldest brother of my late husband, the remaining lakheraj lands," and so on. The document proceeds: "Now the temple of the Sri Sri Iswar being broken, and necessary repairs and various other things being requisite for the service of the idol, I have given you a settlement as a mourousee mokurruree talook of the entire lakheraj zemindari rights in the said mouzah at a fixed premium of Rs. 325, for a consideration of Company's Rs. 1,900, which I have received in cash and in full weight." That is the substance of the document.

The other document is executed by Rashmoni in favor of Soondur Krishna Sen, one of the family of one of the grantees of the mokurruree. It is a bill of sale of the proprietary right to the extent of Rs. 300 of the mokurruree rent, and it says: "Deducting the land of the said decree, the remainder is my own right," referring to the decree in favor of Bhagiruthi, "a mourousee and mokurruree talook, representing the entire right in the lakheraj zemindari, was given in settlement of Nimai Soondur Roy, inhabitant of Naharpara, and Ram Soondur Sen, inhabitant of Koridha, at an annual jumma of Rs. 325, exclusive of collection charges, on the 18th Cheyt of the year 1254. They hold possession of the property as a mourousee and mokurruree talook, and are paying the fixed jumma. I, agreeably to the instructions of my late husband, have commenced building the temples of Sri Sri Iswar Radhamohun Thakoor Jee, and others, but being in want of means, am unable to carry out the instructions of my husband. I have voluntarily, in my sound senses, sold to you for Company's Rs. 1,700 my own entire share of 14 annas, 15 gundahs, 1 cowri, 2 kags out of 16 annas of the said mourousee mokurruree mouzah, the jumma of which is Rs. 300."

Mr. Leith, on the part of the appellant, undertook to satisfy their Lordships that this mehal of Gopejan had been dedicated to the idol, and therefore it was incompetent for Rashmoni to make these alienations.

Now, apart from the admissions contained in the mourousee pottah and the bill of sale themselves, their Lordships are clearly of opinion, in accordance with the view of the High Court, that the evidence fails to show that this land was so dedicated.

Mr. Leith opened his case by an endeavor to show a deed of foundation or endowment of the idol by the gift of this estate from Rajah Mahanund, who was the father of Rajah Bijoy Krishna, the husband of Rani Rashmoni.

It may be convenient to state here the position of the family so far as it is material to the present case. Rajah Mahanund, who, it is said, was the founder of this endowment, died in 1805 or 1806. He had a son Bijoy, who left a widow, Rashmoni, giving her the *anumati-patra*, to which reference has already been made. She, it appeared, lived until February 1870. She exercised the power of adoption given to her by her husband, and adopted Krishna Chunder, who married Rani Prosunnomyi Debi. He also had no son; and he also gave to his wife a power of adoption, which she exercised in favor of the appellant, Konwur Doorganath Roy. It appears that Rajah Bijoy had two brothers, and one of them married a lady of the name of Bhaguruthi Debi, who in the year 1855 brought a suit against Rashmoni, and obtained the decree already mentioned, to recover one third of the mehal of Gopejan.

If the deed of endowment from Rajah Mahanund were satisfactorily proved, and it were an endowment which dedicated this mehal to the service and worship of a particular idol, then, though the idol were a family idol, the property would be impressed with a trust in favor of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction. No question, however, of that kind arises in the present case.

The proof of this deed of endowment, which is said to have been executed by the Rajah Mahanund, when it comes to be investigated, is of the most unsatisfactory description. First, the existence of such a deed at all is not clearly made out; and so far as the document, the rubicari of a former suit, is relied upon as showing its contents, the description there given is so obscure that it is impossible to say whether the whole of the mehal of Gopejan was included in the supposed dedication or not.

First, with respect to the nature of the proof; what is relied upon as evidence of the deed is a rubicari of a proceeding in a former suit brought by a creditor against Rashmoni in the year 1840. It appears that in that suit certain property was attached, and that Rashmoni, in order to get rid of the attachment, set up that the property so attached was dewuttur property dedicated to the idol Radha Mohun Thakoor. It appears from the rubicari that this deed was put forward by a man called Bhuttacharjya, who was the *tasildar* of Rani Rashmoni. Neither the deed itself nor a copy has been produced in the present suit. No witness has been called who ever saw it; and it is to be observed that though Bhuttacharjya was called as a witness in the suit brought by Prosunnomoyi on behalf of the present appellant to set aside these deeds during the lifetime of Rashmoni, and which was dismissed, because it was considered to be incompetent to institute it during the lifetime of Rashmoni, he was not asked any question about this deed.

The state of the case then is this: No evidence has been given of the existence of such a deed, except the mention of it in the rubicari; no witness has been called who ever saw it. The man who produced it in the creditor's suit, when called in Prosunnomoyi's suit, does not refer to it; and the only search which has been proved is a search made by some clerk in the *sherista* of the *zemindary*,—a young clerk who was not likely to have any knowledge of the deed, and who simply says that upon search he did not find it there.

In that state of things their Lordships think it is very doubtful whether secondary evidence of the deed should be permitted at all; but if it be allowed, then they are to judge of the effect of the secondary evidence, and to determine in the first place whether it satisfies them that such a deed really existed at all. Now from the circumstances which have been already pointed out, they are by no means satisfied that such a deed ever did exist. That a document of the kind was put forward by Bhuttacharjya on behalf of Rashmoni in the creditor's suit is proved by the rubicari; but whether it was a genuine deed, or one put forward to meet the purposes of that suit, is left in doubt and obscurity.

But assuming that a deed did exist, and that it was to the effect which is referred to in the rubicari, their Lordships find that the question what property was included in it is left in considerable obscurity. It appears that the property which had been attached was a brick-built house and garden. The rubicari states, "It appears from a perusal of the whole of the papers of the record, that for the payment of the money due to the plaintiff, the brick-built house and garden, etc., belonging to the defendant, were under attachment. After issue of notice of auction sale, the objector above-mentioned filed a petition, stating, among other matters, that the properties which were assigned by Raja Mahanund Roy, father-in-law of the defendant, for the worship of the idol Radha Mohun Thakoor, etc., established by the Raja, cannot be sold or transferred by his heirs." It appears that there was an order that the sale should be stayed, and that the objector should file proofs of his statement. The rubicari states, "Accordingly the objector filed the shesbaitnama of the 5th Aughran 1202 under seal and signature of Raja Mahanund, accompanied by an isumnvisi containing the names of four witnesses." Then, "The objector has also filed a copy of the nikas paper of the year 1213, bearing the seal and signature of the Collector, to prove that the properties of the deb-sheva, as aforesaid, are part and parcel of the lakheraj mouzah Gowaljan." That appears to be this mouzah Gopejan. This is the only phrase which can be relied upon as showing that the entire mehal was included in the supposed endowment. But the passage is in itself obscure. The literal reading of it is that the brickbuilt house, garden, etc., which had been devoted to the idol, were part and parcel of the lakheraj mouzah Gowaljan. It is quite consistent with that statement that these parcels had been taken out of that lakheraj mouzah and devoted to the idol.

Therefore, in addition to the insufficiency of the proof to satisfy their Lordships with reasonable certainty that such a document really existed, there is so much obscurity in the language that it is impossible to say that if it did exist it included the whole of this mehal.

If that document is out of the case, there is very slight evidence indeed of any such endowment. The case then rests, independently of the admissions in the deeds, upon the evidence of the dewan and mookhtar and one or two other witnesses that the rents of this mehal Gopejan were applied to the worship of this idol. But that evidence is extremely vague and extremely loose. The mookhtar says in several places that the rents were applied to the worship of the idols, and it is plain from all the evidence in the case that there were several idols belonging to this family, and no doubt the rents of some of the family mehals were applied to sustain their temples and worship. But supposing it to be taken that the rents of this mehal were applied during the period that the witnesses speak of, to the worship of the idol Radha Mohun, that fact is by no means sufficient to establish the onus which lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship. Very strong and clear evidence of such an endowment ought to exist. In the present case there is no proof that priests were appointed. If any had been appointed, they might have been called. There is no production of accounts showing that the rents were separately collected and applied for the worship of this idol. For anything that appears, the rents may have gone into the general body of the accounts relating to the estates of this family, and there is really no document whatever upon which the finger can be placed to show that an endowment was made, other than that rubicari to which reference has already been made.

Besides the weakness of the proof of endowment on the part of the plaintiff, strong presumptions that there was none arise from other facts and circumstances in the case. It is said that the application of the rents of this particular mehal for a certain period to this idol is some evidence that the family were aware that the rents were properly and by right so to be devoted; but if the conduct of the

family is to be regarded, there is, on the other side, the strongest indication, from what occurred in the suit brought by Bhagiruthi, the widow of the eldest brother of Bijoy, that the family understood that there was no such endowment. That suit was brought by Bhagiruthi to recover from Rashmoni one-third of the mehal in question. She did not claim it as property to which she was entitled as joint shebait, but she claimed it as one-third of the family estate to which she, as widow of one of the brothers, was entitled. That is her claim. Rashmoni does not set up as a defence that the mehal was dewuttur property devoted to this idol, that she was the shebait, and entitled, at all events, to the possession and the management of it,—she sets up no case of that sort,—but allows a decree to be passed against her in favor of Bhagiruthi to recover one-third of the mehal, and in that decree the property is described, not as dewuttur, but as bromuttur property.

Now if this mehal had been really dedicated to the idol, it would no longer have been a partible estate. Rashmoni would, as shebait, have been entitled to the possession of it, and to the management and disposition of the revenues; and all that Bhagiruthi could have been entitled to would have been a share in the surplus revenues, if there should have been a surplus, after due provision had been made for the worship of the idol.

Therefore there is not only weakness of proof on the part of the plaintiff, but a very strong presumption, arising from the conduct of the parties in the suit in question, that this was not dewuttur property such as it is alleged to be on the part of the plaintiff.

Supposing the case had rested there, their Lordships feel no doubt whatever that the judgment of the High Court was perfectly right. But it does not rest there, and it now becomes material to consider the terms of the *mourousee pottah* and of the bill of sale. Mr. Leith, in his reply, very properly relied on them as being the strength of his case. If they are to be used as evidence only, then this evidence must be weighed with all the other evidence in the case, and so weighing it, their Lordships are not satisfied that it turns the scale in favor of this property being dewuttur. But the statements in these deeds are relied upon by the plaintiff as an admission which estops the parties to them from asserting that these lands were not dewuttur. But if the statements are relied on in this way, they must be taken as a whole; and so taking them it would appear that, granting the lands were dewuttur, the sale would be justifiable, the statement being that the sale was made for the purpose of the repair of the temple of the idol. The *mokurruree* was granted, according to the statement, because the temple was out of repair, and money was wanted to restore it. The sale of part of the *mokurruree* rent was granted in consideration of money stated to be required for the completion of the temple which it was stated was already in course of erection. If, therefore, the statements in these deeds are taken as a whole, the alienations they contain were justifiable, assuming the property to have been dewuttur land.

What, then, is the plaintiff's position? These deeds are 30 years old, and he comes into Court to set them aside upon the ground that they were collusive; and if he could have shown that the representation, although made, was not believed by the grantees, and that they colluded with Rashmoni to put a pretended consideration on the face of the deeds, he might have succeeded. But there is no evidence whatever of any such collusion. There is nothing to show that the original grantees did not believe the statements appearing upon the face of the deeds; indeed if they had made enquiry they would have found that the fact agreed with the statement, for it appears upon the evidence and upon the finding of the Subordinate Judge that the temples were out of repair. If, then, the temples were out of repair, and if Rashmoni offered this *mokurruree pottah* to raise money for the purpose of doing the repairs that the temple required, the purchaser who *bona fide* took it upon that representation would clearly be entitled to keep his purchase. It may be that Rashmoni did not intend

to apply the money to the purpose for which she professed to require it. It may be that she always intended to apply it to the payment of the Government revenue, as it appears that in point of fact she did. But unless the purchaser was aware at the time he made the purchase that that was her intention, and that the statement in the deed was a colorable one, he could not be injured by her concealment of her true object, or by her having subsequently applied the money to a different purpose. She, as the manager of this estate, had the same right, or an analogous right to that of the manager of an infant heir; and that was defined in very plain language in the case in 6th Moore, p. 423,* "The power of the manager for an infant heir to charge an estate not his own is under the Hindoo law, a limited, and a qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bond fide* lender is not affected by the precedent mismanagement of the estate; the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected though it be shown that with better management the estate might have been kept free from debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as much as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge; and they do not think that under such circumstances he is bound to see to the application of the money." That passage was adopted in a very late case before this Board, *Prosunno Kumari Debya v. Golab Chand Baboo*, in the 2nd Law Reports, Indian Appeals, p. 151.† In that case a shebait had incurred debts, and mortgaged the property of the idol for the purpose of the necessary sustentation of the worship of the idol;—and this tribunal held that the position of the shebait was analogous to that of a manager of an infant, and that he had the same authority, which in both cases arises from the necessity of the case, to raise money for the benefit of the estate. Here it cannot be said the grant of a mokurruree pottah was an improvident way of raising money, if it were necessary to do it at all. It still left a rent for the sustentation of the idol; and if the transaction be *bond fide*, the subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced.

On these grounds, therefore, their Lordships think that, assuming the purchasers to be bound by the representations in the deeds, there being no evidence that they did not put entire faith in them, the grants cannot now be impeached.

It was objected on the part of the plaintiff that this answer had not been put forward by the defendants, and undoubtedly they have relied more strongly upon the defence that the land was not dewuttur land at all. But several paragraphs in the written statements were pointed out, in which the case was made. It is no doubt alleged in these paragraphs that the money was wanted for two purposes, for the sustentation of the worship of the idol and the repairs of the temple, and also for the payment of Government revenue. But their Lordships think that there is enough in those statements to allow of the present

* 18 W. R. 84 n.; 2 Suth. P. C. R. 36.

† 23 W. R. 253; and see *ante* p. 102.

answer to the estoppel being made on the part of the respondents, and it is to be observed that in the suit brought by Prosonnomoyi during the lifetime of Rashmoni, in which the original grantee, Sen, was a party, he there set up the defence in a perfectly correct form, namely, that the representation made was that the money was wanted for the repairs of the temple, and that he advanced it for that purpose.

But assuming the facts to be as alleged in the statement of defence, their Lordships are still of opinion that the plaintiff could not succeed on this plaint in setting aside the deeds; because if part of the money only was required for the repairs of the idol, or was represented to have been so required, and this was *bond fide* believed in by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose. It would then come to this, that too much of the idol's property may have been granted, and that a less quantity of land than that included in the grants would have sufficed to raise the money required for the temples; but that would not be a sufficient ground for setting aside the deeds altogether. The plaintiff in that case should have offered to reimburse the *bond fide* purchasers so much of the money as had been legitimately advanced.

Their Lordships, in making these last observations, do not wish it to be understood that this is the case which appears upon the facts; they make these observations with reference only to the pleadings, and to indicate that, supposing that technical objection could have been made to the pleadings, it still would not have availed the appellant in the present appeal, because even so his suit in the present form could not have been sustained.

On the whole, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal, with costs.

The 1st December 1876.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert. P. Collier.

*Religious Endowment—Pagoda—Assignment of Uraima Right—Specific
Performance—Detinue—Custom—Sale of Trusteeship.*

On Appeal from the High Court at Madras.

Rajah Vurmah Valia

versus

Ravi Vurmah Mutha.

Where an assignment transferred to the plaintiff the Uraima right, or right of management, of a pagoda, and all the rights of the existing trustees, including the right to the custody of certain jewels devoted to the service of an idol, the plaintiff's suit to recover the jewels was clearly not one for specific performance, but in the nature of an action for detinue.

Persons holding such a trust are not legally competent to transfer it at their will.

When, owing to the absence of documentary or other direct evidence of the nature of the foundation, and the rights, duties, and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution.

Where the custom set up was one to sanction, not merely the transfer of a trusteeship, but the sale of a trusteeship for the pecuniary advantage of the trustee, such a circumstance alone would justify a decision that the custom was bad in law.

Mr. Mayne for Appellant.

No one for Respondent.

This was an appeal against a decision of the High Court of Judicature at Madras, confirming a decree of the Civil Court at Tellicherry. The questions at issue were, whether the managers of a certain pagoda in Malabar could lawfully alienate to the appellant, who is the Rajah of Cherikal, their right to manage that pagoda; and, if so, whether the alienation conferred any and what rights against the respondents. The pagoda Tracharamana is one of great antiquity, but nothing certain is known of the date at which it was built, or the persons by whom it was founded or endowed. The pagoda itself is an institution very different from the ordinary Hindoo pagoda. It appears to consist merely of a raised floor in the middle of a jungle, upon which the idol stands unprotected by walls or roof. There is only one festival in the year, which lasts 28 days, and for which temporary sheds are erected annually. The jewels and other property of the institution are kept in a tower called the Karimpana Goprum, which is 12 miles from the pagoda; and from this Goprum the jewels and treasure are carried by a procession of temple officials at the time of the annual festival, and taken back again when the festival is over. The expenses of the festival are principally defrayed from the offerings of the worshippers. Besides these there is an accumulated treasure, valued at Rs. 48,000, and a very large amount of landed property, which is admittedly vested in the managers. There appeared to be no object to which the funds could be applied except the celebration of the annual festival. From 1856 to 1866 the managers appeared to have been borrowing money either on their own account or for the purposes of the pagoda, and pledging and selling the landed property of the pagoda, and numerous suits were brought against them, under which large quantities of land were sold in execution of the decrees. In these circumstances the managers, in the beginning of 1868, being still in debt to the amount of about Rs. 52,000, entered into the arrangement with the appellant which gave rise to the present suit. The appellant undertook to pay off the debts and take over the pagoda and its property, and conduct all the ceremonies, and it was asserted that he paid in cash to the managers Rs. 46,000 to liquidate the debts and Rs. 10,000 for their own use. In consideration of that the Rajah was assigned all the property of the pagoda. Subsequently disputes between the parties arose, and the present litigation was instituted. The Judges decided in effect that the trustees of a pagoda could not lawfully alienate the trust property. Against that decree the present appeal was instituted.

Sir James Colville delivered the judgment of the Judicial Committee as follows :—

This is an appeal by the person who has been throughout the argument called the Cherikal Rajah against a decree of the Civil Court of Tellicherry and a decree of the High Court of Madras, both dismissing his suit. The Rajah claims to be the assignee of the Uraima right, or right of management, of the Tracharamana pagoda and its subordinate chetroms, under an assignment from the persons known as the Uralers of that religious foundation. The early history of the foundation seems to be lost; no trustworthy account of its origin is to be found in the evidence taken on the remand by the High Court. The nature of the existing institution, however, is shown pretty clearly upon the proceedings. It appears that the so-called pagoda is not a pagoda in the ordinary sense of the word, but a mere platform in the middle of the forest, upon which, once in every year, certain ceremonies take place in honour of a particular idol; that to this annual festival a large number of persons resort; that considerable presents and offerings are made there by the worshippers; and that the festival is a matter of general interest to the Hindoo inhabitants of that part of the country. It also appears that the property of the trust consists partly of a large landed estate, and partly of jewels of considerable value, which were kept in a place called the Karimpana Goprum. The Rajah having obtained from the Uralers the assign-

ment contained in Exhibit E, succeeded in getting into possession of the whole or greater portion of the landed property ; but his right to the custody of the jewels was disputed by the defendants to this suit and others ; who actively resisted his attempt to remove them from their ordinary place of custody. There being a real or supposed risk of a breach of the peace, the usual reference to the magistrate took place. Whilst that was pending, the Rajah asserted that the Goprum had been broken open and some of the jewels abstracted. However that may be, it is certain that the persons accused of having robbed the Goprum were acquitted of any criminal offence ; that the jewels which they were said to have stolen were placed in the hands of the magistrate, who passed an order forbidding the Rajah to remove the property, or any portion of it, from its usual place of security in the Goprum until he had the authority of the Civil Court for so doing ; and directing that the keys of the room which contained the jewels should remain in the hands of the person who is the third defendant on this record. Upon this the Cherikal Rajah brought the present suit.

It seems to their Lordships that there was some little confusion and misconception in the Indian Courts as to the nature of the suit. The Civil Judge speaks of it as a suit for specific performance. Again, Mr. Justice Holloway, in the second ground of his judgment on the appeal, seems to draw a distinction between the jewels and the other property belonging to the institution, and to express an opinion that in order to dispose of the plaintiff's claim, it was sufficient to say that the jewels having been devoted to the service of an idol, were *extra commercium*, and could not pass under the assignment. The suit is clearly not one for specific performance. It is not brought against the other parties to the contract, the Urallars, but against persons, strangers to the contract, who are disputing the right of the plaintiff under his assignment to take possession of a portion of the property belonging to the pagoda.

Again, if it be conceded that the assignment has legally transferred all the rights of the Urallars to the Rajah, and that the Urallars had an unqualified right to the custody of these jewels, and the power of removing them to any place they pleased, and of keeping them there, it would hardly be an answer to the suit to say that the jewels, being devoted to an idol, were *extra commercium*. The suit seems to their Lordships to be in the nature of an action for detinue, brought to recover jewels, the right to the custody of which the Rajah says has passed to him by virtue of the assignment, wherein the plaintiff has to make out his title to the goods, which by an apt plea has been put in issue.

The parties having put in their written statements, certain issues were settled in the cause.

Of these their Lordships have only to deal with the first and second. The first is, was the deed of assignment valid ? the second, has the plaintiff thereby acquired all the rights of the Urallars ?

It is to be observed, however, that this second issue covers something more than the broad and general question whether the Urallars were legally competent to transfer the property of this pagoda to an individual upon the trusts upon which they themselves held it. If this question be decided as the Courts in India have decided it, there is of course an end of the plaintiff's case. But if it were decided in his favor, a further question would arise, viz., whether, according to the constitution of this particular institution, the concurrence of the Kottayam Rajah, or that of some of the ministerial officers of the institution, and in particular of the third defendant, was not necessary in order to validate the assignment. Upon these and other questions relating to the rights and powers of the defendants, which are more distinctly raised by the subsequent issues, Mr. Mayne has not as yet addressed their Lordships ; and the conclusion to which their Lordships have come renders it unnecessary to discuss them. They propose therefore to consider only the broad and general question decided by the Indian Courts, viz.,

whether the Urallars were legally competent to transfer their Uraima right, by the Exhibit E.

It is admitted that according to the constitution of the institution the Urallars for the time being were to be the Karnavens or chief members of four different Tarwads. It was, therefore, presumably the intention of the founder that the Uraima right should be exercised by four persons representing four distinct families.

The first question is, whether, independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships to establish this proposition; principle and reason seem to be strongly opposed to such a power, and particularly to such an exercise of it as has taken place in this instance. The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together; he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district, open to the public opinion of that district, and having that sort of family interest in the maintenance of this religious worship which would ensure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties, with all the property of the trust, to a single individual who might act according to his sole discretion, and might have no connection with the families from which the trustees were to be taken. Such a transferee might be a powerful man, as probably this Cherikal Rajah is, and therefore the less amenable to public opinion, the less capable of being reached by the Courts, and the more likely to deal with the institution with a high hand. Mr. Mayne almost admitted that the broad principle *delegatus non potest delegare* would *prima facie* apply to such a case. He argued, however, that the decisions of the Court of Chancery, of which some have been cited in the judgment of the Civil Judge, are of no authority upon a question arising between Hindoos touching a Hindoo religious foundation; and he relied on various cases decided in India, as favoring, if they do not directly affirm, the propositions which the appellant has to establish. In their Lordships' opinion, the authorities cited by him do little or nothing to advance the appellant's case. In the first the decision was against the particular transfer in question. The authority relied upon was a mere expression of opinion on the part of certain pundits, founded on the text of the Dayabhaga (a treatise not necessarily of authority except in Bengal), that a certain deed of gift executed by the owner of lands in Bengal would carry dewuttur lands with the obligation of keeping up the worship of the idol. The next case which was cited from the Bengal S. D. A. Reports for 1850 really has no application to the present; or, if it has any, is inconsistent with the appellant's contention. The Court then said, "But a further objection arises as to the plaintiff's claim, viz., that were the deed established, and were it shown that it was the intention of the donor to transfer to the donee his rights of office as well as personal rights, and also the duties incumbent on the office of Mohunt, there has been no public acknowledgment of the plaintiff by the assembly of Mohunts and others in due form, as is proved on the Record to be customary on the death of one Mohunt and the appointment of his successor." In that case, therefore, evidence of what the constitution of the foundation was had been given; the transfer which was insisted upon was shown to be inconsistent with that constitution, and was treated as invalid.

Again, the preponderance of the authorities in Madras appears to be against the present contention. The first case, cited from the first volume of Madras

High Court Reports, decided that the assignment in question was not valid because all the Urallars had not joined in it.

It cannot be inferred from such a ruling that there was any implied decision, or even, as Mr. Mayne would put it, a dictum in favor of the proposition that an assignment executed by all the Urallars of any foundation of this kind would operate as an effectual transfer of their trust. The Court merely decided on one patent defect of title, without considering whether, if that defect had not existed, the title could have been supported.

The next case was that before Messrs. Innes and Collette. That is to some extent in favor of Mr. Mayne's view, though it related to a charitable and not to a religious foundation, and we have not clearly before us what the facts were as to that foundation. That the broad distinction which the Civil Judge takes between a religious and a charitable foundation, can be supported, their Lordships are not prepared to say. Then came the decision of Mr. Justice Holloway when he was a Judge of Calicut, which is set out at page 396 of this Record. It is said that the High Court afterwards remanded this cause for the trial of certain issues as to the alleged rights of the plaintiff, who, it may be observed, was the same person as the plaintiff in the present case. Some of those rights, however, were different from that now asserted. The plaintiff did not there claim, as here, only under an assignment from certain Urallars. He also set up superior rights to those of the Urallars, claiming a power to remove as well as a power to appoint them. It is not shown to their Lordship's satisfaction that Mr. Justice Holloway's general position in that case was finally or conclusively overruled by the High Court.

This being the state of the authorities, their Lordships are of opinion that there is no authority binding even on the Court of Madras which is inconsistent with the judgments under appeal; that the general principle affirmed by those judgments is correct; and consequently that the Urallars had no power under what may be termed the common law of India to transfer their Uraima right to the plaintiff, the Cherikal Rajah.

But it is said that in India, and particularly in that part of India in which this pagoda is situated, custom must prevail against the general law. That such would be the consequence of a well proved and established custom their Lordships do not deny. In the present case, however, the Civil Judge has distinctly found against the existence of the custom; and although the High Court has not dealt at large with the evidence given in the cause, Mr. Justice Kindersley, at all events, seems to have treated the alleged custom as not established. If the two Courts had clearly concurred in a finding that the custom had not been established, their Lordships would have applied their ordinary rule in such cases; but there being some slight doubt about the effect of the second judgment, they have allowed Mr. Mayne to draw their attention to the evidence. After hearing that evidence they feel bound to say that it is wholly insufficient to induce them to overrule the finding of the Civil Judge. It appears to them that no general custom such as that contended for can be established by such very vague and loose evidence. They would further observe that they have grave doubts whether any such general custom can, in cases like the present, be set up and proved in that way. They conceive that when, owing to the absence of documentary or other direct evidence of the nature of the foundation and the rights, duties, and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution. This seems to have been decided in the case of *Greedharee Doss v. Nundokissore Doss Mohunt*, which is reported in the 11th Moore's Indian Appeals.* That came before this Board, on appeal from a decision of the High Court of Bengal, when Sir Barnes Peacock was Chief Justice; and in the Chief Justice's judgment, which was afterwards affirmed by this Board, there is this passage: "Numerous cases have been cited to show what was the usage,

* 8 W. R. P. C. 25; 2 Suth. P. C. R. 86.

but the law to be laid down by this Court must be as to what is the usage of each Mohuntee. We apprehend that if a person endows a college or religious institution, the endower has a right to lay down the rule of succession; but when no such rule has been laid down, it must be proved by evidence what is the usage, in order to carry out the intention of the original endower. Each case must be governed by the usage of the particular Mohuntee." And their Lordships on the appeal said, "It is to be observed that the only law as to these Mohuntees and their offices, functions, and duties, is to be found in custom and practice, which is to be proved by testimony; and no evidence has been adduced before their Lordships to show that any appointment has ever been made in reversion on any former occasion." That seems to their Lordships to point, though perhaps less distinctly than the passage in Chief Justice Peacock's judgment, to the necessity of proof of the custom of the particular Mohuntee. The same principle was recently affirmed by this Board, in the case of the *Rameswaram Pagoda*, reported in 1 Law Reports, Indian Appeals, page 209.* At page 228 their Lordships observe: "But the constitution and rules of religious brotherhoods attached to Hindoo temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them. That principle was laid down by this Committee in an appeal involving the succession to the office of Mohunt of a richly endowed mutt in Rajgunge, in these terms." And the judgment then cites the passage, from the 11th Moore's Indian Appeals which has been just read, and proceeds to consider the evidence of usage as to the particular pagoda.

Their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case; and they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law.

Upon these grounds their Lordships are of opinion that no case has been made for interfering with the decrees under appeal; and they must humbly advise Her Majesty to affirm those decrees and to dismiss this appeal.

The respondents not having appeared there will be no orders as to costs.

The 16th February 1877.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Joint Hindoo Family—Self-Acquired Property—Education from Joint Funds.

On Appeal from the High Court at Madras.

Pauliem Valloo Chetti

versus

Pauliem Sooryah Chetti.

Their Lordships would require very strong and clear authority to support such a proposition as that, if a member of a joint Hindoo family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property.

* See *ante* p. 17.

*Sir James Stephen, Q.C., and Mr. Mayne for Appellant.
Mr. Cowie, Q.C., and Mr. Norton for Respondent.*

This was an appeal from a decree of the full bench of the High Court of Judicature at Madras affirming a decision of Mr. Justice Kernan. The facts of the case are set out sufficiently in the judgment of the Judicial Committee, which was delivered as follows by *Sir Robert Collier* :—

This case has been argued at considerable though not unnecessary length, and in the course of the argument several questions of law of much importance have been raised, but, in the view which their Lordships take of the case, it ultimately resolves itself into one or two questions of fact attended with no great difficulty.

Those questions arise in this way: Chuckeray, the original plaintiff, upon whose death the present plaintiff, his son, was substituted on the record, was the son of Aroonachellum. Aroonachellum was one of four brothers, sons of Mauree. Chuckeray brought his suit for the purpose of setting aside the will of Aroonachellum, made in favor of his brothers, upon various grounds; but the only ground now necessary to refer to is that the property of Aroonachellum was joint, because it was ancestral—derived from his father—and therefore that Aroonachellum could not dispose of it by will, or at all events could not dispose of more than a part of it.

This case has come before three Courts in India. It was first heard by Mr. Justice Kernan, who dismissed the suit on the ground that, in his opinion, the property of Aroonachellum was not ancestral but was self-acquired. The case then came before the Chief Justice and Mr. Justice Holloway, who differed in opinion; the Chief Justice holding that the property was self-acquired, Mr. Justice Holloway holding that it was ancestral. The opinion of the senior Judge prevailing, there was an appeal to a full bench High Court, which, with the exception of Mr. Justice Holloway, held that the property was self-acquired, and that the will was valid. Their Lordships have not in this case insisted on the rule that they will not permit under ordinary circumstances the concurrent judgments of two Courts on a question of fact to be disputed, because the questions of fact appeared to be a good deal mixed up with questions of law.

On the part of the appellants, it was not denied that Aroonachellum had, in the ordinary sense of the word, made his own fortune, that the property which he devised to his brothers was acquired by his successful trading and by the exercise of his industry and intelligence; but it was contended that that property was to be deemed in point of law to have been derived from his father Mauree, firstly, because he had originally received a certain amount of property from Mauree, with which he had commenced his trading, and which became, as it has been termed, the nucleus round which his fortune gathered; and, secondly, because, even if he did not acquire anything from his father, nevertheless, inasmuch as he was educated out of the funds of the family, all his acquisitions became joint in contemplation of law.

The first question is a pure question of fact. Upon it Sooryah, the defendant, the executor of the will of Aroonachellum, was examined, and he is reported by the Judge of the Court of first instance to have been a satisfactory and trustworthy witness. This witness, amongst other things, says, "The sons of Mauree got no property of our father; on the contrary, we supported the father. He was dubash in Baker's house in 1805 or 1806. Kistnamah"—he was the eldest son—"was not assisted by any funds derived from my father. Mauree suffered loss to 25,000 or so, and Kistnamah paid that out of his own money." Then he further says, the statements made in the answers filed in the suit of Narrainsawmy, the son of Kistnamah, "especially that Mauree's assets were not enough to pay debts—insolvent, in fact. The debts Mauree left were ten times larger than the

property he left. We paid a lakh for Court costs after his death from 14 to 34. Kistnamah carried on on his own account; so did Aroonachellum; so did Cothundaram and self," that is, the other brothers. "During the life of father we were always in the same house living, and also Sawmy"—he was a cousin—"and cooked and ate together. Up to the death of Mauree there was no division. We each worked separately, and the brothers had to pay 30,000"—rupees or pagodas, it does not appear which—"for the debts of father, owing to security given by him, but we laboured separately, and had our property separate."

In their Lordships' opinion, if this evidence, uncontradicted as it is, had stood alone, it would have amply supported the finding of fact of the three Courts. But it is materially corroborated. In the first place, it is corroborated in this way:—a suit was brought against Mauree in 1805 (Mauree died in 1814) by one Devaljee, who had obtained a loan from Mauree on a mortgage, Devaljee alleging that Mauree held possession of the mortgaged premises and received the proceeds for a long time after the mortgage had been paid off. This suit was attended with considerable expense to Mauree in his lifetime; and it went on, and was a source of great expense, and considerable loss, to his sons, until it was finally decided in 1835. We have the master's various reports in the course of it; and it is enough to say that from those reports it appears that Mauree at the time of his death had been overpaid to the amount of more than 8,000 pagodas, which he owed to Devaljee, and that this sum exceeded considerably any assets which Mauree had. Mauree left a will leaving his property to his sons. But their Lordships do not think it necessary to determine a question raised here, though apparently not in India, whether, if there had been a surplus after satisfying Mauree's liabilities, his sons would have taken by descent or by devise. Three of his sons renounced probate. The eldest son, Kistnamah, took out administration with the will annexed, and, as administrator with the will annexed, obtained possession of the property. It appears that Kistnamah up to the time of his death retained this property, as it was right and prudent for him to do, in order to meet the possible adverse result of the suit of Devaljee; that in defending the suit, and in the expenses of administration, he disbursed considerably more than the whole value of the property; and that, although the greater part of these disbursements were ultimately disallowed as against the creditors, the representatives of Devaljee, the deficiency was made good out of his estate; that after his death, which occurred in 1826, no assets of Mauree came to the hands of his surviving sons, except the half share of the garden at Athepattam and some other immoveable property of small value, all of which was afterwards sold under the final decree of the Court in satisfaction of the claim of Devaljee's estate.

The statement of the witness Sooryah is also further corroborated in this way:—One Narrainsawmy, the son of Kistnamah, the eldest son of Mauree, brought a suit very much of the same description as the present for the purpose of disputing the will of Kistnamah, on the ground that Kistnamah's property was joint. In that suit the whole of the family agreed in treating the property of Kistnamah as self-acquired; and if Kistnamah's property was self-acquired, and not derived from Mauree, some presumption arises that the property of Aroonachellum was not derived from Mauree.

On these grounds their Lordships entirely concur with the finding of the Courts upon the first question; namely, that Aroonachellum did not receive any property from his father on which he commenced his trading, or which could in any sense be properly called the nucleus of his trading fortune.

The next contention is: that Aroonachellum having been educated out of the joint funds of the family, his acquisitions became in point of law joint. In support of the allegation of fact on which it is sought to found this legal inference the only evidence produced is the answer of the defendants, Sooryah among them, in a suit filed by one Sawmy, a grandson of Nullamuttu, who was the father of Mauree;

Sawmy contending, amongst other things, that the property of Mauree was ancestral, derived from Mauree's father Nullamuttu; and the four brothers, Kistnamah, Aroonachellum, Cothundaram, and Sooryah, contesting that proposition, and contending that the property of their father Mauree was self-acquired. That answer contains this passage: "Aroonachellum was educated by his said father Mauree by and out of his separate funds or means; and when this defendant Aroonachellum was of sufficient age he was put forward in life by his said father, and by and through his means and influence only, and afterwards by and through the industry and exertions of this defendant Aroonachellum on his own behalf." If this passage be relied upon as an admission it must be taken as whole, and it contains a distinct assertion, that whatever were the charges of Aroonachellum's education—and it nowhere appears what sort of education he had—those charges were borne by the separate estate of his father, over which he had an absolute power of disposition. There was, therefore, at that time, no joint estate in the proper sense of the word; and the foundation of fact then fails upon which the legal inference was to have been based.

This being their Lordships' view, it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant, which, stated in plain terms, amounts to this: that if a member of a joint Hindoo family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property,—is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given, it does not appear to them necessary to review the text books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in the 10th vol. of Sutherland's Weekly Reporter, p. 122, in which a judgment was given by Mr. Justice Jackson and Mr. Justice Mitter, both very high authorities, lays down the law bearing upon this subject by no means so broadly as it is laid down in two cases which have been quoted as decided in Madras; the first being to the effect that a woman adopting a dancing girl, and supplying her with some means of carrying on her profession, was entitled to share in her gains; and the second to the effect that the gains of a vakeel who has received no special education for his profession are to be shared in by the joint family of which he was a member; decisions which have been to a certain extent also acted upon in Bombay. It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of Bengal is not more correct than what appears to be the doctrine of the Courts of Madras.

For these reasons their Lordships are of opinion that the judgment of the Court below was right, and they will humbly advise Her Majesty that that judgment be affirmed, and this appeal be dismissed with costs.

* The 2nd March 1877.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Jurisdiction—Right of Deshmukhs—Pensions Act (XXIII of 1871).

On Appeal from the High Court of Bombay.

Vasudev Sadashiv Modak
versus
 The Collector of Rutnagiri.

The right of the Deshmukhs, whether in its inception and original character or by reason of the alterations in its character that have subsequently taken place, was held to be in the nature of a grant of revenue (their functions being those of a collector of revenue for the Government), and therefore excluded from the jurisdiction of the Civil Courts by the Pensions Act, XXIII of 1871.

This was an appeal from a decree of the High Court of Bombay of the 1st October 1874, affirming a decision of the District Judge of Rutnagiri in that Presidency.

Mr. Cowie, Q.C., and Mr. Mayne for Appellants.

Sir James Stephen, Q.C., and Mr. Graham for Respondent.

The appellant is the hereditary Deshmukh of a portion of the district of Rutnagiri in the Presidency of Bombay. In early times the Deshmukh was the chief police and revenue authority, and was responsible for the collection of the revenue. Latterly his functions have to a great extent fallen into disuse, and seem now to consist only in reporting upon the state of the crops and rendering a general assistance in revenue matters. The Deshmukh was remunerated by the right of levying directly from the ryots certain sums on the grain assessment and on various articles of sale. Up to 1842 these dues, whether in grain or cash, were collected by the appellant's ancestors and by himself directly from the ryots; but after that year the Government officials collected them with the regular revenue, and paid them over to the Deshmukh. In 1867 a new survey came in force. The grain assessments were abandoned, and a consolidated cash assessment was introduced. When that change was effected, the appellant contended that he was entitled to receive half an anna in the rupee upon the whole consolidated assessment, whereas the Government urged he was only entitled to that percentage upon the amount of the original cash assessment, and that upon the balance he could only claim such a percentage as he would have received if the amount had been levied in grain under the old system. Litigation ensued, and in the end it was decided by the Courts in India that the claim was inadmissible, the Government having reserved to itself a right of considering the validity of claims in all parts of India to pensions and similar allowances confirmed and granted by itself, instead of allowing them to be submitted for adjudication to its own Courts, and therefore that the plaintiff would have to seek his remedy elsewhere than in a Court of law. From these decisions the present appeal was instituted.

Sir James Colvile delivered judgment as follows:—

This is an appeal against a judgment of the High Court of Bombay confirming a judgment of the Judge of first instance, which, before the settlement of issues in the cause, dismissed the suit of the appellant on the ground that it was excluded from the jurisdiction of the Civil Courts by "The Pensions Act 1871." The material Sections of that Statute are the 4th and the 3rd.

The 4th says, "Except as hereinafter provided"—and it is admitted that the case does not fall within any of the statutory exceptions—"no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or grant for which such pension or grant may have been substituted;" and the 3rd, which is an interpretation Section, says, "In this Act the expression 'grant of money or land revenue' includes anything payable on the part of Government in respect of any right, privilege, perquisite, or office."

It is to be observed that upon this appeal it would be impossible for their

Lordships to pronounce affirmatively that the suit is not one which under the Act is excluded from the jurisdiction of the Civil Courts. The case as put by the learned Counsel for the appellant is simply that the materials before the Courts were insufficient to show that they had not jurisdiction, and that therefore the cause should be remitted to India for a fuller trial there on this issue.

The materials which were before the Court were the plaint, the oral examination by the Judge of the plaintiff's pleader, the sunnud of the 3rd March 1777, and the judgment in a former suit instituted by the appellant against the Government before the passing of the Act, which is set out at p. 10 of the Record. The question is whether, taking all these together, the Judge had not sufficient grounds for saying that the suit was within the meaning and operation of "The Pensions Act 1871."

The plaintiff's case was that he was the hereditary Deshmukh of certain turufs or districts; that as such, he and his ancestors had long been entitled to receive directly from the ryots a per-centage equivalent to six pie in the rupee upon that part of the revenue which was assessed in cash; a smaller per-centage upon that part which was assessed in grain; and certain other dues which their Lordships think may be dismissed from consideration; because, though the articles in respect of which they were payable were articles upon which revenue was levied under the former native governments, they have long since been abandoned by the British Government as the subjects of revenue, and the rights of the Deshmukh in respect of them are really not in issue in this suit. The questions arising between the parties may be fully tried and determined upon the first two items of revenue.

These rights of the Deshmukhs were, as the plaintiff says, confirmed, or, as the other side put it, regranted by the sunnud of 1777. And the plaintiff alleges that up to the year 1842 he received his dues directly from the ryots, but that since 1842 the Government has received them on his behalf, and become accountable to him for them. It is an undisputed fact that in the year 1868 there was a new revenue settlement, since which the whole of the revenue receivable by Government and assessed upon the ryots has been a money assessment, no part of the revenue being now assessed in grain.

Upon this state of facts, two distinct questions arise; first, whether in its inception and original character the Deshmukh's right is not one within the scope and operation of the Act of 1871? Secondly, whether, if that be not the case, the right has not been brought within the scope and operation of the Act by the alterations in its character that have subsequently taken place?

The judgment of the High Court of Bombay answers the first of these questions in the affirmative, and proceeds on that finding. It says, "Now according to plaintiff's own showing, it is clear that the allowance was, in its inception, either a pension or a grant of money or land revenue, or both. It was a pension or annual sum conferred, and it was a grant of land revenue made for services to be rendered. The mode in which it was to be levied appears to be immaterial. The Government of the time, having the undoubted right to levy assessment on all cultivated lands not expressly exempted from assessment, assigned a portion of such assessment or land revenue, varying each year according to the amount of the assessment which the Government reserved to itself for the remuneration of the watan-dars."

Their Lordships, without adopting every word of that judgment as their own, are of opinion that the general conclusion is correct, and think it is established by the sunnud of 1777. That document recites the representation or petition of the appellant's ancestors, from which it appears that whatever may have been the nature of the original right, the right of receiving these haks from the ryots had at all events for a considerable number of years been suspended; that as early as the time of Sivaji the haks were resumed by the Government of the day, and the

value of them credited to the Government—that is, treated as part of the general revenue of the country—certain fixed salaries being paid to the Deshmukhs; and that this system, with some variation as to the amount of the salary, continued during the time of Kanoji Angria, and was in force when the country again came under Mahratta rule. The petition of the then Deshmukhs to the Peishwa prayed to have the old and suppressed allowances restored to them; stating however that there was a dispute between them and certain other parties as to who were the proper watandars. The result was that the Peishwa recognized the right of the appellant's ancestors as between them and the rival claimants, and made an order upon the mahajans and the khots of the villages of the mahals or turufs in question, enjoining them to cause the amount of the hak on the Government jamabandi, whatever it may amount to, according to the established practice, to be paid by the ryots to the petitioners, their sons and grandsons. Now the original right of these Deshmukhs, the beginning of which seems to be lost in antiquity, was substantially, as the High Court has put it, in the nature of a grant of revenue. Their functions were those of a collector of revenue for the Government. They were authorized to retain out of what they received from the ryots, a certain per-centage upon that which was fixed as the Government revenue for themselves, paying the balance to the Government. It is difficult to see how the Government could impose upon the ryots the obligation of paying these allowances to their officers, except by the exercise of their sovereign right of imposing and receiving a revenue from all lands which were not in their nature rent free. The land revenue system in India is founded upon the notion that the State is entitled to receive a certain portion of the produce of all lands not especially exempted from assessment. Of course some governments have been more exacting than others, but the general action of native governments was to take a certain proportion. From the gross amount assessed the expenses of collection must necessarily be deducted; and whether the collectors were paid by salary, or allowed to receive a commission on their collections directly from the ryots, the sum which went into the coffers of the Government was equally reduced by the amount of their allowances.

Their Lordships are of opinion that whatever the foundation of the Deshmukhs' rights originally was, the sunnud must now be treated as the foundation of those rights as they exist. At the date of that document the receipt of the old allowances had long been interrupted. The whole of what was received from ryots went into the coffers of the State, which paid its collectors by salaries; and consequently the restoration of the old allowances by the Peishwa was in substance a grant by him of part of his land revenue, and therefore falls within the terms of the 4th Section without the aid of the 3rd as a grant of money or land revenue, conferred by a former government. Therefore their Lordships agree with the High Court in the conclusion to which they came upon the first question; and that is, of course, sufficient to dispose of the present appeal.

If it were necessary to go further and to consider whether the claim, however it might have stood on the sunnud, has been brought within the Act by what has since taken place, their Lordships would be of opinion that the judgment in the former suit affords sufficient grounds for so deciding.

That suit proceeded upon the alteration made under the revenue settlement of 1868. The plaintiff appears to have claimed six pie in the rupee upon the total amount of the assessment, which then consisted wholly of money. The Government met that claim by a contention that upon so much of the existing assessment as might be considered to represent the former grain assessment he was entitled only to the smaller percentage. The Judge decided this question in the plaintiff's favor, and allowed him the larger per-centage upon the whole of the assessment; and did so upon this, among other grounds, *viz.*, that by the change in the system of assessment his interest might have been affected, and therefore

that it was equitable to allow him the larger per-centage upon the whole of the then assessment.

His claim in the present suit adopts this definition of his rights, and seeks to enforce them accordingly. The former judgment therefore seems to show that what is now payable by Government is so payable out of the general land revenue in respect of a right, privilege, perquisite, or office formerly enjoyed within the meaning of the 3rd Section of the Act; and to negative the statement in the plaint to the effect that since 1842 the Government has received the Deshmukh's allowances as something distinct from revenue from the ryots on his behalf and as his agent, under circumstances which would make them liable to him as for money had and received.

It appears, therefore, to their Lordships that no ground has been made for disturbing the judgment of the Court below, and they must humbly advise Her Majesty accordingly. They would have been extremely sorry if they had had to remand the cause, because though it might have been satisfactory to have fuller information on some points raised in the argument, they are satisfied upon the materials before them that a fuller trial would equally result in the conclusion that the suit is within "The Pensions Act 1871," and that the plaintiff must seek his remedy by the procedure thereby provided.

Their Lordships will humbly advise Her Majesty to dismiss the present appeal, and to confirm the judgments below, with the costs of the appeal.

The 10th March 1877.

Present :

Lord Blackburn, Sir James W. Colville, Sir Barnes Peacock, Sir-Montague E. Smith, and Sir Robert P. Collier.

Company—Ratification (of Act in Excess of Authority)—Future similar Acts—Notice.

On Appeal from the Court of the Recorder of Rangoon.

Irvine

versus

The Union Bank of Australia.

A person or body of persons, not competent to authorise an act, cannot give it validity by ratifying it.

It would be competent for a majority of the shareholders present (though not a majority of the shareholders of the Company), at an Extraordinary Meeting convened for that object, of which object due notice had been given, to ratify an act previously done by the Directors in excess of their authority; and the circulation of a Report before a half-yearly meeting distinctly giving notice that the Directors had done an act in excess of their authority, and that the meeting would be asked, by confirming the Report, to ratify the act, might be sufficient notice to bring the ratification within the competency of the shareholders present at the half-yearly meeting.

But the ratification at a half-yearly meeting of a particular act in excess of authority, would not extend the authority of the Directors so as to authorise them to do similar acts in future.

In this case it was held that there was no evidence to show that any sufficient notice of the substance or effect of the Reports intended to be presented at the half-yearly meetings in question was given to the shareholders of the Company so as to lead the absent shareholders to know or even to imagine that the Directors intended to report that they had exceeded their authority, or that, by the adoption of the Report of the Directors to be laid before the meeting, an act of the Directors in excess of their authority would be rendered binding upon the whole body of shareholders.

*Mr. Cowie, Q.C., and Mr. E. Macnaghten for Appellant.
Mr. Benjamin, Q.C., and Mr. Murray for Respondents.*

Sir Barnes Peacock gave judgment as follows :—

This is an appeal from a decree of the Recorder of Rangoon in a suit in which the respondents, suing in the name of their inspector, were plaintiffs, and the appellant was one of the defendants.

The suit was brought to recover the sum of 15,296*l.* 17*s.* 6*d.*, for money advanced by the Bank to the Oriental Rice Company, Limited, and to enforce an equitable mortgage as a security for the advances.

The plaintiffs prayed, amongst other things, that it might be declared that, by virtue of the deposit by the Company of certain title deeds and the agreements accompanying the same, they were entitled to an equitable lien or mortgage upon certain messuages and premises situate in the town of Rangoon for securing the repayment of the said sum of 15,296*l.* 17*s.* 6*d.*, and that upon non-payment of that amount the defendant might be foreclosed from his equity of redemption in the said premises, or that the said premises might be sold, and the proceeds applied in payment of the said sum or such other sum as the Court might find to be due to the plaintiffs, with interest and costs.

The Company were made co-defendants in the suit, but they did not appear or defend.

The defendant (appellant) claimed the property under a purchase at a sale in execution of a decree against the Company, by which he acquired the right, title, and interest of the Company, and nothing more. That purchase was made on the 31st May 1872.

The principal question to be decided is what is the sum for which the Union Bank is entitled to a charge upon the property. On the part of the Bank it was contended that they are entitled to a charge for the full amount claimed, and on the part of the defendant (appellant), that the charge is limited to the amount of one half of the actually paid-up capital of the Company, which paid-up capital the appellant in his written statement alleged was never more than 17,100*l.*

There was some discussion at the hearing as to what really was the actual amount of the paid-up capital.

Their Lordships then expressed their opinion upon the point, and stopped the learned Counsel for the respondent. They were of opinion that it should be taken at 17,100*l.*, the amount found by the learned Recorder.

The Company was originally formed in the Colony of Victoria by Articles of Association, dated the 25th April 1861, and on the 18th August 1864 it was duly registered as a Company limited by guarantee under an Act of the Legislature of Victoria which followed and adopted the provisions of the Companies Act 1862.

By that registration the Company, by virtue of the Section of the Colonial Act corresponding with s. 196 of the Companies Act of 1862, became subject to all the provisions, so far as they are applicable to the present case, of the Colonial Companies Act, in the same manner in all respects as if it had been formed under that Act.

The Articles of Association contained no restriction or limitation on the Company's power of borrowing.

As regards the Directors, however, their authority to borrow was limited; for it was expressly stipulated by Article 50 of the Articles of Association, which were registered under the Companies Act, and of which the Bank was bound to take notice, "that subject and without prejudice to the power therein given to the meetings of shareholders and the conditions and restrictions therein contained, the Directors for the time being should have, amongst others, the following powers, that is to say, the power of borrowing and taking up on the credit of the said Company or of its property any sum or sums of money from time to time, but so, nevertheless, that the total amount to be so taken up should not exceed in the aggregate, *as an existing debt at the same time*, one-half of the then actually paid-up capital of the said Company, and that for the purpose of securing any sum or sums which might be so borrowed by the Directors, they should be at

liberty to mortgage, with or without power of sale, and otherwise to charge and encumber, all or any part of the property, estate, and effects, real and personal, of the said Company, and to accept, make, or endorse, any bill of exchange or promissory note on behalf of the said Company, or to overdraw the account of the said Company at their bankers, or to execute and give any bond, covenant, or other obligation binding the said Company, and the affairs and concerns of the said Company, both in India and Victoria and elsewhere, and that the entire and sole management, conduct, and regulation of the business and affairs of the said Company, both in India, and Victoria, and elsewhere, according to the provisions and subject to the restrictions of the said Articles of Association, should be confided to and be under the direction of the said Directors for the time being, who should have and might exercise all the powers which might be exercised by the whole of the shareholders."

It was, therefore, clearly beyond the authority of the Directors to borrow or take up upon the credit of the Company as an existing debt at the same time an amount or amounts exceeding one-half of the actually paid-up capital of the Company. There is no doubt that the authority of the Directors, limited as it was by the Articles of Association, was capable of being extended under the provisions of Article 31. But by that Article one-half of the votes of all the shareholders given at a general meeting called for the purpose was necessary.

The Article is in the following words :—

"One-half of the votes of all the shareholders given at a general meeting called for the purpose shall be competent *and necessary* to make, to enlarge, extend, rescind, alter, or repeal, wholly or in part, all or any of the provisions or powers herein contained, or to remove any Director or Trustee, or to increase or diminish the number of Directors, but that upon all other questions or business to be transacted at any meetings (except as herein specially mentioned) a majority of the votes of the shareholders present in person or by proxy and not declining to vote shall decide."

It was not contended that the authority of the Directors either to borrow or to mortgage was ever extended at a general meeting of the shareholders called for the purpose, but it was contended by the learned Counsel for the respondents, that the limitation of the power of borrowing and of mortgaging, contained in Article 50, was merely a limitation of the authority of the Directors conferred by the same Article; that it was not part of the constitution of the Company, which, if the Company had been originally formed under the Companies Act of 1862, must have been contained in the Memorandum; and, consequently, that it was not a limitation of the general powers of the Company, or of the whole body of shareholders; and that the acts of the Directors in excess of their authority might be ratified by the Company and rendered binding.

Their Lordships are of opinion that the above contention is correct, and they will proceed to consider whether the acts of the Directors in borrowing in excess of their authority were ever duly ratified by the Company.

The learned Recorder considered that there was sufficient evidence to show that the shareholders acquiesced in and approved of the acts of the Directors in borrowing and mortgaging, and he relied upon what took place at the half-yearly meetings held in 1868 and 1869.

A ratification is in law treated as equivalent to a previous authority, and it follows that as a general rule, a person, or body of persons, not competent to authorise an act, cannot give it validity by ratifying it.

By the 21st of the Articles it is provided that an Ordinary Half-yearly Meeting shall be held during the months of October and April in each year.

By the 22nd, that an Extraordinary General Meeting may be called at any time for a special object.

By the 25th, that a notice shall be sent to each shareholder, stating the day

and place of the meeting, and "also the business proposed to be transacted thereat."

By the 26th, that at every general half-yearly meeting the accounts and a statement of the Company's affairs, etc., shall be laid before the shareholders, and such meeting "may examine, allow, and confirm, or reject the accounts and report of the Directors or Auditors, so as to bind all the members for the time being of the Company, and all persons claiming under them."

The notice that a half-yearly meeting was to be held would sufficiently indicate that it was for the purposes mentioned in Article 26, but would not indicate that it was for any other purpose.

The report of the Directors referred to in Article 26 seems to their Lordships the same thing as the statement of the Company's affairs previously mentioned in the same article. There is nothing in the Articles requiring the Directors to circulate the reports among the shareholders before the meetings. There is no evidence in the case that the reports were in fact circulated before the half-yearly meetings, and the form of the reports bearing dates on the days of the half-yearly meetings looks as if they were produced for the first time when laid before those meetings.

Their Lordships think that it would be competent for a majority of the shareholders present (though not a majority of the shareholders of the Company), at an Extraordinary Meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the Directors in excess of their authority; and they are not prepared to say that, if a report had been circulated before a half-yearly meeting distinctly giving notice that the Directors had done an act in excess of their authority, and that the meeting would be asked, by confirming the report, to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting.

But if the object was to give the Directors in future an extended authority beyond what is given by Article 50, their Lordships think that it would be an alteration of the provisions contained in the Articles which, under cl. 31, could only be made by a vote of one-half of all the shareholders of the Company.

There is a wide distinction between ratifying a particular act which has been done in excess of authority, and conferring a general power to do similar acts in future.

This distinction must be borne in mind in considering whether the ratifications at the half-yearly meetings of particular acts done previously to those meetings, gave validity to acts of a similar character done subsequently.

For instance, it is important in considering whether the ratification at the half-yearly meeting held on the 30th April 1868, of the act of the Directors in borrowing 13,000*l.* when 10,000*l.* previously borrowed remained unpaid, if made out, so far extended the powers of the Directors as to authorize them to take up as an existing debt at the same time, a further sum of 23,000*l.* when the sums of 13,000*l.* and 10,000*l.* should have been paid off, notwithstanding the provisions of Article 31, which rendered the votes of one-half of all the shareholders to be given at a general meeting necessary to enlarge or extend any of the powers contained in the articles.

Their Lordships are of opinion that the ratification at a half-yearly meeting of a particular act in excess of authority would not extend the authority of the Directors so as to authorize them to do similar acts in future.

Their Lordships have now to apply the above principles to the facts of the case.

The moneys claimed in the present suit were advanced in February 1871, 10,000*l.* under the letter of credit No. 130, and 5,000*l.* under the letter of credit No. 153. (See Mr. Curayne's evidence, Record, p. 135, line 23, and the account,

p. 4 of the Record.) The balance remaining due of all sums previously advanced by the Bank had been reduced at the end of 1870 to 8*l.* 8*s.* 9*d.* (See account set out in the plaint, Record, p. 4.)

The last general half-yearly meeting of the Company was held on the 13th October 1869. At that meeting the Directors submitted their report for the period ending the 30th June 1869 (Record, pp. 40 and 41), and that report was adopted (p. 37).

According to the evidence of Mr. Curtayne (p. 135) the letter of credit No. 153 was issued on the 9th September 1869. The fact of the Directors having obtained that letter of credit could not and did not appear in the report of the Directors for the period ending June 1869, and the act of obtaining that letter of credit or of borrowing money thereon does not appear to have been ever reported or made known to the shareholders, or ratified by them. The claim, therefore, as to that 5,000*l.* must be rejected unless the ratification of the act of the Directors in obtaining previous letters of credit for 10,000*l.* and 5,000*l.*, Nos. 150 and 141, as stated in the report of 29th October 1868 (p. 37), which was ratified at the half-yearly meeting held on that date, authorized the Directors to obtain the letter of credit No. 153 after the letter of credit No. 141 of the 11th September 1868, for 5,000*l.* referred to in that report had been paid off. (See Mr. Curtayne's evidence, pp. 134 and 135.)

Their Lordships are of opinion that the ratification of the report of 29th October 1868, did not authorize the Directors to obtain the letter of credit No. 153, or to borrow the 5,000*l.* now claimed as having been advanced thereon on the 11th February 1871. The sum of 5,000*l.* advanced on the 17th February 1871, on letter of credit No. 153, must therefore be disallowed.

The only item remaining to be considered is the 10,000*l.* advanced on the 11th February 1871, on the letter of credit No. 150. (Page 4 of Record.)

That letter of credit, according to the evidence of Mr. Curtayne, p. 135, was obtained on the 23rd December 1867. It authorized the Chartered Bank of India, Australia, and China, in Rangoon, they then being the agents there of the Union Bank, to honour the Rice Company's drafts through their manager, Mr. Jamieson, on the Union Bank of Australia in London to the extent of 10,000*l.*, *at any time until the 29th March 1869.* (Page 135.)

The obtaining of that letter of credit was mentioned in the report of the Directors, presented at the meeting of the 29th October 1868.

The following is the statement contained in the report:—

"In addition to the Bank credit for 10,000*l.* with which Mr. Jamieson had been hitherto furnished to enable him to conduct the financial wants at Rangoon, another credit for 5,000*l.* has been forwarded, which Mr. Jamieson advises will be of great assistance in his operations." (Record, p. 37.)

That report was read and adopted at the said meeting. (Record, p. 36.)

It did not necessarily follow because a letter of credit for 10,000*l.* was obtained that the Directors would act upon it, in violation of Article 50, by taking up upon it an amount exceeding in the aggregate as an existing debt at the same time more than one half of the paid-up capital of the Company. The Directors did not exceed the authority conferred upon them by the Articles of Association by obtaining the letter of credit; the excess of authority was in taking up upon it a sum in excess of the amount which they were authorized to borrow.

Under the letter of credit a sum of 5,000*l.* might have been taken up and paid off, and then another sum of 5,000*l.* taken up under it, without an excess of authority.

At the time of the adoption of the report, on the 29th October 1868, the letter of credit then existing was to expire on the 29th March 1869. It was not mentioned in the report that the credit obtained was to expire on that day, but every shareholder must have known that letters of credit, in practice, are for a

limited time. It is not at all unusual, but it is not a matter of course, to extend the time if the original credit has not been acted upon.

Even if the adoption of the report mentioning the credit for 10,000*l.* authorized the borrowing at one time of the whole amount (which their Lordships are disposed to think it did not), it by no means follows that it authorized the renewal of the letter of credit and the acting upon it after the time originally limited had expired.

There was nothing in the report to lead to the supposition that the Directors had any intention to renew the letter of credit or to borrow money upon it after the 29th March 1869. The shareholders present at the half-yearly meeting might have had very good reasons for considering that it was expedient to obtain a letter of credit for 10,000*l.*, or even to borrow upon it 10,000*l.* at one time during the currency of the letter of credit, without considering whether it would be prudent or advisable to borrow 10,000*l.* at one time on the 11th February 1871, more than two years after the date of the meeting of October 1868, and when the Company might possibly consist of an entirely different body of shareholders.

But however this may be their Lordships are of opinion that there was no evidence to show that any sufficient notice of the substance or effect of the reports which were intended to be presented at the half-yearly meetings above referred to, was given to the shareholders of the Company in pursuance of the 25th clause of the Articles of Association so as to lead the absent shareholders to know or even to imagine that the Directors intended to report that they had exceeded their authority, or that, by the adoption of the report of the Directors, to be laid before the meeting, an act of the Directors in excess of their authority could be rendered binding upon the whole body of shareholders.

Their Lordships being of opinion that the act of borrowing in excess of authority was never ratified, it is not necessary to consider whether, if it had been duly ratified, the property of the Company would have become charged as a security for the repayment of the amount.

The case of the *Royal British Bank v. Turquand*, 5 Ellis and Blackburn, 248, and the same case in error 6th id., 327, were cited in the course of argument to show that the excess of authority was a matter only between the shareholders and the Directors, and that it does not affect the rights of the Bank. In that case it was said by C. J. Jervis: "We may now take it for granted that the dealings with these Companies are not like dealings with other partnerships, and that parties dealing with them are bound to read the Statute and the Deed of Settlement; but they are not bound to do more. The party here (that is in *Turquand's* case) on reading the Deed of Settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions." In the present case, if the Bank had referred to Clause 50 of the Articles of Association they would have found that the Directors were expressly prohibited from borrowing beyond a certain amount.

The case of *The Royal British Bank v. Turquand* was decided with reference to a Company registered under 7 and 8 Vict., c. 110, and Chief Justice Jervis remarked that the lender finding that the authority might have been made complete by a resolution he would have had a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done. In the present case, however, the Bank* would have found that, by the Articles of Association, the Directors were expressly restricted from borrowing beyond a certain amount, and they must have known that if the general powers vested in the Directors by Article 50 had been extended or enlarged by a resolution of a general meeting of the shareholders under the provisions of s. 31, a copy of that resolution ought, in regular course, to have been forwarded to the Registrar of Joint Stock Companies, in pursuance of s. 53 of the Companies Act, and would have been found amongst his records.

Their Lordships are of opinion that the learned Recorder was correct in holding that this case is different from that of *The Royal British Bank v. Turquand*.

It is unnecessary to consider what would have been the rights of the Bank if the amount which they advanced had not been more than one half of the actual paid-up capital, but had been advanced at a time when an unpaid debt on account of moneys previously borrowed from other persons, together with the money lent by the Bank, would have exceeded the amount which the Directors were authorized to borrow. In the present case, the 10,000*l.* and 5,000*l.* were both lent by the Bank itself.

It was argued that the advances made by the Bank under the letter of credit did not amount to a lending by the Bank or a borrowing by the Directors. There is nothing in that objection. If, however, it was not a borrowing, the Directors had no power to pledge the property sought to be affected by the equitable mortgage as a security for the repayment of it. It was only for securing moneys borrowed that the Directors were authorised to mortgage or charge the property of the Company.

For the above reasons their Lordships are of opinion that the plaintiffs are not entitled as against the defendant to a charge on the property beyond the amount of one half of 17,100*l.*, the paid-up capital of the Company.

The amount therefore allowed to the plaintiffs by the decree of the lower Court must be reduced, and their Lordships will humbly advise Her Majesty that the decree be reversed, and that it be declared that the plaintiffs had a valid equitable mortgage on the property mentioned in the plaint for the principal sum of 8,550*l.* only.

It was objected at the hearing on the part of the appellant that the decree ought to have been for a foreclosure, and not for a sale; but at the close of the case their Lordships were informed that the property had been sold under the decree, and that the money had been deposited in Court; and that the appellant does not object to the sale.

Their Lordships will therefore further advise Her Majesty that it be ordered that the costs of the suit in the lower Court, both of the plaintiffs and of the defendant respectively, as taxed by the lower Court, be paid to the said parties respectively out of the proceeds of the sale of the property which are now in Court, and that out of the balance of such proceeds there be paid to the plaintiffs a sums of rupees equivalent, at the rate of exchange current between Rangoon and England at the time of the filing of the suit, to the principal sum of 8,550*l.*, with interest thereon, at the rate of 8 per cent., from the 5th October 1872, to the date of the sale of the property, together with a proportionate part of the accumulations, if any, of the proceeds of the sale, and that the residue of the said proceeds and of the accumulations thereon, if any, be paid to the defendant appellant.

The respondents must pay the costs of this appeal.

• The 24th March 1877.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Contract—Coercion.

On Appeal from the High Court at Calcutta.

Baboo Prem Narain Singh and others
versus
 Baboos Parasram Singh and Bholonath Singh.

Baboo Prem Narain Singh and others
versus
 Baboo Rooder Narain Singh.

(*Consolidated Appeals.*)

HELD that it would not be equitable to uphold an ikrarnamah executed by the respondents (three young men) in favor of their uncles and cousins, whereby they parted with a half of their property, and executed without any consideration whatever, and very shortly after they had come to their property, and when they were not fully acquainted with their rights and do not appear to have had any professional advice, and when the appearance of their uncles with a large force, the possession taken of their property, the institution of criminal proceedings, and other circumstances constituted a state of things likely to overawe them and materially to affect the free exercise of their will.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Appellants.
Mr. Cowie, Q.C., and Mr. Doyne for Respondents.

Sir Robert Collier delivered judgment as follows :—

This suit was brought under the following circumstances. Theoraj Singh had three sons. One of his sons, Tej Narain, who died in 1819, left two widows, who died respectively in 1857 and 1859. The widow who died last left a daughter Sribatti, who married Omrao Singh—a daughter who became insane during her mother's lifetime. This daughter had three sons, Rooder Narain, Parasram, and Bholonath, who are the plaintiffs in the two suits which may be treated for all purposes as one. The defendants are some of them the sons, and others the grandsons of Behari and Purbhoo Narain, the other two sons of Theoraj Singh. The plaintiffs bring their suit for the purpose of setting aside an ikrarnamah, executed by them on the 22nd December 1859, whereby they gave up what may be stated generally as a half of their share of the property of their grandfather Tej Narain to the defendants, and they also claim to recover that half which they then gave up.

The Subordinate Judge decided the case in favor of the defendants, dismissing the plaintiffs' suit. That decision was reversed by the High Court, who set aside this ikrarnamah upon grounds which may be thus shortly stated—that the ikrarnamah was given without consideration; that the eldest plaintiff was just of age, and the two others under age, at the time that it was granted; that they executed it without sufficient information of their rights, or sufficient advice, and under undue influence and pressure.

It appears to their Lordships convenient in the first place to consider what were the rights of the respective parties at the date in the case which is most material, namely, the death of Indrabati, the latter surviving widow of Tej Narain, which occurred on the 7th December 1859. At that time Sribatti, the daughter of Indrabati, was alive and married to Omrao Singh, but a lunatic. Her three sons, who have been before mentioned, were, according to their Lordships' view, of about the ages which are ascribed to them by the High Court; but they do not think it necessary, any more than the High Court did, to state precisely what they consider to be the age of each. It will be enough to say that the eldest does not appear to have been very much over age. According to their Lordships' view, these three grandsons of Tej Narain were clearly entitled to the property of Tej Narain.

Then comes the question, what that property was? Now it appears that in 1802 a deed of family partition was executed. At that time the mouzahs belonging to the family were fifty. Two may be put out of the question. One seems to have been appropriated to the support of the widow of Deoraj, a brother of Theoraj Singh; forty-eight remain. Of those, forty were divided among the

three brothers, Behari, Tej Narain, and Purbhoo Narain, Tej Narain taking fourteen, and the other two brothers thirteen. It appears further that there were eight mouzahs which were held free from Government Revenue, and which were not divided either by name or by metes and bounds, but with respect to which there is this general expression at the end of the document: "Whereas we, all the shareholders, have divided among ourselves all the villages belonging to our ancestral inheritance." The effect of this document appears to their Lordships to be that, with respect to the forty villages, they were actually divided, as it were, physically; and with reference to the others, that there was a division, each party having a third share. And it appears to them further that the High Court is right in saying that this division was recognised, for they come to the conclusion that upon the death of Tej Narain, his widows were permitted and did take possession, and keep possession, not only of the 14 mouzahs, but of the undivided share, as far as it could be taken possession of, of the other mouzahs; they were permitted to take possession and did retain possession until their deaths.

That being so, in their Lordships' view, Rooder Narain, Parasram, and Bholonath, the plaintiffs, were entitled clearly to the whole property in dispute; and their uncles and cousins, who were the defendants, had no title or claim to title to any portion of them. It has been indeed said that before a certain decision, which is called the Shevagunga case, there may have been an impression that the law was different, but, on referring to that case, it does not appear to their Lordships that it bears upon the present question. It may be enough to say that in that case it was decided that "in a united Hindoo family" (and that term must be borne in mind) "where there is ancestral property, and one of the members of the family acquires separate estate on the death of that member, such separate acquired estate does not fall into the common stock, but descends to the male issue, if any, of the acquirer, or, in default, to his daughters, who, while they take their father's share in the ancestral property, subject to all rights," and so on. Then, "Where property belonging in common to a united Hindoo family has been divided, the share of a deceased member of the family goes in the general course of descent of separate acquired property." But in this case it appears to their Lordships that at the date to which reference has been made, namely, the death of the last surviving widow, Indrabati, there was no joint property and no joint family, for not only had the property been all divided in 1802, but the family were separated in food and in lodging. It appears to their Lordships, therefore, that even if this Shevagunga case had never been decided, there could have been no rational doubt or dispute that the plaintiffs were the heirs of their grandfather in respect to the whole of the estate now claimed.

Those being in their Lordships' view the rights of the parties, it remains to enquire what was done? There is undoubtedly a good deal of conflicting evidence, but the view which their Lordships take of it is in substance this:—The defendants, Inder Narain, Bodh Narain, and Ram Gopal appear to have come to the family house, from which the deceased had removed shortly before her death to a place which is sometimes called Babbni. They appear to have come with a large body of retainers, undoubtedly calculated to inspire terror, and to have taken possession of the whole property of the deceased, to which they had no right whatever, thereby acquiring a very great advantage over these young men. It may be that the young men were prepared also to resist, and to use force for the maintenance of their rights, and that they would have been assisted by their father, Omrao, and by Juggut, as he is sometimes called, or Jugroop, the father-in-law of the eldest of them. Both sides appear by their petitions to have entertained serious apprehensions of an affray. The Government thought it necessary to interfere. They sent officers for the purpose of keeping the peace, and they issued orders summoning the parties before them, and binding them to keep the peace.

It was in this state of circumstances that the proceeding took place to which great importance has been attached by the appellants. What is called a punchayet was formed. Three persons acted as arbitrators, Hem Narain, and Dabi Singh, who appear to have been neighbouring zemindars, and Juggut Koonwar, who was the father-in-law of the eldest of the grandsons. We have but little information as to what was referred to this punchayet and what the punchayet recommended, in fact almost the only information on this subject which we have is from a deposition of Dabi Singh taken in another suit, to which suit perhaps it may be as well now to refer for the purpose of getting rid of it. It appears that soon after the execution of this ikrarnamah Omrao Singh, the father of the plaintiffs, filed a suit for the purpose of obtaining possession of the property in dispute on behalf of Sribatti, his wife, whom he alleged not to have been a lunatic at the time of the death of Indrabati, and therefore to have succeeded to her inheritance. He also in that suit sought to set aside this ikrarnamah. That case came before this Board and was eventually decided upon the ground that it was shown that Sribatti was a lunatic and could not inherit, therefore Rooder Narain, Parasram, and Bholonath, her sons, would inherit instead of her. That was the only point decided. Their Lordships at this Board give no decision whatever upon the question of the ikrarnamah. So much by way of parenthesis. This witness, Dabi Singh, who had been examined in that case, gives an account which appears to be almost the only account we have of what took place before the punchayet. He says, "No coercion, etc., was exercised on any one. Baboo Omrao Singh also was present at the time of the execution of the ikrarnamah, and he also consented to the execution of the ikrarnamah, at the same time having appointed a punchayet composed of Baboo Hem Narain Singh and me the witness, and Juggut Narain Koonwar and others. He said in an entreating manner that Rooder Narain Singh's grandmother has said that she gave an eight annas share to her daughter's sons, and an eight annas share to Baboo Inder, Narain Singh, and others, the husband's relatives. In conformity with this, settle our dispute. We did so accordingly," and so on. With respect to this it may be observed that, on the part of the defendants, evidence was given to the effect that the widow Indrabati had in fact treated the defendants as entitled to the property, but had put it to them as it were *ad misericordiam* to allow her grandsons to have a half share of it. The High Court disbelieved that evidence; and it would appear that they disbelieved also this statement of this witness. If this statement is untrue, we have no reliable evidence whatever of what came before the punchayet or what was done by it. If it is true, it would appear to amount to this, that the defendants having with a high hand taken possession of an estate to which they had no right, the father of the plaintiffs, who is sometimes described as a timid man, entreats them to give half to his sons, on the ground that Mussumat Indrabati had left it to them, or desired that it should be left. If this be so, so far from showing that the plaintiffs were acquainted with their rights, it tends to show that they were not acquainted with them; and that they had some notion that Indrabati had a power of disposing of the estate, which she had not. But the compromise, as it has been called, entered into in reference to this punchayet is altogether silent as to what is recommended to be done by the arbitrators. It is to this effect: "Whereas in consequence of the death of Indrabati," and so on, "who was our maternal grandmother and my (Baboo Omrao Singh's) mother-in-law, a dispute about her estate existed between us," and so on; "and whereas by the arbitration of a punchayet composed of" so and so, "besides respectable neighbours, the dispute between us, which might have resulted in a serious affray, was settled amicably between us by the arbitrators to-day, and now there is no cause of dispute which might result in an affray between us; therefore we have executed this acknowledgment, undertaking to abstain from any affray. We do declare that if we again raise any cause for an affray we shall personally, without demur, pay a fine" of so and so. This docu-

ment is altogether silent as to any division of the property or anything to be done by the parties, except to abstain from an affray; and it may be here observed that it would appear conclusively from this document, what indeed might be inferred from other evidence, that there was very serious apprehension of an affray, and that a breach of the peace was, to say the least, imminent, a state of things altogether inconsistent with the account of the defendant's witnesses (the one subject on which they all agree) that there was not only no affray, but absolutely no apprehension on the part of anybody of the possibility of an affray, but that everything was perfectly peaceful and orderly. Seven days after the date of this document the ikrarnamah in question was executed. It may be here observed that this ikrarnamah contains no reference whatever to the punchayet or to the document which had been executed seven days before. It speaks of Indrabati having taken possession of all the shares and how she sent in her lifetime for Inder Narain and Bodh Narain, and so on, "and gave us the declarants out of the whole of her share an eight annas of the immoveable property." It states, therefore, a gift by this lady of half the property when manifestly she had no power to dispose of any of it. It may perhaps be here observed, with reference to the doubt expressed by the High Court, as to whether it is true that this lady did dispose or affect to dispose of the property in the manner alleged, that she asserted at the time she took possession of the property and subsequently in a petition of 1852 that she had the sole right to the property, and that the plaintiffs were her sole heirs. This document, which need not be further referred to, contains an agreement to divide the property between the plaintiffs and defendants. On the 28th January following there was a proceeding which has been a good deal relied upon on the part of the defendants. It appears that both these young men went before the Criminal Court, and they there made depositions which have been referred to—depositions very like each other—in which they state that they have been charged with an unlawful assembly, but deny that they had taken part in an unlawful assembly, and state the substance of this ikrarnamah as a compromise, which they had entered into for the purpose of showing that they ought not to be convicted of any such offence, and they are bound over in their recognizances not to commit an offence. The young men seem to have been brought before the Court, and put under recognizances some considerable time before, in pursuance of an order of the Court. These depositions appear to their Lordships substantially a part of the same transaction, and it may be that at this time the plaintiffs were under the impression that the ikrarnamah they had executed was binding upon them. But, undoubtedly, not long afterwards, in the action which is brought by their father, they seek to repudiate, as far as they can repudiate, the transaction.

Looking at the whole case, the main features of it appear to be these: These young men execute a deed, whereby they part with a half of their property. It is, in their Lordships' view, executed without any consideration whatever. It is executed very shortly after they had come to their property, and when it may be considered as, at all events, doubtful whether they were fully acquainted with their rights; indeed the evidence in the case tends to show that they were not fully acquainted with their rights. At the time of the execution of a most important document they do not appear to have had any professional advice; and further, the appearance of their uncles with a large force, the possession which was taken of their property, the criminal proceedings, and the other circumstances which have been referred to, constituted a state of things likely to overawe them, and materially to affect the free exercise of their will.

It appears to their Lordships, therefore, that it would not be equitable that this ikrarnamah should be upheld. Under these circumstances, they are of opinion that the judgment of the High Court was correct, and they will humbly advise Her Majesty that that judgment should be affirmed, and this appeal dismissed with costs.

The 18th April 1877.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Privy Council (Order of)—Costs—Interest—Practice (Execution of Decree)—
Limitation—Construction.*

On Appeal from the Chief Court of the Punjab.

Forester and others

versus

The Secretary of State for India in Council.

The Secretary of State for India in Council

versus

Forester and others.

Where an Order of Her Majesty in Council is silent as to interest upon the costs of the decree, the Judge of the Indian Court which has to execute the decree has no power to direct payment of those costs with interest.

Semble.—The existing practice, as to Orders in Council as well as to decrees of the Indian Courts, is that interest cannot be given in execution unless it is specially directed to be given.

Where an Order in Council, in reversing the decrees of both Indian Courts, directed that the costs of the suit, so far as they had been occasioned by the improper plea of the Statute of Limitations, should be paid by the defendants to the plaintiffs; it was held, upon the true construction of the Order, that the intention of the Judicial Committee was to give the plaintiffs the whole cost of the suit, so far as they had been paid, whether incurred in the three Courts in which they were directed to be taxed or in the Court of first instance.

In this case cross appeals were instituted by the parties against certain decrees made by the Chief Court of the Punjab, in 1875, for the purpose of giving effect to Orders of Her Majesty in Council, by which General Lord Forester and others representing the estate of the late Mr. Dyce Sombre were declared entitled to certain costs incurred in the Courts of India; and the main questions which now arose were as to the amount they were entitled to recover in respect of these costs, and at what rate interest should be allowed upon such costs, or upon any part of them. The litigation has lasted since 1848, but the suit was decided on its merits as late as 1873, and the question of costs was alone involved in these appeals.

Mr. Leith, Q.C., and Mr. Doyne for Appellants.

Mr. J. D. Mayne for Respondent.

Sir James Colville delivered judgment as follows:—

These appeals arise out of proceedings taken in the Chief Court of the Punjab to give effect to an Order of Her Majesty in Council made on the 5th day of February 1873.* That order was designed to determine finally a litigation which had subsisted for a great many years, first between the committee of the late Mr. Dyce Sombre, and, after the death of that gentleman, between his representatives and the Government of India, touching the liability of the Government for a seizure of certain arms and military stores effected upon the death of the Begum Sumroo. It was a peculiar order, because after reversing the decisions of the Indian Courts, declaring the seizure to have been wrongful, and ascertaining the value of the arms and munitions of war, and the amount of the damages to be paid by the defendants to the plaintiffs, it proceeded, with the consent of the Counsel on both sides, to direct payment of that sum to be made in this country, leaving nothing to be carried out in India except the final

* The judgment of the Judicial Committee is reported in 18 W. R. 349; 2 Suth. P.C.R. 628.

direction as to costs, which was, "That the costs of the appellants in the Chief Court of the Punjab, and in the Court of the Commissioner at Hissar, and in the Court of the Deputy Commissioner of Delhi, be taxed and ascertained by the proper officers of those Courts respectively, and that the amount of the costs of the appellants in all the Courts in India be paid to the appellants in India by the respondent."

After various proceedings had in the Chief Court of the Punjab the Order under appeal was made. The following are the material passages in it. "The costs taxed and ascertained to have been incurred in India by the plaintiffs, appellants, which shall be payable by the defendant, respondent, amount as per memorandum at foot to Rs. 12,354-12-0, but no interest is allowed on such costs." And, "The Court further orders and decrees that the defendant shall refund to the plaintiffs the sum of Rs. 1,014, with interest thereon, from the 11th September 1849 to date of payment, at the rate of 12 per cent. per annum, and a further sum of Rs. 5,309, with interest thereon, from the 4th August 1865 to date of payment, at the rate of 12 per cent. per annum."

Against this order the appeal and the cross appeal have been brought. The appeal of the plaintiffs is in effect that interest ought to have been allowed upon the Rs. 12,354 12 annas in a certain way. The Judges of the Chief Court of the Punjab had held that, in executing the Order of Her Majesty in Council, they were not at liberty to give any interest upon the costs, because the order contained no direction for the payment of interest in respect of such costs; and it may further be observed that the mode in which the plaintiffs in the Court below sought to have the interest which they claimed computed was a very peculiar one. They asked to have the gross principal amount of the plaintiffs' costs, viz., the Rs. 12,354 12 annas, divided into four sums, and to have interest computed on each of such sums from the date of the decree of the Court wherein the costs which it represented had been incurred. So far as their Lordships are aware, there is no instance of such a course having been adopted, certainly none has been brought before them during the somewhat lengthy argument which has taken place upon these appeals. The Committee that made the report to Her Majesty upon which the Order in Council was made, if it had intended to place, by means of some such direction, the parties in the situation in which it considered they would have stood if everything had been done rightly in the Lower Courts, would of course have been competent to do so; but that a subordinate Court executing an Order in Council which is silent upon interest, is at liberty to interpolate such a very special direction into that order, is a proposition which seems to their Lordships to be wholly unsustainable. It is not necessary for their Lordships to consider from what other date interest should be calculated, because they are of opinion that the Chief Court of the Punjab is right in its conclusion; that where the Order in Council is silent as to interest upon the costs decreed, the Judge of the Indian Court which has to execute the decree has no power to direct payment of those costs with interest.

The learned Counsel for the appellants relied upon what they said had been the course of practice in India. In determining what is the existing practice in India, their Lordships think they ought first to consider what are the statutory provisions which govern the present procedure of the Courts in India. Those which are material to the present question are to be found in ss. 10 and 11 of Act XXIII of 1861. The words of s. 10 are, "When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum, adjudged from the date of suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of suit, with further interest on the aggregate sum so adjudged, and on the costs of the suit from the date of the decree to the date of payment." This Clause seems to give

the Courts a discretionary power to allow interest on costs, rather than to make it imperative upon them to do so. The learned Counsel for the plaintiffs, however, relied on certain decisions of the High Court of Bengal, which they said established that an order for costs necessarily implied that the party in whose favor they were decreed might take out execution for them, with interest from the date of the decree to the date of payment. It appears, however, that the more recent and authoritative decisions upon s. 11 of Act XXIII of 1861 are the other way. It is sufficient to mention the case reported in the 6th Weekly Reporter at p. 109, which was a decision of the full bench of the High Court of Bengal; and that before Mr. Justice Bittleston, which is reported in the 3rd Madras High Court Reports, p. 401. Those cases seem to have established as to decrees of the Indian Courts that the Judges of the subordinate Courts executing those decrees have no right to allow interest unless the decree which is to be executed has specifically directed the allowance of that interest. It was said that these cases or some of them related to the principal moneys decreed, or to mesne profits; but so far from there being any authority in favor of a distinction between these and costs, the case of *Rodger v. The Comptoir d'Escompte de Paris*, 7 Moore P.C.C., N.S. 331, is an authority for the proposition, that a claim for interest on costs in that respect is less favored than a claim for interest on the principal money decreed. Since the before-mentioned cases have been determined as to the practice of the Courts of India and the powers of the Judges executing decrees of those Courts, the power of a Subordinate Court executing an Order of Her Majesty in Council has also been considered in the two cases cited from the Weekly Reporter,* in which judgment was given by Mr. Justice Mitter; and it appears, that as to Orders in Council as well as to decrees of the Indian Courts, the existing practice is that interest cannot be given in execution unless it is specially directed to be given.

It appears to their Lordships that the principle of the decisions which have established this practice is sound, and that the plaintiffs have failed to show that the order made by the Chief Court of the Punjab is erroneous, in that it has refused to allow interest on the sum of Rs. 12,354 12.

Their Lordships have now to consider the cross appeal. The first point taken on that appeal is that the defendants have been erroneously charged so much of Rs. 12,354 12 annas as consists of costs which were incurred in the Delhi Court before Mr. Gubbins, and were dealt with by the order in Council of February 3rd 1858. Now, that prior order in Council came about in this way: when the suit was first brought in the Zillah Court of Delhi by the committee of the lunatic, Mr. Dyce Sombre, Mr. Gubbins, the Judge of that Court, dismissed it on the ground that the claim was barred by the Statute of Limitations. His decision was confirmed on appeal by the Sudder Court of Agra. Against both decrees there was an appeal to Her Majesty in Council. The Judicial Committee thought that the decisions were erroneous; reversed them; and directed that the costs of the suit, so far as they had been occasioned by the improper plea of the Statute of Limitations, should be paid by the defendants to the plaintiffs. That order for payment was never wholly carried out. It was partially carried out, because the costs incurred in the Appellate Court were paid; but the costs incurred in the Court of First Instance—the Court of Mr. Gubbins—do not appear to have been paid; and it is contended on the part of the defendants now that those costs cannot properly be given as part of the costs payable under the order in Council of 1873.

It appears to their Lordships wholly unnecessary to consider the arguments which have been addressed to them touching the plea set up in the Courts of the Punjab, that the claim for these unpaid costs was barred by the Statute of Limitations, or the orders passed upon it. Whether it would have been proper for their Lordships in any case to express an opinion as to the merits or effect of those orders, in such a proceeding as this, is very questionable; but it appears to their

* 15 W. R. 335; 16 W. R. 303.

Lordships that those orders, taking them at their highest, could only bar the remedy given by the Order in Council of 1858, for the recovery of those costs; and that upon the true construction of the Order of 1873, it was the intention of this Committee to give the plaintiffs the whole costs of the suit, so far as they had not been paid, whether incurred in the three Courts in which they are directed to be taxed, or in the Court of Mr. Gubbins. The ordering part of the Order in Council directs, not only that the costs in the three specified Courts are to be taxed, but that the amount of the costs of the appellants in all the Courts in India are to be paid to the appellants in India by the respondents; and the judgment of the Committee on which this Order was drawn generally expresses that the plaintiffs were to receive their costs of the suit. It also appears that when this matter was discussed in the Court below, Mr. Plowden, who appeared for the defendant, consented to the costs in question being ascertained in that Court, and that thereupon the Court made an order that they should be included in the Rs. 12,354 12, and paid by the defendant to the plaintiffs. This seems to their Lordships to have been a very proper concession on the part of Mr. Plowden; inasmuch as it was equitable that these costs should be paid to the successful party; and reasonable that there should be one order made for the payment of all the costs of the suit, instead of leaving open any questions touching the rights of the plaintiffs under the Order in Council of 1858.

Their Lordships, therefore, feel no doubt in affirming the judgment of the Chief Court of the Punjab upon this point.

The next question raised by the cross appeal was with reference to the refund of the sum of Rs. 1,014. There were three points made upon this item: one, that the principal had already been repaid; another, that it was subject to the same objection as that which has just been disposed of with respect to part of the Rs. 12,354; and the third, that it ought not to have been ordered to be refunded with interest. Of the supposed repayment there is no evidence whatever. At page 54 of the record, the senior Judge of the chief Court of the Punjab says:—"The Court, referring to annexure D., has now before it a sealed copy of the order of Mr. Gubbins, dated 11th September 1849, showing that the sum of Rs. 1,014 was paid by the plaintiffs for the defendant's costs in that year;" and no suggestion that it had ever been refunded seems to have been made before him. As to the second point, it is sufficient to say that the general obligation of Government to refund whatever they had received in respect of the costs awarded by the erroneous decrees, although there was no positive direction for a refund in the Order in Council, having been admitted, and properly admitted, the objection that this particular sum was paid for costs incurred in Mr. Gubbins' Court, cannot, for the reasons already given, be allowed to prevail.

Upon the question whether this sum, and the further sum of Rs. 5,309, ought to have been ordered to be refunded with interest, their Lordships are of opinion that this case stands clear of what is ruled in the final part of Lord Cairns' judgment in *Rodger v. The Comptoir d'Escompte de Paris*, because they find that in the proceedings of the Chief Court of the Punjab, at page 54 of the record, there was a submission to the discretion of the Court, whether interest on these sums should be allowed or not. With the exercise of that discretion in the particular case their Lordships are not disposed to interfere, considering that it is but equitable that the party who has received money under a decision afterwards found to be wrongful should account for that money with interest.

It has, however, been admitted at the bar that there has been an error in the mode in which the interest on the Rs. 5,309 has been directed to be computed, by reason of that sum having been received in three different portions, and at three different dates. It will be necessary to correct this error, but as it ought to have been pointed out to the Court below, the variation in the order will not affect their Lordships' order as to the costs of the appeal.

Their Lordships will therefore humbly advise Her Majesty to vary the order under appeal so far as it directs interest at the rate of 12 per centum per annum on the sum of Rs. 5,309 to be computed and paid from the 4th August 1865, by directing that as to Rs. 3,159, part of the said sum of Rs. 5,309, such interest be computed and paid from the 27th August 1867; that as to Rs. 1,150, other part of the said sum, such interest be computed and paid from the 27th August 1867; and that as to the further sum of Rs. 1,000, being the remainder of the said sum, such interest be computed and paid from the 4th August 1865; but, subject to such variations, to confirm the said order under appeal, and to dismiss both the appeal and cross appeal. Both parties being thus found to be in the wrong, there will be no costs of the appeals on either side.

The 2nd May 1877.

Present :

Sir James W. Colville, Sir Robert Phillimore, Sir Barnes Peacock,
Sir Montague E. Smith, and Sir Robert P. Collier.

Marine—Collision—Negligence—Onus probandi.

On Appeal from the High Court at Calcutta.

Hart
versus
Avigno.

(The "Dacca" and "Michelino.")

Where a collision took place by the stern of the "Dacca" running amidships into the port side of the "Michelino" while at anchor, the burden of proof lay very heavily upon the "Dacca" to show that the collision so caused with a vessel properly at anchor in a proper place was not the consequence of negligence and bad seamanship; and their Lordships were of opinion that the evidence clearly established that the "Dacca" was to blame for not keeping a proper look-out, which reason alone prevented her from seeing the light of the other vessel at anchor.

This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal, which reversed a decree of one of the Judges of the Court of Vice-Admiralty Jurisdiction in a suit promoted by the respondent, as the master of the Italian barque called the "Michelino," for the recovery of damages in consequence of a collision which took place between the "Michelino" and the "Dacca." The "Michelino" was an Italian barque, lying about three miles from the fairway buoy of the pilot's station near the entrance of the Rangoon river. She had been at anchorage there from the 3rd to the 12th February. The collision took place by the stern of the "Dacca" running amidships into the port side of the other vessel while at anchor. The burden of proof, therefore, lies very heavily upon the "Dacca" to show that the collision so caused with a vessel properly at anchor in a proper place was not the consequence of her (the "Dacca's") negligence and bad seamanship.

Now, the defence which she sets up is substantially this: that the barque had not, at the time, a proper light, in the sense of not being sufficiently bright, and that the light was not placed in a proper place. Those who appear on behalf of the "Dacca" have relied very much upon a rule of the port of Rangoon, which provides that all vessels in the port and in the roadstead there shall carry a light upon their starboard foreyard-arm. There is no question in this case that this rule was not complied with, that the light which was carried by the barque

was hanging on the fore-stay about 19 or 20 feet from the lower deck. There is no dispute at all that this light was carried in that place, and was burning, howsoever, at the time of the collision.

Their Lordships are by no means satisfied that, in the circumstances of this case, the rule which has been referred to was binding upon the barque. She appears to have been anchored, perhaps in a fairway, but certainly on the high sea. Their Lordships, therefore, are not by any means satisfied that the rule was binding upon this foreign vessel; and it would be a question deserving of very great consideration whether, in these circumstances, the rule which was binding upon her was not rather the sailing rule, which is of international obligation, and which enjoins that the light shall be carried where it can be best seen, not higher than 20 feet. Their Lordships, however, in the view which they have taken of this case, do not think it necessary to pronounce any positive opinion upon this point, because it appears to their Lordships that the barque did carry a light of such a quality and so placed as to apprise approaching vessels that she was lying at anchor.

The question, therefore, immediately arises, how came it to pass that the "Dacca," which was entering this roadstead on her way to Rangoon, between two and three o'clock on the morning of the 12th February, did not see this vessel, which was lying at anchor, as has been described, and with a light burning, which, as the evidence appears to show, would have been visible a mile distant.

Now, the reasons assigned are, first, that there was a kind of haze upon the water, which prevented the light being as well observed as it otherwise would have been. Their Lordships are of opinion that the evidence does not sustain that allegation of the defence. The next reason is that, shortly before this collision, the pilot vessel, called the "Spy," which lay behind the barque at the entrance of the Rangoon river, threw up a blue light; and the "Dacca" having replied to that light, another blue light was thrown up, which disclosed to the "Dacca," for the first time, that the barque was under her starboard bow, or on her starboard side; and it has been said that possibly the blue light might have been either in one line with the light of the barque, or that it might have dazzled the eyes of those on board the approaching "Dacca," so that they did not see the white light which was unquestionably burning on board the barque.

Their Lordships have consulted their nautical assessor on this point, and he is clearly of opinion that the blue light would not have any such effect, but rather the contrary, namely, that of disclosing entirely the whole side of the barque. There is no evidence which their Lordships think can be relied upon to show that the blue light had the effect, in any way, of obscuring the white light of the barque.

Their Lordships have been referred to the case of the "Telegraph," to which it may be well to advert. That was a case decided by this Board in the year 1854, in which the Privy Council took a different view of the merits of the case from that which had been adopted by the Court below, and they reversed the sentence of the Court of Admiralty. The language of the learned Judge, Mr. Justice Patteson, who delivered the judgment, is important. At the close of the judgment, he says, "Here is the light in the mizen rigging, here is the steam-vessel coming up, and no doubt the mizen mast and the sail that was brailled up, and other things, might very likely have hidden the light from view, but if it had been at the top of the mast it could not have been hidden. Therefore, we cannot see how there can be the slightest doubt on the question; and we are assisted by nautical men, who take the same view of the case. We are clearly of opinion that the view taken by the Trinity Masters is not a just and proper view, but that the light was in all probability hidden by the position in which it was placed. At the mast head it might, and in all probability would, have been seen." It is clear, therefore, that the circumstances of that case render it wholly

inapplicable to the one which their Lordships are now called upon to decide. It is also to be observed that in this case the sailing rules clearly applicable were plainly violated.

Their Lordships, on referring to the two judgments which have been given in the Courts below, think it right to observe that in the interval which happened between the judgment given by the Judge of the Vice-Admiralty Court and that given by the Appeal Court of Judicature at Bengal, evidence had been admitted which would, perhaps, have materially affected the judgment of the Court of First Instance, if it had been laid before it. That evidence consisted in a remarkable letter addressed by the captain of the "Dacca" to his agents on the morning of the collision, in which he described the disaster as being attributable "to the ship being directly anchored in a line with the pilot schooner, and in the very track of our mail steamers," and in which there is no reference, from beginning to end, to the accident being attributable to the absence of light or the improper position of the light on board the barque. The other evidence admitted by consent had been taken before the Court of the Recorder; and upon that evidence the Appeal Court came to a very clear opinion that while, on the one hand, the negligence of the "Dacca" was clearly made out, in running into this vessel, lying in her proper anchorage water, there was no contributory negligence on the part of the barque. This Court was of opinion that the "Dacca" was to blame on various grounds: for having gone at too high a rate of speed, for having put her helm a-starboard, and for not having a proper look-out. Their Lordships offer no opinion upon the question as to whether the vessel was going at too high a rate of speed, or whether she was right or wrong in putting her helm a-starboard. But, on the other ground, namely, that she was not keeping a proper look-out, their Lordships are of opinion that the evidence, carefully examined and investigated, clearly establishes that proposition; and they are at a loss to find any sufficient reason whatever, except that of a bad look-out, which could have prevented this approaching vessel from seeing the light of the barque at anchor. Their Lordships are, therefore, of opinion that the sentence of the Court of Appeal must be sustained.

With respect to what was urged by Mr. Clarkson, at the close of his speech, on the subject of the bottomry and the conditions upon which execution was stayed, their Lordships feel that they cannot interfere with the exercise of the discretion of the Court below upon that point.

On the whole, therefore, their Lordships will humbly advise Her Majesty that the sentence appealed from be affirmed, with costs.

The 3rd May 1877.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Hindoo Law—Inheritance—Brothers of the Whole and Half Blood,

On Appeal from the High Court at Calcutta.

Sheo Soondary

versus

Pirthee Singh and others.

By the law of the Dayabhaga, a brother of the whole blood succeeds, in the case of an undivided immoveable estate, in preference to a brother of the half blood.

Mr. Cowie, Q. C., and Mr. Graham for Appellant.
No one for Respondents.

Sir Montague Smith gave judgment as follows:—

The single question in this appeal is whether in a joint family a brother of the half blood is entitled to succeed equally with a brother of the whole blood to the share of the deceased brother. It arises at the close of a long litigation, and in consequence of a remand which was made by Her Majesty, upon the recommendation of this Committee, on the hearing of a former appeal in this suit.* It is not necessary to recount at any length the proceedings in the suit, because the determination of the above question will support either the decree of the Subordinate Judge or the decree of the High Court which reversed that decision; but it may be stated that the action was brought by the present respondent, Pirthee Singh, against the Court of Wards, who were representing Sheo Soondary, to recover an estate called Talook Sunkra in Zillah Bhaugulpore. The estate had belonged to Soomaer Singh, the common ancestor of the plaintiff and Sheo Soondary, and on the original hearing of the suit in India, and upon the former appeal here, it appeared that two only of his descendants were before the Court, namely, the plaintiff and the defendant. Pirthee Singh was one of the sons of Soomaer, and Sheo Soondary was a granddaughter of Manick, another son. Manick left an only son of the name of Durbijoy, and he had died leaving his daughter, Sheo Soondary, as his heir and representative.

The questions originally contested in the suit were whether Pirthee Singh was the legitimate or illegitimate son of Soomaer Singh, and an issue was directed to try that question. The other question was one of law, whether the law of primogeniture obtained in the family of Soomaer Singh or not. Those were the two questions upon the former appeal. It became, however, necessary to ascertain whether the family were governed by the law of the Mitakshara or by the law of the Dayabhaga, and how that was remained uncertain upon the record as it was brought up before this Committee. The result of the appeal was that their Lordships recommended that the cause should be remanded to try the following issues: "First: Whether Soomaer Singh left any and what legitimate sons other than Manick Singh in the pleadings mentioned, and the respondent; and, if so, whether they are living or dead? And if any of them are dead, when they respectively died, and whether they left any and what male descendants?" That issue was sent down, because upon the hearing of the appeal it appeared that there were other sons of Soomaer besides those who were the parties to the record, and their Lordships felt that it would not be right to give a decision disposing of this property without some enquiry being made respecting the other sons. The facts which appeared upon the trial of this issue have led to the question which is now before their Lordships for decision. The second issue was, "Whether the estate of Soomaer Singh which was formerly within the limits of Zillah Beerbhoom, having been transferred to Zillah Bhaugulpore, the succession thereby becomes liable to be regulated by the law of the Mitakshara, or whether by reason of any local or family custom such succession, notwithstanding the transfer, continues to be governed by the law of the Dayabhaga." The finding of both the Courts upon that issue was that this family is governed by the law of the Dayabhaga.

Upon the trial of the first issue it appeared that Soomaer left six sons by three wives; Manick the son of the eldest wife; four others, Durbar, Tiluk, Hurry, and Ghansi, sons by his second wife; the plaintiff, Pirthee Singh, being the only son of the third. The question arose below whether Pirthee Singh, as a brother of the half blood, succeeded equally with Tiluk, brother of the whole blood, to the shares of Durbar, Ghansi, and Hurry, who are dead. The Subordinate Judge

* See 21 W. R. 89; 2 Suth. P. C. R. 922.

held that he did not so succeed; that he was only entitled to his own share as one of the six sons of Soomæer, and, therefore, to only one sixth of the property. Upon an appeal to the High Court that decision, so far as it related to the share of Pirthee Singh, was reversed, and it was held that he was entitled altogether to six annas and eight pies share of this estate, made up of the shares to which they held him to be entitled as heir to his half-brother, and his own share.

Their Lordships have been referred to the Dayabhaga and the commentators upon the text of the Dayabhaga, and they have also been referred to a decision of the full bench of the High Court of Bengal, in which the question now to be determined was raised and very fully considered. That decision is opposed to the judgment of the High Court in the case under appeal; but at the time this judgment was given, the decision of the full bench had not been delivered, and the High Court appear to have determined the question in this suit without going very fully into the doctrine. They probably acted upon certain decisions which have been given by Divisional Courts of the High Court of Bengal, which held that the half brother was entitled to share in the same way as a uterine brother. The cases which have so held are *Tiluk Chunder Roy v. Ram Luckhee Dossee*, 2nd Weekly Reporter, 41, *Kylush Chunder Sircar v. Gooroo Churn Sircar*, 3rd Weekly Reporter, 43 (in which the Court went fully into the text-books and commentators), and *Shib Narain Bose v. Ram Nidhee Bose*, 9th Weekly Reporter, 87. These decisions come near together in point of time. They are not decisions running over a long period of years, which might in that case be considered to have declared the law with regard to the succession to property, and which under such circumstances their Lordships would have been unwilling to disturb; but they are decisions of a recent date and coming very nearly together.

The recent case in which the question came before the full Court for consideration is *Rajkishore Lahoory v. Gobind Chunder Lahoory* (1 Indian Law Reports, Calcutta Series, 27).^{*} That case is entitled to great authority from the manner in which it came before the Court. The question is precisely that which is raised in the present appeal, and upon the hearing before the Divisional Bench, the Judges, upon being referred to the decisions in the Divisional Courts on the subject, felt considerable doubt whether they had been correctly decided; and the question being one of great importance, they thought it right to refer the then appeal for decision to the full Court. That accordingly was done. Mr. Justice Macpherson gave the judgment of the Court, in which all the other Judges, being five in number, concurred.

It cannot be denied that the construction of the text in the Dayabhaga itself is not free from difficulty. In the early sections of the chapter in which it is discussed (the 11th chapter), the law appears to be laid down with tolerable clearness, that the half brother does not succeed to the share of his half brother's estate in the case of an undivided family which has never separated. But in clause 35, a doubt is thrown upon the certainty of the doctrine thus laid down by a citation from Yama, which runs thus: "The whole of the undivided unmoveable estate appertains to all the brethren; but divided unmoveables must on no account be taken by the half brother." This citation occurs in one of a series of paragraphs which discuss the effect of brothers becoming reunited after a separation; and it would appear that the law is different with regard to half brothers who, having once separated, are reunited, from that which governs the case of half brothers who have never separated.

Their Lordships do not think it necessary to discuss at length the different passages in the Dayabhaga and the commentaries of text writers upon them, because that has been done very fully in the able and well considered judgment of the High Court delivered by Mr. Justice Macpherson. It is a question of

positive law, and finding the law expounded, and, as their Lordships think, correctly declared by the High Court, it is sufficient to say on the present occasion that they adopt the opinion of the High Court and the grounds upon which their judgment is founded. There is no doubt that the brother of the whole blood stands with regard to religious offices in a higher position than the brother of the half blood. The brother of the whole blood offers three oblations to the ancestors of the deceased on the father's side, and three on the mother's; whereas the brother of the half blood offers three to the paternal ancestors only. Therefore, there are reasons peculiar to the Hindoo law of succession as expounded by the Dayabhaga, which may have led to the distinction in the mode in which the succession to brothers takes place. The High Court, having gone through the authorities, have declared what appears to them to be the result in the following sentences: "We thus have it that, (a) applying the principle which is the basis of the whole scheme of inheritance propounded in the Dayabhaga, the whole brother undoubtedly succeeds in preference to the half-brother: (b) In the Dayabhaga, s. 5, cls. 9, 11, and 12, it is expressly said that the whole brother succeeds before the half-brother; and elsewhere there are indications that the commentator accepted as a fact the superiority of the whole blood: (c) The son of a whole brother is expressly declared to rank before the son of a half-brother, and the principle upon which this is declared applies equally to the case of brothers and half-brothers: (d) When there has been a separation, a half-brother who becomes reunited gains by the reunion a better position than he otherwise would have had, and is brought up to the level of a whole brother who has not become reunited,—which proves that the original position of the half-brother was inferior to that of the whole." This last proposition seems to be well founded on the authority of the Dayabhaga. Section 35, which embodies the passage from Yama, is referred to and explained in the judgment as follows: "It is to be observed,—and I think it is shown by cl. 36 that this is so,—that in the Dayabhaga itself this text of Yama is introduced only as being connected with the matter under discussion, *viz.*, the succession in cases of separation with or without reunion, etc., and there really is nothing to lead to the supposition that it was referred to save as bearing on that matter, or that in quoting it in cl. 35 there was any intention of contradicting or throwing doubt on the law as already distinctly propounded by the writer himself in the earlier portion of s. 5." Their Lordships think that this construction reconciles the different parts of the Dayabhaga.

The result is that the judgment under appeal cannot be supported, and their Lordships will humbly advise Her Majesty to vary the decree of the High Court by declaring that Pirthee Singh is entitled to a sixth, that is to say, two annas and eight pies share of the estate instead of a six annas and eight gundas share. Inasmuch as the law had been declared in favor of the respondent at the time the decree was passed, their Lordships think that it is not a case for costs.

• The 14th May 1877.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Evidence (Documentary)—Remand.

On Appeal from the High Court at Calcutta.

Burra Lall Opendronath Sahee Deo

versus

The Court of Wards.

This case was remanded for further enquiry and report by the High Court, the Judicial Committee being dissatisfied with the manner in which the Judges of the High Court had overruled the Lower Court on a question of fact, by rejecting certain entries (in books which, in the conflict of oral testimony on both sides, were brought into Court to show on which side the truth lay) as not genuine, from their own observation of the books, without taking evidence or rehearing the case on that point.

Mr. Leith, Q.C., Mr. Doyne, and Mr. John Cutler for Appellant.

Mr. Cowie, Q.C., and Mr. E. Macnaghten for Respondent.

This is a suit brought to recover the possession of the estates, which are said to comprise 7,000 villages, belonging to the impartible Raj of Nagpore Khoord; and the question raised in it is the right of succession to the Raj upon the death of the late Maharajah Juggurnath Sahee Deo, which happened on the 9th July 1869.

In view of the advice which their Lordships propose humbly to tender to Her Majesty, it will not be expedient to discuss, on the present occasion, the conflicting evidence which the case presents. It will be sufficient to state shortly the undisputed facts.

The original appellant, who died during the pendency of this appeal, which is continued by his son, was a nephew of the late Maharajah, being the eldest son of his only brother, Kowur Sreenath Sahee, and claimed to be his heir, disputing the legitimacy of two children, still minors, namely, Pertab Oodey Nath Sahee Deo, who is alleged to be the son of the late Maharajah by his wife Ranee Luchun Kowur, the first respondent, and Juggut Mohun Sahee Deo, alleged to be his son by his wife Ranee Komul Kowur, the second respondent. These minors are represented in the suit and the present appeal by the Collector exercising the functions of the Court of Wards in Chota Nagpore.

The case was tried in the first instance by the Judicial Commissioner of Chota Nagpore (Colonel Rowlett), who held that both the minors were illegitimate, and that the appellant was entitled to the Raj. This judgment was reversed on appeal by a Division Bench of three Judges of the High Court of Bengal.

The late Maharajah succeeded to the Raj on the death of his father, Gobindnath, in 1822, being then about the age of nineteen. His only brother, Sreenath, had three sons, Burra Lall, the appellant, and two others, usually called Manjhill Lall, and Chota Lall. Sreenath died in 1848. The family was joint, and Sreenath and his sons lived with the Maharajah in the ancestral family residence at Palkote, until the Maharajah removed from it to Bhowro in 1865.

The affairs of the late Maharajah's zemindary were managed by his brother Sreenath, and on his death, Burra Lall succeeded him as manager. These facts appear from a petition presented by the late Maharajah to Government in 1848, in which he expresses great confidence in his nephew. In 1852 Burra Lall was dismissed from the management of the Raj, but was reinstated as manager in 1860. In 1863 he was again and finally removed from the management, and from that time enmity existed between him and the Maharajah.

It is asserted by Burra Lall in his evidence that his dismissal was on both occasions brought about by Gopal Sahee, an illegitimate son of the Maharajah, and Mahal Sahee, a gomastah. These persons, it is alleged, acquired and exercised great influence over the Maharajah, obtained the management of his property, and were the principal actors in the conspiracy which is charged in the plaint, namely, to put forward two children born of other parents as the sons of the Maharajah, one by Ranee Luchun, the other by Ranee Komul.

At the time the Maharajah left Palkote to go to Bhowro he had four wives. The senior was the Maharanee or Burra Ranee, who was a lady of high rank, the daughter of a Maharajah. The next was called the Koonwur Ranee; the third

was Ranees Luchun ; and the fourth Ranees Komul, who had then been married about ten years.

The Maharajah had no legitimate offspring when he left Palkote. The Burra Ranees had given birth to a son in 1834, who died on the day he was born ; he was her only child. The Koonwur Ranees was childless. Ranees Luchun had had only one child, a daughter, who was born in 1856, about two years after her marriage, and died within a year of its birth. Ranees Komul had never given birth to a child.

The Maharajah left Palkote for Bhowro in July 1865, taking with him Ranees Luchun and Komul, and leaving the Maharanees and his second wife at Palkote. He was then about sixty-two years old. On the 23rd March 1866, nine months after leaving Palkote, Ranees Luchun, it is said, gave birth to Pertab Oodey ; and in less than a month afterwards, namely, on the 19th April 1865, Ranees Komul, it is said, gave birth to Juggut Mohun.

On the way to Bhowro, the Maharajah stopped at Nagpheni, and there married a girl of the age of twelve years, who accompanied him to Bhowro.

The Maharajah had no residence of his own at Bhowro, but occupied there a house belonging to one of his retainers.

A few months after the arrival of the party at Bhowro a report reached Palkote that the Ranees, Luchun and Komul, were both pregnant. This appears from a paragraph in a Petition in Lunacy, presented on the 30th December 1865, by Burra Lall, to Mr. Oliphant, the Deputy Commissioner of the district, alleging that the Maharajah was then of unsound mind, and incompetent to manage his affairs, and praying that his estates might be placed under the management of the Court of Wards, under Act XXXV of 1865.

The application in lunacy failed.

The report that the Ranees were pregnant may have arisen from the fact that the *punchumrit*, a ceremony usual in the fifth month of pregnancy, had been performed. It took place in the case of Ranees Luchun in the month of November, and in that of Ranees Komul in December 1865. It is common ground to both parties that all the ceremonies which usually take place before and after the birth of a child were performed, that is to say, the *punchumrit* in the fifth month, and the *ugunasnan* in the ninth month of pregnancy ; those after the birth being, the *chuttee* on the sixth, the *burrhee* on the twelfth, and the *ekaisi* on the twenty-first days. The birth of the first boy was notified by the Maharajah in several petitions to the officers of Government on the day following the birth, in which the child is styled "Doobraj," the usual title of a Maharajah's eldest son, and to these communications congratulatory answers were received. Similar notifications were made on the birth of the other boy. The Maharajah continued at Bhowro, the children living with him until his death in 1869.

The case of the respondents is that the minors are the sons of the Ranees ; that Ranees Luchun gave birth to the Doobraj in the presence of four of her own servants from Palkote, a woman called Puddum acting as midwife. That Ranees Komul also gave birth to Juggut Mohun, in the presence of her four Palkote servants, Puddum again acting as midwife.

The appellant does not rest on a mere denial of the respondents' case, but undertakes to show that the two boys were the children of other parents. He denies that either of the Ranees was pregnant at Bhowro. He affirms that Pertab Oodey was the son of one Gudaee, a man of low caste, and his mistress Oormilla, and that he was carried into the apartments of Ranees Luchun a few hours after his birth, and passed off as a child of which she had just been delivered ; and that Juggut Mohun was the son of one Gungnath by his wife Ugundh, to whom she gave birth in Ranees Komul's apartments, and who was passed off as the son of the last-named Ranees.

This case, in its details, involves a charge of conspiracy against Gopal Sahee

and the other persons, including the Ranees, who are alleged to have been concerned in putting forward these children. On the other hand, if that case be untrue, the appellant and his partisans have conspired to make a false charge to deprive legitimate heirs of their succession. Each case, if the testimony of the witnesses in support of it is believed, is completely proved ; but as both cannot be true, there has been on one side or the other a deliberate conspiracy, supported by a mass of perjured witnesses. The difficulty of finding the way to the truth in this conflict of evidence is greatly increased by the undoubted fact, which is adverted to by both the Courts below, that there is much evidence on each side to which it is impossible to give credit.

This being the general position of the case, so far as regards the testimony of the witnesses, the evidence to be derived from the books which were brought into Court becomes of great value in determining the question on which side the truth lies ; but, unfortunately, from the manner in which the High Court has dealt with them, they have become an element of disturbance in the case, embarrassing to those who are called on to decide it.

The most important books are the rozenamchas, or journals, containing daily entries of the receipts and disbursements in the Maharajah's household. Besides the original journals, there is a book containing, not a literal copy, but a summary in more or less detail of the entries in the journals from 1st Assin 1922 to 30th Bhadoon 1923. (The dates are thus given in the judgment of the Judicial Commissioner (Record, p. 572), but in the exhibit itself the latter date is 18th Bhadoon.) This last book was sent to the Court of Gya during the lunacy proceedings, and was made up from the original journals, for the purpose of being so sent.

The other books are a bhundar or storekeeper's book, and two registers of the attendances of servants.

All these books, except that sent to the Court of Gya, were taken possession of by Mr. Webster, the Commissioner, the day after the Maharajah died, and handed over to the Court of Wards.

It appears that the original books were brought into Court in the present suit on the 19th May, and that from the Court of Gya on the 29th June 1870 ; but no attention appears to have been directed to the entries in them until all the witnesses on both sides had been examined. This appears from a petition filed by the respondents' vakeel, alleging that "artifice" had been used in the book in which the names of Oormilla and Gudae are entered ; that "it was only yesterday, that on the book being opened, he came to know of this, or he would have filed several refutations of it," and praying that the book kept by the late Maharajah's treasurer, Bachum Lall, might be sent for. On the 2nd September 1870 the Judge made an order rejecting the petition, on the ground that it had been presented "after the case for the plaintiff and the defendant had been closed."

On the same 2nd September the appellants examined Bhopal Ray, and on the 3rd Seetul Pershad, on the subject of the books ; and on the latter day Mahal Sahee and Dabee Churn were examined by the respondents respecting them.

It is to be noticed that Seetul Pershad had been examined in the suit by the respondents, and it would seem from the exhibits in the suit that he had been appointed by each of the Ranees her agent to defend the present suit on her behalf. (Record, p. 141.)

The rozenamchas are said by Bhopal Ray and Seetul Pershad to be signed by the Maharajah and some of his officers (not always the same), and the one which is principally impeached, viz., that from 1st Cheyt 1923 to 22nd Sawun, is said by both these witnesses to be "all written by Seetul Pershad." Both also say it bears the Maharajah's signature, but there is a difference in their evidence as to the other signatures. Bhopal says it is signed by Bhunjun Lall, the

treasurer, Mahal Sahee, and Kustooree Lall, whereas Seetal says it is signed "at the end" by the Maharajah, Gopal Sahee, and Bhopal. Speaking of another rozenamcha, however, Bhopal says, "it used to be signed daily," and the apparent difference in the evidence may perhaps be reconciled by the fact that Seetul is speaking of the signatures at the end of the book, whilst Bhopal may be referring to those in other parts of it.

Mahal Sahee denies that the rozenamcha commencing the 1st Cheyt was written wholly by Seetal Pershad. He says it has been written partly by Seetal, "the remainder by others whose handwriting I do not recognize." He also says he recognizes some of the signatures in the book as the Maharajah's, but some he does not recognize. He admits that the book produced from the Gya Court, commencing 1st Assin 1922, was that sent from Bhowro to the Court, and that it has the signatures of the Maharajah, Bhopal Rai, and Gopal Sahee.

Dabee Churn denies that the book commencing 1st Cheyt is one coming from the Maharajah's office, but he is the only witness who says so.

Both the Courts in India have regarded the entries in these books as tests of the truthfulness of the case on the one side or the other, but have been led by them to directly opposite conclusions.

It would seem, from the judgment of the Judicial Commissioner, that the genuineness of two only of the entries had been challenged before him, and that unsuccessfully. He treated the whole as genuine, and held that they disproved the truth of the respondents' case, and confirmed that of the appellants. On the other hand, the Judges of the High Court came to the conclusion that a leaf in the book commencing 1st Cheyt, containing all the entries of the 26th Cheyt, which, no doubt, are of a most important character, had been interpolated; and that in the Gya book the name of Ugundh had been fraudulently inserted, and a figure added to the entry in which her name appears. Thereupon they not only rejected these entries, but were led by the fraud they assumed to have been practised to disbelieve the whole case of the appellants. Mr. Justice Norman rests his judgment entirely on this ground, intimating that but for the discovery of the falsification of the books, he should have concurred in the judgment of the Judicial Commissioner.

Having adverted to the importance attached, and rightly attached, by the Courts in India to these entries, their Lordships will now consider them in detail. They will first take the entries of 26th Cheyt (the day of Pertab Oodey's chuttee, and on which Oormilla is said to have left Bhowro). Among them are:—

R. a. p.

"Hookumnamah and receipt, dated this day through Baboo Gopal Sahee,
and Sowayah Bhundaree, for payment to Musumat Oormilla, and
Gudace of Sumbulpore 310 0 0."

[This sum corresponds with Rs. 300 and travelling expenses, Rs. 10, Gudace says he received.]

Again:—

"Hookumnamah and receipt, dated this day through Sooburna Brahmin
for the payment of the midwife Phoollo—

"Seeda—provisions	...	...	...	...	R. a. p.
"Present on leaving	...	...	...	...	0 10 0
					5 0 0

"5 10 0"

[Phoollo is the name of the midwife who is said to have attended Oormilla.]

There are also on this leaf entries of payments to servants, who were said by the Ranees and other witnesses never to have been in their or the Maharajah's service. These entries include payments to Sowayah Bhundaree, for Bhundar expenses, and to his two wives, Reori and Lungri, "for washing the room where the child was born."

Also, under the head of "paid to Songstresses" (explained to be those who

sang at the chuttee), and under the description of "Employés of the Saujhill Ranee" (Luchun) appear payments to

Dulgerea and
Gowree,

and under the description of "Employés of the Chota Ranee" (Komul) appear payments to

Mungri,
Besunee,
Emrit, and
Nunhakee,

also payments to two palkee-bearers—Dalla and Jolla.

The importance of these entries, if genuine, cannot be disputed. Mr. Justice Glover admits their force, but adds a remark which, perhaps, naturally arises: it is a singular thing that the entries of this one particular day should, if correct, prove almost every one of the plaintiff's allegations."

The extract from the Gya book of the 26th Cheyt, gives very imperfect, if indeed any, support to these impeached entries. The only entry relied on for this purpose is the following:

					R.	a.	p.
"Present and Bedaye (on leaving)	...	...	...	...	311	0	0."

This, it is said, represents the payment of Rs. 310 to Oormilla and Gudae, with R. 1 added, which was paid to a bard.

There is indeed another entry:—

					R.	a.	p.
"Expenditure of the Chuttee of the Dobraj	...	...	...	...	92	4	6."

but this affords no materials for a comparison with the detailed items of expenditure in the original book.

Seetul Pershad explains the entry of Rs. 311 thus:—

"In the original book there is an entry of Rs. 310 to Mussumat Oormilla and Gudae of Sumbulpore. In the copy there is an entry of Rs. 311 for a present on departure, and in this is included R. 1 paid to a bard, and that Rs. 110, the total being entered as Rs. 311."

Whether this explanation be satisfactory or not, Seetul says the entry represents the payment to Oormilla and Gudae, and he does not appear to have been cross-examined as to the genuineness of the original entry. This witness also says, to account for the details of the disbursements of the chuttee not being entered in the copy sent to Gya, that a warrant came from the Court to Gopal Sahee, who directed it to be made quickly, so the total only was written in the copy.

The Judges of the High Court have, as already stated, come to the conclusion that the leaf in the original book has been interpolated. Mr. Justice Kemp and Mr. Justice Glover both say that it does not appear to have been written in the same handwriting as the other pages of the book; and Mr. Justice Glover points out that "the leaf contains not only the entries of the 26th Cheyt, but the two first entries of the 27th, the whole in the same handwriting, whilst the entries of the 25th and the remaining entries of the 27th in the next leaf are in a different hand, the hand apparently that wrote the whole of the rest of the book."

The learned Judges seem to have come to this conclusion from their own observation of the books, without hearing evidence, or calling upon the parties for an explanation. It nowhere appears that the Advocate-General who was Counsel for the present respondents contended that the leaf had been interpolated, or did more than object to particular entries in it.

The Judges took the same course with respect to an important entry in the Gya book which affects the case of the younger minor.

The entry is as follows :—

" 20th Bysack—

" Present on leaving to Ugundh Kowri	...	...	...	R. a. p.
				112 0 0."

The 20th Bysack is the day on which Ugundh left Bhowro, and no doubt the entry, if genuine, would afford material confirmation of the appellant's case regarding her. The Judges have found that the words "Ugundh Kowri" have been interpolated, and the figure 1 added to the entry. They say that these additions are written "in a thicker hand and with different ink." The entry without these additions would stand "present on leaving Rs. 12," and would then be of no significance. The page in the Bhowro book which contains the entries of 20th Bysack is missing. The Judicial Commissioner has found that the pages containing the entries of the 16th to the 20th Bysack inclusive, have been removed; but he expresses no opinion, and, apparently, made no investigation as to this removal. It is difficult, however, to resist the conviction that they were designedly abstracted. However this may be, there can be now no comparison of this entry with the Bhowro book; but the Judges say that the details of the Gya book do not correspond with "the terij" or summary of the different heads of account which was produced, and that in the terij for the month of Bysack neither the totals nor the daily account correspond with the books. They particularly point to the entry on 20th Bysack of the purchase of a horse, the price of which in the book is entered as Rs. 200, and in the terij as Rs. 300. It seems to have been urged before them by the present respondent's Counsel, and Mr. Justice Kemp says, "with some show of reason," that the difference of Rs. 100, is that added to the figures in the entry in which Ugundh's name appears.

This terij does not appear upon the record, and their Lordships are therefore unable to say whether any such inference properly arises from the variances between it and the books.

The entry of the payment to Ugundh was one of the two impeached at the hearing before the Judicial Commissioner, and his finding upon it is as follows :—

"It has, however, been objected by the pleader for the defendants that the words Ugundh Kowri have been added afterwards to the previous entry. I have, however, examined the book attentively, and although the words Ugundh Kowri are a little heavier than the words which precede them, they correspond in appearance with the way in which the figures 112 have been written, so that this objection is not of any avail."

It does not appear that the suggestion that the initial figure 1 had been added was made to him. He thought that the name "Ugundh" corresponded with the way in which the figures (in the plural) were written, though it may be assumed from the terms of his finding that both differed from the writing of the rest of the entry.

The only other entry impeached before the Judicial Commissioner is that in which the name of "Jeetni Helin" appears. His finding upon it is as follows :—

"Regarding the tampering that has taken place in the name of Jeetni Helin, in the accounts of Bhoznath, it is clear even now that the name of Jeetni was the one originally entered in them, and as it has been proved that these papers reached the Deputy-Commissioner's Office without any alteration in her name having been made, it appears evident that what has been done has been effected after they were received by him, and by some one in the interest of the defendants, who wished to make it appear that the name of Jeetni had been substituted for that of some one else, but in this the person, whoever did it, has completely failed."

If, however, the High Court are right in supposing that the books have been tampered with in the way they point out, this may not be a right conclusion.

The above are the only entries which have been directly impeached, but the conviction of the Judges of the High Court that they were spurious led them to distrust all the other entries, and indeed the whole of the respondents' case.

Mr. J. Norman says: "Coming upon this flagrant instance of the manufacture of evidence on the part of the plaintiff, I lose all confidence in the materials with which I have been obliged to deal."

And Mr. J. Glover says, "I think that where so many alterations have been shown, it would not be very safe to take any of the entries relied on by the plaintiff for granted."

Their Lordships cannot but think that this, upon the evidence then before the Court, was too sweeping a condemnation of the books.

Mr. Justice Glover remarks that the defendants (as is no doubt the case) strongly objected to the books being put in at such a late stage of the case without opportunity being given to them of producing rebutting evidence, and seems to consider there was a miscarriage of justice in their objection being rejected. Supposing this were so, it might be a reason for further investigation, but not for a conclusion adverse to the other side; and their Lordships cannot but regret that the learned Judges of the High Court, before over-ruling the Judicial Commissioner on a question of fact, which greatly influenced both his and their own judgments on the whole case, and formed the pivot on which Mr. Justice Norman's opinion entirely turned, did not take evidence and rehear the case on this point.

But, whilst their Lordships are dissatisfied with the manner in which the Judges of the High Court arrived at their conclusion, they do not feel themselves at liberty to disregard it, and give effect to the entries which they rejected.

The Judges below have decided upon their own inspection of books which are not sent over, and upon inferences from a terij which is not in the Record. All their Lordships can do under these circumstances is to consider whether the entries which are not directly impeached enable them to see their way to a final decision, or whether they should remand the case.

The most important of these entries affects the case of the elder minor. It is under the date of 8th Magh 1922, and is as follows:—

	R. s. p.
"Paid to Moorli Brahmini and Sowayah Bhundaree for going to Sumbul- pore, for urgent business 	30 0 0."

A similar entry appears in the Gya book, except that the words "for urgent business" are omitted.

Mr. Justice Glover observes, on the entries generally, that it is incredible that the parties to the fraud should have made or passed entries of this kind, and Mr. Justice Kemp remarks that Rs. 30 is too small a sum to have been given to these persons if they were going on the mission described in the evidence.

No explanation of this entry appears in the evidence.

The entry in the Gya book of the 26th Cheyt, "present and bedaye on leaving, Rs. 311," has already been commented on. This entry, taken alone, can scarcely be relied on to confirm the evidence that Rs. 310 were paid to Gudaes on this day, for numerous entries of presents on leaving appear in the books. It requires Seetul Pershad's evidence to explain it.

The only entry in the Gya book which directly affects the case of the younger minor is the impeached one of the 20th Bysack, already noticed, which, omitting Ugundh's name and the figure 1, stands:—

"Present on leaving 	R. s. p. 12 0 0"
---	-----------------------------

The next entry is—

"Subsistence to the people of Munho 	R. s. p. 1 8 0"
---	----------------------------

The first entry in this reduced state is, as already observed, of no signifi-

cance. The other entry is supposed to refer to those who came from Munho with Ugundh. It may be so, but it would scarcely be safe to draw that inference from it.

The remaining entries in the rozenamchas are those in which the names of servants, whom the two Ranees and their witnesses deny were ever in their service, appear.

The entries are not of money paid to them, but of money, food, and other things paid or carried by them to others.

In this class of entries the following names appear :—

Lungri and Reori (the wives of Sowayah), the former twice and the latter once, and Mungri and Imrit (said to have been servants of Komul), the former twice and the latter once.

(The names of the other women said to have been servants of the Ranees, viz., Dulgeria, Besun, and Nunki, only appear in the entries of the 26th Cheyt.)

Besides these, there are entries of payments to Sowayah and to the two witnesses Dele and Julha.

Sowayah's name also appears in the Bhundaree book, and the names of Dele and Julha in the servants' attendance book.

It is to be observed that the names of some of the Palkote servants whom the respondent's witnesses deny were with the Ranees at Bhowro, appear in entries similar to those relating to the Bhowro women.

The gleanings thus made from the entries, which are not directly impeached, tend to confirm, so far as they go, the appellant's case, but fall very far short of affording the confirmation it would receive if the entries rejected by the High Court were found to be authentic. Their Lordships, therefore, think that it would be more satisfactory, before coming to a final decision on the appeal, that the true state of the books should be ascertained by a further enquiry, in which each party should be at liberty to adduce evidence with reference to the composition and state of the books and of the entries in them, and with reference to the custody of the books, and the persons who could have had access to them.

If it should be found that the rejected entries are genuine, their value will have to be estimated by their Lordships in disposing of the case; whilst if it should appear that the books have been fraudulently dealt with by the agents of either of the parties, it may be necessary for them to consider how far, from the nature and extent of the falsification which may be shown to exist in them, the general case of the party whose agents may be found to have been guilty of the fraud ought to be discredited.

Their Lordships think that the remand should be for an enquiry and report by the High Court on the following points:—

Whether the leaf containing the entries of the 26th Cheyt in the rozenamcha of the 1st Cheyt to 22nd Sawun is the original or an interpolated leaf, and if the former whether any, and, if any, which of the entries in it have been added or altered since it was first written; and by whom and when, if such leaf is found to have been interpolated, such interpolation was made, or, if it is found to be the original leaf, but to contain added or altered entries, by whom and when such additions and alterations were made.

Whether the following entry in the book produced from the Court of Gya, under the date of 20th Bysack :

“ Present on leaving to Agundh Kowri ... Rs. 112 ”

was originally written as it thus appears, or has been added to and altered in any and what particulars, and if so, by whom and when.

Whether the pages of the original rozenamcha, containing the entries of the 16th to the 20th Bysack inclusive, and which pages were found by the Judicial Commissioner to have been removed, were designedly abstracted, and, if so, by whom and when.

Whether the other entries material to the issues in the cause appearing in the extracts from the books set out in pages 22 to 24 (inclusive) of the Record, are original and genuine entries, or whether any, and which of them, have been added or altered, and if so, by whom and when.

Whether any other entries appear in the books brought into Court besides those set out in the present Record, which are material to the issues in the cause, and if so, what entries.

Their Lordships also desire that upon this remand it should be ascertained and found whether the petition alleged in the affidavit of Mr. Hawes (filed on the application for review) to have been presented in 1862 by the late Maharajah to the Lieutenant Governor of Bengal, praying that he might be allowed to adopt a son, was so presented, and if so, that such petition, and the reply thereto, if any, should be placed on the Record.

They also desire that it should be enquired into and found whether there is, or is not, any custom or practice in the Maharajah's family with respect to the adoption of a son.

Their Lordships will humbly advise Her Majesty to the above effect.

The 14th May 1877.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Limitation—Act XIV of 1859, s. 21—Execution of Decree—“Must,” “shall,”
and “may”—Res Judicata—Act VIII of 1859, s. 2—Jurisdiction.*

On Appeal from the Chief Court of the Punjab.

The Delhi and London Bank (Limited)

versus

Melmoth A. D. Orchard.

The words “nothing in the preceding Section shall apply to a judgment in force at the time of the passing of the Act,” in s. 21 Act XIV of 1859, mean that nothing in the preceding Section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act; and the words “but process of execution *may* be issued” mean that, notwithstanding anything mentioned in the preceding Section, execution might issue either within the time limited by law, or within three years next after the passing of the Act, whichever should first happen.

The substitution of the word “must” or “shall” for the word “may” can only be done for the purpose of giving effect to the intention of the Legislature; but, in the absence of proof of such intention, the word “may” must be taken to be used in its natural, and therefore in a permissive and not in an obligatory sense.

An order declining to execute a decree for want of jurisdiction is not an adjudication within the rule of *res judicata*, or within s. 2 Act VIII of 1859, so as to bar a subsequent application for the execution of that decree.

Mr. Leith, Q.C., and Mr. Graham for Appellant.

Mr. Doyne for Respondent.

Sir Barnes Peacock gave judgment as follows:—

This is an appeal from a judgment and order of the Chief Court in the Punjab, dated the 31st July 1874, reversing on review a former judgment and order of the same Court of the 17th March 1873, and thereby disallowing the execution of a decree obtained by the appellants against the respondent for the recovery of a sum of Rs. 14,408. 14 for debt and costs.

The judgment was recovered on the 5th October 1866, in the Court of the

Deputy Commissioner of Delhi. Subsequently to the decree the defendant made various payments on account up to the month of October 1869. On the 22nd of that month the plaintiffs presented a petition to the Deputy Commissioner, claiming a balance of Rs. 19,227. 3. for principal and interest, and praying that, after ascertaining the amount to be recovered, a certificate might be sent to the Civil Court at Meerut, transferring the decree, in order that it might be executed in that Court (Record, 7 and 9).

It is unnecessary to refer particularly to all the proceedings which took place on that petition; it is sufficient to say that on the 10th December 1869 the Deputy Commissioner made the following order:—

“The decree is of a prior date to the introduction of Act XIV of 1859. It should be executed according to the civil law of the Punjab; and as, according to the said law, the period of one year was fixed for its execution, and in case that period expires, the rule is that the decree should be executed by obtaining the sanction of the Commissioner; and as on the report sent for obtaining sanction the Commissioner did not pass any order either giving sanction or any other order, and as it is not within the power of this Court to execute such a decree, it is ordered that (the petition) be sent to the Record-room” (Record, p. 11).

There can be no doubt that the application made on the 22nd October 1869 was *bond fide*, and, indeed, the learned Counsel for the respondent has very properly admitted that it was so.

No appeal was preferred from the order of the 10th December 1869; but the defendant, notwithstanding the order, made further payments on account.

On the 4th May 1871, the plaintiff, alleging that the payments made were not sufficient to cover the interest, and claiming a balance of Rs. 23,772. 13. 7., made a fresh application to the Deputy Commissioner for a certificate and transfer of the decree to the Court of Meerut for execution, and prayed that a summons might be issued under the provisions of Act VIII of 1859 (Record, p. 12).

Upon that petition the Deputy Commissioner, on the 6th May 1871, made the following order:—

“As the application for execution has already been rejected and sent to the Record-room, and now the period for execution has expired totally, it is ordered that the application be rejected and sent to the Record-room” (Record, p. 13).

With reference to the statement that the period for execution had then totally expired, it may be as well to point out that Act XIV of 1859 was extended to the Punjab on the 1st January 1867, and consequently that the period of three years from the time when the Act came into operation in the Punjab had expired before the application of the 4th May 1871 was made. On the 30th June 1871 the Deputy Commissioner refused to review his judgment, and on the 10th July of that year the plaintiffs appealed to the Commissioner, who, on the 18th August 1871, dismissed the appeal, holding, amongst other things, that the three years' grace under the limitation law expired on the 1st January 1870, and that a mere petition for execution which was dismissed was not sufficient to keep a decree in force (Record, p. 18).

The case was appealed to the Chief Court of the Punjab, which at first rejected the appeal (Record, p. 19). Subsequently a full Bench of that Court, on the 17th March 1873, upon review, decreed the appeal with costs, and reversing the orders of the Lower Courts, ordered and decreed the appellants' application for execution with costs and the costs of the appellant in the Appellate Court (Record, p. 24). They said:—

“The application for execution in 1869 to the Assistant Commissioner at Delhi was, in the opinion of this Court, a *bond fide* proceeding to enforce the decree of 1866. It was a proceeding to enforce the decree, and not merely to keep the decree in force. Before the expiration of three years from the date of that proceeding the present application was filed” (Record, p. 23).

Subsequently, on the 31st July 1874, upon a review of the judgment so given on review, the Chief Court reversed their decree of the 17th March 1873, upon the ground that the decree having been obtained before the introduction of Act XIV of 1859 into the Punjab, the case must be governed by the provisions of s. 21, and not by s. 20. The case was decided by Mr. Justice Boulnois and Mr. Justice Melvill upon the authority of the cases of *Báúdekúvar v. Mulji Náran* (3 Bombay High Court Appeal Cases, 177), and *Makúndú Valad Báalachárya v. Síta-rám and Nílo* (5 Bombay High Court Appeal Cases, 102). Mr. Justice Thornton held a contrary opinion, and recorded his reasons for dissent.

It was not contended that the decision of the Chief Court of the 17th March 1873 was incorrect for any other reason than that afforded by the words of s. 21 of the Act (p. 43).

The case depends upon the proper construction to be put on ss. 20 and 21 of Act XIV of 1859. The following are the words of those two Sections :—

"20. No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution.

"21. Nothing in the preceding Section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued, either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire."

It was pointed out, in the case of *Kishen Gooroo Doss Auckholu and others v. Modhoo Koonndoo and others* (6 "Weekly Reporter," Miscellaneous Full Bench Rulings, p. 98), that according to the literal wording of s. 20 no process of execution could ever issue to enforce a judgment, even within a week from the date of it, unless some proceeding had been taken to enforce or keep it in force within three years next before the application for execution; and it was held that such a construction was obviously insensible, and that the meaning of the Section was that no process of execution should be issued to enforce a judgment or order of a Court not established by Royal Charter, after the expiration of three years from the date of it, unless some proceeding to enforce it, or to keep it in force, should have been taken within three years next before the application for such execution.

That was held to be the proper construction of s. 20, both in that case and in the subsequent Full Bench case of *Gangaluchun Ghosal v. Bonomalú Mullick and others* (7 "Weekly Reporter," Full Bench Rulings, p. 515).

In the latter case it was held that, under s. 21, execution might issue after the expiration of three years from the time of the passing of the Act to enforce a judgment which was in force at the time when the Act was passed, provided some proceeding to enforce the judgment within the meaning of s. 20 had been taken within three years next preceding the application for execution.

That decision was followed by the High Court in Madras, in the case of *Karuppanan v. Muthannan* (5 Madras High Court Reports, p. 105).

The High Court in Bombay put a different construction upon s. 21. The cases are referred to in the judgment now under appeal. They held that the words, "Nothing in the preceding Section shall apply to judgments in force at the time of the passing of this Act," could not be rejected without violating a fundamental rule for the construction of statutes; and that the words, "May be issued," should be read as "Must be issued;" and they treated the words "Judgment in force at the time of the passing of this Act," as applicable to a judgment in force at the time of the extension of the Act to the Punjab, though not in force at the time of the passing of Act XIV of 1859.

It cannot be disputed that the construction put upon by the Act by the

High Court at Calcutta, if permissible, was equitable, and prevented what must be admitted to be an inconvenience and injustice (p. 43). Indeed, if the construction put upon the Act by the High Court at Bombay, and by the Chief Court in the Punjab, is correct, a judgment creditor could not, after the three years, have enforced a judgment which was in force in the Regulation Provinces when Act XIV of 1859 was passed, or a judgment which was in force in the Punjab at the time when the Act was extended to that province, however diligent he might have been in endeavoring to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act, and in the Punjab at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature.

There is no doubt that in some cases the word "must," or the word "shall," may be substituted for the word "may;" but that can be done only for the purpose of giving effect to the intention of the legislature; but, in the absence of proof of such intention, the word "may" must be taken to be used in its natural, and therefore in a permissive and not in an obligatory sense.

On the construction of this inartificially drawn statute their Lordships are of opinion that the words, "Nothing in the preceding Section shall apply to a judgment in force at the time of the passing of the Act," mean that nothing in the preceding Section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act; and that the words "*but process of execution may be issued*," mean that, notwithstanding anything mentioned in the preceding Section, execution might issue either within the time limited by law, or within three years next after the passing of the Act, whichever should first happen.

It appears, then, to their Lordships that the words "Nothing in the preceding Section" (as used in s. 21), mean that the prohibition laid down in s. 20 should not apply to judgments in force at the time of the passing of the Act.

Without expressing their concurrence in all the reasoning of the Full Bench in the Calcutta case above cited, their Lordships are of opinion that that decision was correct, and that the application made to the Court of the Deputy Commissioner of Delhi, on the 22nd October 1869, being *bond fide*, though unsuccessful, was a proceeding to enforce the judgment within the meaning of s. 20; and that that proceeding having been taken within three years next preceding the application made on the 4th May 1871, to which the judgment now under appeal relates, such last-mentioned application was not barred by s. 21 of Act XIV of 1859, and ought to have been granted.

It was contended that the rule *res judicata* applied, and that the application made on the 4th May 1871 was barred by the order of the Deputy Commissioner, of the 10th day of December 1869, from which no appeal was preferred. But their Lordships are of opinion that the order of the 10th day of December 1869, was not an adjudication within the rule of *res judicata*, or within s. 2 of Act VIII of 1859.

For the above reasons their Lordships will humbly advise Her Majesty that the judgment and order of the Chief Court of the Punjab of the 31st July 1874 be reversed, and that the judgment and order of the 17th March 1873 be affirmed and stand in force; and that the defendant do pay to the plaintiffs their costs incurred in the Chief Court of the Punjab subsequently to that decree. The respondent must pay the costs of this appeal.

The 9th June 1877.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Jurisdiction—Commissioner in Oudh—Appeal to Privy Council—Order “nunc pro tunc”—Judgment—Witness—Act I of 1869—Registered Talookdars—Trustee.

On Appeal from the Court of the Commissioner of Seetapore in Oudh.

Thakoor Hurdeo Bux

versus

Thakoor Jawahir Singh.

A Commissioner in Oudh has no authority to admit an appeal to the Privy Council from a decree of his affirming a decree of the Settlement Officer of that district, notwithstanding that his decree was final; the words “Court of Highest Civil Jurisdiction in any province” in Act II of 1863 having reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases.

To avoid delay and expense in this case, their Lordships granted special leave to the appellant to appeal, and allowed the case to be argued *nunc pro tunc*.

Officers who act as Judges, if entrusted at the same time with administrative duties, ought to be most scrupulous in the endeavor to form their opinions independently. They ought not to refer to their superiors, whether judicial or administrative, for opinions to enable them to form their own judgments, or for instructions or orders directing them as to the course which they, as Judges, ought to pursue. If any information from a superior is considered necessary, he ought to be examined as a witness.

A person who has been registered as a talookdar under Act I of 1869, and has thereby acquired a talookdaree right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised within the talook for another, and be liable to account accordingly.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Appellant.

Mr. Doyne for Respondent.

Sir Barnes Peacock delivered judgment as follows:—

This is an appeal from a decree of the Commissioner of Seetapore, in Oudh, dated the 10th June 1872, affirming a decree of the Settlement Officer of that district, dated the 21st December 1871.

When the appeal was called on for hearing, Mr. Doyne, the learned Counsel for the respondent, took a preliminary objection, and contended that the Commissioner had no legal authority to admit the appeal. In support of his contention, he referred to the Oudh Civil Courts Act (No. XXXII of 1871), and to Act No. II of 1863. By s. 4 of the former Act five grades of Civil Courts in the Province of Oudh were established, of which that of the Judicial Commissioner was the highest. By s. 15 cl. 3 of the same Act, an appeal from a decree of the Commissioner, when an appeal is allowed by law, lies to the Judicial Commissioner; but by s. 4 it was enacted that if the Court of First Appeal confirms the decision of the Court of First Instance, such decision shall be final.

By s. 1 of Act II of 1863, which was a general Act to regulate the admission of appeals to Her Majesty in Council from the Courts in the non-regulation provinces in India, the right of appeal was limited to final judgments, decrees, or orders, made on appeal or revision by the Court of highest civil jurisdiction.

It was contended on the part of the appellant that, as the judgment of the Commissioner affirming the judgment of the Settlement Officer was final, and no appeal lay from it to any Civil Court of higher jurisdiction, the Court of the Commissioner was, as regards this case, the Court of highest civil jurisdiction in the province. It should be remarked that, in the Privy Council Appeals Act of

1874, which was passed after the appeal in the present case was allowed, and which repealed Act No. II of 1863, the words "Court of Final Appellate Jurisdiction" are used in place of the words "Court of Highest Civil Jurisdiction."

Their Lordships are of opinion that the Court of the Commissioner was not in this case the Court of Highest Civil Jurisdiction in the province within the meaning of Act II of 1863, notwithstanding the decision of the Commissioner was final. If the Commissioner had reversed the decree of the Settlement Officer, his decision would not have been final, but an appeal might have been preferred to a higher Court of Civil Jurisdiction in the province—*viz.*, to that of the Judicial Commissioner.

In their Lordships' opinion, the words "Court of Highest Civil Jurisdiction in any province," in Act II of 1863, had reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. If the Court of the Commissioner was the Court of Highest Civil Jurisdiction in the province, within the meaning of that Section, because an appeal from his decision in the particular case did not lie to a higher Court in the province, a Court of Small Causes would be equally a Court of Highest Civil Jurisdiction in a case in which its decision is final; and, in that case, it might, under the provisions of the same Section, admit an appeal to Her Majesty in Council, if it should declare the case a fit one for such appeal.

When the preliminary objection was made their Lordships recommended the appellant to present a petition for special leave to appeal, which was accordingly done, and special leave was granted. In order to avoid delay and expense, the Court suggested that the case should be argued *nunc pro tunc*, and that course was assented to by the learned Counsel on both sides and adopted.

Under the special leave a petition of appeal has now been duly lodged, and referred to the Judicial Committee.

The suit was brought by Hurdeo Bux, the appellant, and Purbut Singh against the present respondent. Purbut Singh has not joined in this appeal.

The plaintiffs in their plaint stated that during the king's time the talookas of Bassaindeeh and Sijaolia formed one talooka, and that the fathers of the parties were seven brothers descended from a common ancestor; that four of them separated and partitioned talooka Sijaolia from Bassaindeeh; that talooka Bassaindeeh formed the share of Havanchal Singh, father of Hurdeo Bux, plaintiff, Fateh Singh, father of Purbut Singh, plaintiff; and Bhawani Singh, father of Jawahar Singh, the defendant; that the plaintiffs' fathers, being seniors, used to make collections from the estate and to manage household expenses, including those incurred in marriage and funeral ceremonies; that the father of the defendant treated them as his superiors, and never interfered in the affairs of the estate; that defendant's father was junior, and was treated by the plaintiffs' fathers as if he were their own son; that they (the plaintiffs' fathers) got the kubooleut executed in his name with a view to avoid inconvenience to themselves, and to connect him with offices, but they all lived in commensality, and defrayed their expenses out of the income of the said talooka; that after the death of the fathers of the parties the old practice prevailed between them up to date; that they had been living together and their expenses paid out of the profits of the same estate; that the plaintiffs had continued to enjoy the possession of the talooka while the defendant had been the kubooleutdar; that as the defendant was kubooleutdar the sunnud had been granted to him; that for one or two months, the defendant had, under the sunnud, given rise to enmity, and intended to dispossess them, and put a stop to the profits enjoyed by them for the time past, and wished to deprive the real owners of their right, while the said sunnud did not contemplate to destroy the rights of the plaintiffs; that in the arbitration case of Bisheshur Bux and Gunga Bux, talookdars of Sorara, the defendant had, in his own deposition, stated that in case of his (defendant's)

brothers claiming their shares he would not decline to give them their shares; that the defendant had altogether forgotten this written admission. Wherefore the plaintiffs prayed that, after proper enquiry, orders be passed that they be not deprived of their right.

In their written statement dated the 6th October 1865, at p. 32 of the Record, they stated that they had been compelled, by an order of the Criminal Court, dated the 15th September 1865, to give up possession, but that previously to that time they had held continuous possession. They prayed that under the conditions laid down in the sunnud, in cl. 2 Circular 2 of 1861, the Government of India, letter No. 23, dated the 19th October 1859; and Circular No. 6 of 19th June 1861, justice be done to them, and that they might not be deprived of their right.

The defendant, in his written statement, alleged that the talooka in dispute was the solely acquired property of his ancestors, and particularly of his father; that there had all along been only one kubooleut; that he had held possession without any one as co-sharer; and that he of his own free-will had been assisting his near relations with food, etc., without their having any right; and that a summary settlement had been made with, and a Government sunnud granted to him alone (see Record, p. 41).

The Settlement Officer did not enter into the question whether the property was the self-acquired property of the defendant's father or was the joint ancestral property of the three brothers mentioned in the plaint, but he dismissed the suit upon the sole ground that the defendant was protected by Act No. I of 1869. He stated that he considered himself bound by the opinion of the Financial Commissioner in the late Supreme Court of Landed Estates Jurisdiction, in which, upon a petition presented by the plaintiff relating to another matter, the Financial Commissioner stated, "That the defendant was protected by his sunnud; that the plaintiffs could get nothing, and that it was perfectly useless their continuing litigation" (Record, pp. 95, 96).

The plaintiff Hurdeo Bux appealed from that decision to the Commissioner, who, without giving any reasons, dismissed the appeal, stating that the suit had been dismissed in accordance with the invariable practice of the Courts since re-occupation. (Record, p. 100). Subsequently, upon an application by the plaintiff to the same Commissioner for a certificate that the case was a fit one for appeal to the Privy Council, the Commissioner made the following remarks:—

"I have had this case before me several times since the receipt of the files, and I have consulted the Judicial Commissioner on the points as to which I have felt doubts.

"The case is before me on an application from the appellant for a certificate that it is a fit suit for appeal to the Privy Council. I have no hesitation in granting this certificate, for, though the order of this Court passed in appeal, and, which it is now proposed to contest, is one so obviously in conformity with the previous practice of the highest Courts of Appeal in this province, that it hardly admitted of dispute, and did not require to be supported by any lengthy argument at the time it was written, since that time several cases have been before their Lordships, the orders passed in which have considerably modified the view of the law applying to talookas in Oudh previously taken by the Courts of the Financial and Judicial Commissioners; and, though I do not find any case so clearly in point as to require me to hear an application for review, a course which has been suggested by the appellant, the case is clearly one in which he should be allowed every facility for bringing it before a higher tribunal.

"The certificate will, therefore, be granted, and this Order will be filed with the Record."

The suit was commenced long before Act I of 1869 was passed, viz., as far back as the 28th August 1865, but the judgment of the Settlement Officer, the Court of First Instance, was not pronounced for upwards of six years afterwards.

Some of the proceedings which were taken in the meantime are detailed in the judgment of the Settlement Officer, and well might he describe them as "most extraordinary!"

The lands to which the suit relates were included in that part of Lord Canning's Proclamation of March 1858, which declared that the proprietary right in the soil was confiscated to the British Government which would dispose of that right in such manner as to it might seem fitting.

By the Government letter of the 10th October 1859, set out in the 1st Schedule to Act I of 1869, it was declared that every talookdar, with whom a summary settlement had been made since the reoccupation of the Province, has thereby acquired a permanent hereditary and transferable proprietary right in the talooka for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the talooka.

By s. 3 the Governor-General in Council desired that the Chief Commissioner of Oudh should have ready a list of the talookdars upon whom a permanent proprietary right had then been conferred.

Previously to that letter, *viz.*, on the 24th April 1858, a summary settlement of the lands had been made with the defendant. He was consequently included in the list of talookdars, and a sunnud was granted to him. After the passing of Act I of 1869 he was also registered in List No. 1 under Act No. I of 1869, s. 8, and also in List No. 5 (Oudh "Government Gazette," August 7th 1869).

The order for the summary settlement with the defendant was made by Colonel Barrow, the then Special Commissioner. The defendant, in his application for the summary settlement, stated that he had no partner other than the plaintiff Hurdeo Bux.

On the 4th April 1866, pending the investigation of the case, the then officiating Settlement Officer, Mr. Wood, the Court of First Instance, wrote to Colonel Barrow, the Commissioner of the Lucknow Division, a letter, of which the following is a copy (p. 85):—

"SIR,

"You doubtless recollect Thakoor Jawahar Singh, of Bassadhee, who was rewarded for his loyalty during the late disturbances.

"2. I find that you, as Special Revenue Commissioner, on re-occupation directed that the Thakoor was to be admitted to engage for his talooka.

"3. In statement A, the Thakoor admitted to you that his cousin, Hurdeo Bux, was his sole co-sharer. Notwithstanding this admission, you directed that settlement was to be made with Jawahar Singh. Do you recollect whether you intended such settlement with him alone, as Sadur Malgoosar, as a matter of convenience,* and that Hurdeo Bux, the acknowledged co-sharer, was to be recognized at this settlement according to the nature of the rights?

"4. An early answer will oblige."

To that letter Colonel Barrow, on the 8th April 1866, sent the following answer:—

"SIR,

"Referring to your letter without No., dated 4th instant, in the case of Thakoor Jawahar Singh, of Bassadhee, I have the honor to request you will be so good as to forward to me the Summary Settlement file with Special and Chief Commissioners' orders thereon, as it will enable me better to remember the circumstances, if I see what was written.

"2. It is within my recollection that settlement was made solely with Jawahar Singh, because he had given active assistance to Government in 1858."

Subsequently, on the 25th September 1866, Colonel Barrow wrote to the Settlement Officer as follows (p. 86):—

"SIR,

"I have now received the vernacular papers of the summary settlement of the estate of Jawahar Singh, of Bassadhee, and regret they do not afford much information.

"2. Jawahar Singh was one of those who early tendered allegiance after the rebellion, and afforded active assistance to the British Government. I have little doubt but that, in consequence of this, the estate was conferred on his name alone, and it was the meaning and intention of the settlement of 1858, not only to have but one head in each estate, but that those estates should remain for ever undivided. This latter condition, as you are aware, was departed from under the orders of the Governor-

* Circular 6 of 1862, par. 6.

General making all estates heritable and transferable, under which order talookdars can now divide and will away their villages as they like. It is a question, though, whether any one can or not be admitted to share in a talook.

"3. The policy of the summary settlement was to create and maintain large and undivided estates, a system, I believe myself, admirably suited to this country, but, as that is no longer possible, there can be no reason why sharers should be barred, and provision ought to have been made for their cases by those who departed from one of the principles of the settlement of 1858-59."

Upon the receipt of that letter, the Settlement Officer being, as he stated, at a loss how to proceed, recorded a memorandum dated 23rd October 1866, and forwarded it on the same day to the Commissioner of the Seetapore Division for orders. The following is a copy of the memorandum (Record p. 87):—

"At length I have received Colonel Barrow's reply to my letter of the 4th April last. The delay arose from his not having received the Summary Settlement file from the Financial Commissioner's Office.

"As I am at a loss how to proceed with this case, I submit the proceedings for the orders of the Commissioner, as to whether such a claim is cognisable or not under existing circulars.

"I must state that, in the case marginally noted,* it was proved beyond a doubt that a division of the talooka was effected about twenty years prior to annexation, when four of the seven brothers held their share jointly in common, and three held their share in like manner. The Commissioner will see *that the parties to the suit had lived together as an undivided family up to last year*, when, through an accident (the Sadar Monsarim's Report, under Circular 37 of 1864), a dispute broke out, and Jawahar Singh broke off his connection with his cousins.

"I beg to refer the Commissioner to the vernacular papers filed by the plaintiffs, including an attested copy of Jawahar Singh's statement as an arbitrator in the case marginally noted,† wherein he admitted the plaintiffs' right to separate their shares if they desired it.

"As I am seeking the Commissioner's instructions in the case, I withhold the expression of my opinion on the merits of the claim.

"October 23rd, 1866."

Three months after the date of the memorandum the Commissioner sent it to the Financial Commissioner in a letter dated 22nd January 1867, as follows (p. 88):—

"SIR,

"I have the honour to submit for orders a memorandum, dated 23rd October 1866, with annexures from the Officiating Settlement Officer, Seetapur, respecting the claim of Hurdeo Bux to a share of Talooka Bassadhee, for which Jawahar Singh holds a sunnud.

"2. Some of the villages held by Jawahar Singh under the sunnud are ancestral, some acquired, while others again, having been decreed to Jawahar Singh at regular settlement, are not covered by the sunnud. Jawahar Singh admitted before Colonel Barrow, on the 24th April 1858, that his cousin, Hurdeo Bux, was his sharer. This admission was made on the Summary Settlement Statement, and manifestly referred to the whole estate, and not as Jawahar Singh now pleads, to a single village. Further, in the case of Gunga Bux and Bisheshur Bux, Jawahar Singh deposed, on the 7th July 1859, that it was the custom in his family to allow partition, if any sharer desired it, and several partitions were made prior to annexation, showing that this has erroneously been considered a talook.

"3. The Settlement Officer made a reference in this case to Colonel Barrow when Commissioner of Lucknow (*vide* his replies, No. 597 of the 6th April 1866, and No. 1913 of 25th September 1866), which show that Jawahar Singh has some special claims, as having been one of the first to tender his allegiance, and as having rendered active assistance to Government; but, as the Settlement Statement of April 1858 contains a distinct admission by Jawahar Singh that Hurdeo Bux was his sharer, the question arises (*vide* paragraph 6 of Settlement Circular No. 6 of 1862) whether the settlement in the name of Jawahar Singh only and the grant of a sunnud to him bars the claim of Hurdeo Bux to a share? I recollect that a case was referred to Government in 1862, in which it was held that a settlement had been made with a Ranee as Sudder Malgoosar only, but the particulars may have differed in some respects."

To that letter the Officiating Financial Commissioner on the 26th January in the same year sent the following reply (p. 90):—

* Darrao Singh, etc., v. Khurram Singh.

† Bisheshur Bux v. Gunga Bux.

" SIR,

"In reply to your No. 31 of the 22nd instant, I have the honour to state that the proceedings show that Hurdeo Bux got maintenance in the Nawabee; but nothing on the record tends to distinctly prove that he had proprietorship over any particular portion of this estate in the Nawabee, but, at present, it will not be necessary to enter on the subject of what Hurdeo Bux should get as a relative, the Chief Commissioner having under consideration new rules that will provide for talookdars' relatives who are barred by the sunnud. In the meantime, it would not, perhaps, be a bad plan to give the management of the villages—to the jumma of which Jawahar Singh objects—to Hurdeo Bux, if he accepts the assignment, as he would appear to do.

"2. The general question between the two must remain pending in the Settlement Court until the issue of the new rules. All proceedings are, accordingly, returned."

In the succeeding April the Settlement Officer again applied for instructions, and the Financial Commissioner replied that "no orders could be passed until the measures then under consideration in regard to the claims of co-sharers in talookas should be completed." (See judgment of Settlement Officer, p. 94.)

In consequence of these orders the proceedings appear to have been suspended until the 13th December 1871, when the plaintiffs presented a petition praying for final orders. In the meantime Act I of 1869 had been passed. The then Settlement Officer took up the case, and on the 21st December 1871 held, as before stated, that the plaintiffs' claim was barred by that Act.

Their Lordships cannot help remarking upon the irregularity of many of the above proceedings. They cannot attach any weight to Colonel Barrow's recollection to which he refers in his letter of the 6th April 1866. If any information from Colonel Barrow was considered necessary he ought to have been examined as a witness. The Settlement Officer who was acting as a Judge ought not to have written to him to know what his recollection was upon the subject of the summary settlement. His answer was not evidence, and cannot, any more than the opinion expressed in his letter on the 25th September 1866, be properly used in forming a judicial opinion on the case. Indeed, Colonel Barrow does not appear to have always entertained the opinion that the settlement was made with Jawahar Singh for his benefit alone, for in his Minute, dated 11th April 1868 (Record, p. 115, and see p. 193), he says:—

"I have been much troubled by this case in many ways, and Jawahar Singh, by his bad faith with his relation, *who had lived with him as an undivided family in the Nawabee*, is only leading to his own discomfiture. I would have him look to the summary settlement which was made with him and Hurdeo Bux. *Perchance that may yet be carried out.*"

Officers who act as Judges, if entrusted at the same time with administrative duties, ought to be most scrupulous in the endeavor to form their opinions independently. They ought not to refer to their superiors, whether judicial or administrative, for opinions to enable them to form their own judgments or for instructions or orders directing them as to the course which they, as Judges, ought to pursue. As properly remarked by the Chief Commissioner in his Circular No. 6, p. 39: "The Courts are open to all and must be guided by their own rules."

Colonel Barrow had no authority to stay until the issue of new rules the proceedings then pending judicially before the Settlement Officer. It does not appear whether new rules were ever issued. The Settlement Officer in his judgment treats the measures referred to by the Financial Commissioner as having acquired the force of law by Act I of 1869.

If the Settlement Officer had acted at once upon his own judgment, instead of referring for instructions or orders, the probability is that his judgment would have been given before Act I of 1869 was passed, and in that case he might have come to a different conclusion.

Be that as it may, their Lordships must deal with the case as they now find it.

The question is: Is the plaintiff entitled to any and what share or beneficial interest in the estate, or is his claim barred by Act No. I of 1869?

In support of the appeal the case of *Thookarain Sookraj Koowar v. The Government and others*, 14 Moore's Indian Appeals, p. 112,* was referred to.

In that case the plaintiff's husband, the younger branch of the great Oudh family of Bhinga, had up to the time of the annexation of Oudh, been in the undisturbed and absolute possession of an estate called Deotaha, which had been united in the time of the native government with the large talook of Bhinga, of which the Rajah of Bhinga, the representative of the elder branch of the family, was the talookdar, the plaintiff's husband paying to the talookdar his proportion of the jumma assessed upon the whole talooka.

Upon the making of the summary settlement in 1858-59, after the suppression of the Mutiny, the plaintiff was about to apply to the British Government for a summary settlement of the mehal which belonged to her husband, and which had descended to her. She was, however, dissuaded by the Rajah of Bhinga from so doing, he fully acknowledging in writing her right, and suggesting that, as she was old, she had better leave the protection of her interest to him, and pledged himself that her possession of the mehal should be respected and safe. The summary settlement was accordingly made with him alone. Subsequently one-half of the Rajah's estates was confiscated to Government in consequence of the discovery of some concealed guns, whereupon he pointed out for confiscation the entire mehal of the appellant, as part of the one-half of his estates, and the plaintiff's estate called Deotaha was taken by Government, and the greater part of it made over to Oudh loyalists as a reward for good services.

It was contended that the summary settlement and the Government letter of the 10th October 1859 constituted the talookdar the absolute owner of the whole estate, including the appellant's estate, Deotaha, and consequently that it passed to Government under the confiscation against him. It was, however, held by the Judicial Committee that the settlement and letter had no such effect.

In delivering judgment Lord Justice James, speaking of the Government letter of the 10th October 1859, said (p. 127): "In English language it gave the registered talookdar the absolutely legal title as against the State and against adverse claimants to the talookdary; but it did not relieve the talookdar from any equitable rights to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. In this case the appellant was the acknowledged *cestui que trust* of the registered talookdar, who bound himself expressly in writing that he would respect her rights if she would permit him to be alone so registered. It would be a scandal to any legislation if it arbitrarily, and without any assignable reason, swept away such rights, and in this very painful case it is, at all events, agreeable to their Lordships to find that no such scandal attaches to the laws or regulations of Government Acts in force in Oudh; and that the cruel wrong of which this lady has been the victim is due to the misapprehension of the law by the Commissioner. It is almost superfluous to add that the lady being clearly, as she was, the equitable owner, the decree of confiscation against her trustee could on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which, in effect, made her the sufferer for his offence."

An under proprietary right being the interest to which the appellant was entitled at the time of the annexation of Oudh was, therefore, awarded to her, notwithstanding the summary settlement and the Government letter.

In that case there was a written agreement by the talookdar prior to the summary settlement to respect the rights of the widow if she would allow him to obtain the summary settlement. In the present case, however, there was no written agreement by the talookdar prior to his obtaining the summary settlement, but merely a representation by him that he had no partner except the plaintiff.

* See *ante* p. 1.

In the case of the widow of *Shunkur Sahai v. Rajah Kashi Pershad*, decided in the Privy Council 29th July 1873,* there was also no written agreement signed by the talookdar, but merely a representation made by him at the time of his applying for a summary settlement, followed, apparently, by other admissions. In that case the widow of Shunkur Sahai was entitled as co-partner with Rajah Kashi Pershad to one-third share in seven villages. The summary settlement of 1858 was made with the Rajah as talookdar of twenty-six villages, including the seven in which the plaintiff was interested. In his application for the settlement he stated that in 1264 Fuslee the summary settlement was made as to the seven villages in partnership with both him and the widow at one-third as the share of the widow and two-thirds for himself. (See Record on that case, p. 45.) In the settlement proceedings it was ordered that the settlement of the seven villages with others should be made with the Rajah as talookdar, and that the widow should be recorded as a co-partner. The settlement was accordingly made with the Rajah alone, and he alone engaged for the revenue. (Same Record, pp. 46 and 47.) The sunnud of the talookdary, including the seven villages, was under the letter of 10th October 1859 granted to the Rajah alone. The Rajah disputed the widow's claim, and she sued for proprietary and also for under-proprietary rights. It was held by the Court of First Instance that her suit for the former was barred, by the sunnud being in the name of Rajah Kashi Pershad only; and that she could not recover under-proprietary rights because any title she might have had must have been to proprietary rights. It was held by the Financial Commissioner that the widow was entitled to one-third of the profits of the seven villages when the annual accounts should be made up. Upon appeal to Her Majesty in Council it was held by the Judicial Committee that there was ground for holding that the summary settlement and the subsequent order of 1859 conferred talookdary rights on the widow, but that she was entitled to one-third share of the profits of the seven villages.

That case so closely resembles the present in many particulars, and the remarks of the Judicial Committee are so applicable to it, that their Lordships will read an extract from the Judgment which does not appear to have been yet reported. They say :—

"The construction which their Lordships would put upon the words 'and that the name of Shunkur Sahai's widow be recorded as a shareholder' is not that the Settlement Officer gave, or intended to give, the widow the right of making a summary settlement as talookdar but simply desired to place on record for her benefit her admitted beneficial interest in some and some only of the villages which made up the settled talook."—Printed Judgment, p. 13.

* * * * *

"Mr. Capper seems to have admitted as to the seven villages that though the appellant had not been in independent possession of one-third of the collections, yet that the Rajah might have so bound himself by writing as to have incurred the obligation of accounting to her for one-third of the profits. He ultimately dismissed her suit because her agent had failed to produce a deed in writing so binding the talookdar. Colonel Barrow, however, appears to have held that the admission of the Rajah at the time of the summary settlement and on other occasions, the former being in the nature of an admission on record, were equivalent to such a deed, and that, accordingly, the relation of trustee and *cestui que trust* having so to speak been established between them, she was entitled to one-third share of the profits of the villages when the annual accounts were made up. In this part of the Financial Commissioner's order their Lordships entirely concur."

This case is, therefore, an authority for the proposition that a person who has been registered as a talookdar under Act I of 1869, and has thereby acquired a talookdaree right in the whole property, may, nevertheless, have made himself a

* Ante p. 4.

trustee of a portion of the beneficial interest in lands comprised within the talook for another, and be liable to account accordingly.

In that case the *cestui que trust* was a stranger. In this case the plaintiffs claimed as persons constituting with the defendant a joint Hindoo family.

It appears that the respondent in his application for a summary settlement in the case now under consideration stated that there was no partner of his other than Hurdeo Bux (p. 6), but he said nothing as to Purbut Singh.

On the 22nd March 1866 (Record pp. 78 and 79), the plaintiff deposed that he, Purbut Sing, and the respondent all lived together *and had everything in common up to January then last*, which was nearly eight years after the date of the summary settlement, and more than six from the date of the sunnud.

Their Lordships are of opinion that, up to the time of Lord Canning's proclamation, the whole of the villages mentioned in the summary settlement were the joint family property of the petitioner, and Purbut Singh, and the defendant, and that they were either ancestral or purchased with the proceeds of ancestral estate. The defendant himself, more than a year after the date of the summary settlement, stated in his deposition on oath made in another case on the 8th July 1859, that the custom prevailing in his family was that if his cousins, meaning the plaintiff and Purbut Singh, who were his partners, should claim they could get their shares divided. He said, "They at present live with me, and receive food and clothing." It does not appear clearly from the latter words whether the estate was held as joint family property or whether the defendant merely made an allowance to the plaintiffs.

The defendant in his deposition deposed that his statement made at the time of the summary settlement referred to Mouzah Gungoa only (p. 83). But that seems to be at variance with the statement A, p. 6 of the Record, which refers to the eighty-two villages mentioned in column 3.

The Lower Courts appear to have decided the case merely upon the ground that the defendant was protected by the sunnud, without adverting to s. 15 of Act I of 1869, or enquiring whether, notwithstanding the summary settlement, the sunnud, and the statute, the plaintiffs or the appellant had, either before or after the passing of Act I of 1869, acquired or become entitled to a beneficial interest in any part of the property.

Their Lordships are of opinion that, looking to the allegations in the plaint and written statements, an issue ought to have been raised to try that question. They do not, on the materials before them, feel competent to decide it. The defendant's sunnud is not on the record. They have no evidence of all the circumstances under which the summary settlement was made, nor of those under which the sunnud was granted, nor of what was done with respect to it or the property comprised in it before the registration of the defendant under Act I of 1869.

Their Lordships will, therefore, humbly advise Her Majesty that the Commissioner may be directed to try or to refer to the Settlement Officer for trial the following issue, namely, whether the respondent has in any and what manner agreed or become bound to hold the villages comprised in the summary settlement and sunnud, or any and what part thereof, or the rents and profits thereof, or any and what part thereof, in trust for the appellant and Pertab Singh, or either and which of them; that either party be at liberty to adduce such evidence upon the trial of that issue as he may be advised, and that the finding upon such issue, together with a translation of any additional evidence which may be adduced, be forwarded to the Registrar of the Privy Council, in order to enable the Judicial Committee to report to Her Majesty their opinion upon this appeal.

The 12th June 1877.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Hindoo Law—Maintenance—Illegitimate Son—Unborn Children—Alienation
by Father.*

On Appeal from the Judicial Commissioner, Central Provinces.

Rajah Parichat

versus

Zalim Singh.

The illegitimate son of a person belonging to one of the twice-born classes has a right to maintenance; and so where a Rajah, having then no legitimate son, but having an illegitimate son, executed a sunnud in favor of the latter, who, in pursuance thereof, obtained delivery of possession of a certain village for his maintenance, it was held that the Rajah was acting in the performance of a legal obligation, and that the grant made by the sunnud would not fall within the supposed prohibition that a father, having no legitimate son, is by the Mitachara law incompetent to alienate ancestral estate to a stranger.

Mr. Cowie, Q.C., and Mr. Graham for Appellant.
No one for Respondent.

Sir James Colville gave judgment as follows:—

This is an appeal from an order made by the Judicial Commissioner of the Central Provinces whereby he has decreed to the respondent, the plaintiff in the suit, who does not appear upon this appeal, the possession of a certain village called Simeeria. The facts, so far as it is necessary to mention them, may be very shortly stated. The father of the appellant, the late Rajah Bahadoor Singh, was the owner of an estate consisting of five villages, one of which was this village of Simeeria. They had been held by his ancestors for a long time, but there seems to have been some doubt to what extent they were rent-free, though enjoyed by him as such. Ultimately, however, the Government of the North-West Provinces determined to recognise the right of the Rajah and his heirs to hold them in perpetuity as rent-free. Before that question (which is not material to the decision of the present appeal) was settled, the Rajah, having then no legitimate son, but having an illegitimate son, the plaintiff, Zalim Singh, executed the sunnud which is at p. 3 of the Record, and, with the addition of certain names and titles of the parties which may be omitted, is in these words:—"This sunnud is granted by Rajah Bahadoor in favor of you Zalim Singh, pledging to you the possession of Mouzah Simeeria, which you will hold and enjoy in perpetuity for your personal expenses, food, clothing, Pan, Masala. You are to receive as written herein, and to be regular in rendering your service." Delivery of possession of the village seems to have followed upon the grant, and Zalim Singh was in possession of it when his father died, and continued to be in possession during the period while the estate was administered for the appellant, the legitimate son and heir of the Rajah, by the Court of Wards. The appellant, however, on coming of age appears to have ejected Zalim Singh from the possession of the village. The latter then brought this suit, in which he claimed the possession of the village "as granted to him for his maintenance by the sunnud;" and the statement of his pleaders, who were examined in the cause, contains the following passage: "It is true that the proprietary rights of this village with others belonging to the Jaghire were given at the settlement to Pareechut (the appellant) as head of the family; this Zalim Singh does not dispute, nor does he claim proprietary rights, but as he belongs to the family, and as his father considered this village sufficient for his

support, he claims possession of the same, or a payment in money equal to the profits of the village." And in answer to a direct question by the Court why at the settlement Zalim Singh did not claim proprietary rights, they said, "Zalim Singh only wished for support, and it would have interfered with the position of the head of the family to have broken up the estate by having the proprietary right bestowed on any other than the head of the family." In these circumstances their Lordships do not deem it necessary on this appeal to consider whether upon the true construction of the sunnud it was such a grant in favor of Zalim Singh as would enure for the benefit of his children, if he had any, or enable him, upon an alienation of the village, to give a good title to the purchaser. It seems to them that all that is raised on the present record is the right of Zalim Singh to the present possession of the village.

The course the litigation took was as follows:—The right of Rajah Bahadoor Singh to make such a grant was contested. That issue was found in favor of the plaintiff and against the defendant. The *factum* of the grant was also contested. That issue must be taken to have been conclusively found by the judgment of the Deputy Commissioner confirmed by that of the Commissioner in favor of the plaintiff. It came out, however, before the Deputy Commissioner, that after Zalim Singh had been ejected from the possession of the village, he had executed a mortgage of it in favor of some money lender; and thereupon the Deputy Commissioner came to the conclusion that the plaintiff was no longer entitled to hold the village in khas possession and to receive the collections; but that having a distinct right to maintenance, and having had this village assigned to him by way of maintenance, he was at all events entitled to receive what may be called the net proceeds of it after the expenses of management, collection, and the like were provided for, such proceeds being estimated at the annual sum of Rs. 680. And he made a decree accordingly, which on the appeal of the defendant was confirmed by the Commissioner. Zalim Singh did not appear in the Commissioner's Court, or join in that appeal. It further appears that after the decision of the Commissioner he proceeded to take out execution, and recovered the amount which had been awarded to him by the Deputy Commissioner. In that state of things the defendant, the present appellant, saw fit to carry the case before the Judicial Commissioner by a special appeal, and the two material grounds of that appeal are the first and the fifth. In the first he says:—"The Lower Courts are wrong in law in holding that Rajah Bahadoor Singh had power to alienate ancestral immoveable property in the way he is alleged to have done by the sunnud put forward by the plaintiff." In the fifth he says:—"The Lower Courts are wrong in law in decreeing maintenance in plaintiff's favor, notwithstanding that his plaint was simply for possession of the village of Simeeria, and was never amended so as to enable the Courts to give a decree for maintenance." The Judicial Commissioner in dealing with this special appeal yielded to the last ground of appeal, and held that the Lower Courts had gone beyond their proper functions in making a decree for maintenance in money instead of awarding possession of the village; but he assumed that he had a right to make the decree which he thought ought to have been made on the merits of the case, and he accordingly varied the decree of the Courts below by giving a decree for possession. His decree, which is that now appealed from, is: "That the decrees of both the Lower Courts be reversed, and a decree granted for possession of Mouzah Simeeria to plaintiff, special respondent," with costs.

It has been argued, that to make this decree upon a special appeal was *extra vires* of the Judicial Commissioner, the Courts below having decided against the plaintiff's claim to possession, and he having acquiesced in their decisions. It seems, however, to their Lordships, that the appellant himself reopened that question. He took the cause before the Judicial Commissioner. By his fifth ground of appeal he contended that the particular decree which had been made

was improperly made; by his first ground of appeal he contended that the suit ought to have been dismissed. If he were right on the former point, but wrong upon the latter, it became necessary for the Judicial Commissioner to make some decree, and therefore the question what decree was proper to be made upon the pleadings and evidence in the cause was necessarily open and raised before him.

A more substantial question is that raised by the first ground of appeal. Their Lordships do not think it necessary in this case to determine the question, whether, under the Mitacshara law, a father who has no child born to him is or is not competent to alienate the whole or part of the ancestral estate; whether the rights of unborn children are so preserved by the Mitacshara as to render such an alienation unlawful. When that question does come distinctly before them, it will of course be their duty to decide it; but upon the present appeal they abstain from laying down any positive rule one way or the other. It seems to them that the objection in this case goes only to the particular alienation by the sunnud, which stands upon a different footing. It appears to be unquestionably the law, that the illegitimate son of a person belonging to one of the twice-born classes, and the Rajah may be assumed to fall within that category, has a right of maintenance. Therefore, in assigning maintenance to Zalim Singh, his father was acting in the performance of a legal obligation. He could not consult his legitimate son, because at that time there was no legitimate son born, and therefore looking to the purpose for which the grant made by the sunnud, whatever may be its extent, was made, their Lordships think that it would not fall within the prohibition, supposing, which they are far from deciding, that a father, having no legitimate son, is by the Mitacshara law incompetent to alienate ancestral estate to a stranger. Their Lordships therefore, without, as has been said before, determining anything as to the extent of the grant, are of opinion that upon the question whether the Rajah Bahadoor had power to make it, the concurrent decisions of the three Courts in India were correct; and on the whole case they are of opinion that the decree of the Judicial Commissioner is right, and ought to be affirmed; and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal. There will be no costs, as the respondent has not appeared.

The 13th June 1877.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Registration—Priority—Act VIII of 1871 s. 35—Denial of Execution of
Deed—Refusal to Register—Improper Registration.*

On Appeal from the High Court at Allahabad.

Mahomed Ewaz and another

versus

* Birj Lall and another.

Where a deed is tendered for registration within the time prescribed by Act VIII of 1871, and registered, it is immaterial that another deed has obtained priority of registration.

The latter part of s. 35 of the same Act, taken in connection with the rest of the Act, should be read distributively and be construed to mean that the registering officer shall refuse to register a deed, *quoad* the persons who deny the execution of it, and *quoad* any person who appears to be a minor, an idiot, or a lunatic.

Their Lordships declined to lay down broadly, as a general rule, that, in all cases where a registered deed is produced, it is open to the party objecting to the deed to contend that there was an improper

registration, or that the terms of the Registration Act in some substantial respects have not been complied with.

Mr. Cowie, Q.C., and Mr. Graham for Appellants.

Mr. Doyne for Respondents.

Sir Montague Smith delivered judgment as follows :—

This is a suit brought by the appellants, the sons and heirs of Shere Mohammed, the vendee under a deed of sale which on the face of it purports to have been made by three persons, Mobaruk Jan, and her two sons, Hyat Mohammed and Salamuttoolah. The sale was of certain shares in two mouzahs, the shares which each held not being specified. It must be taken, however, on this appeal, that although the amount of the shares to which each of the parties was entitled is not yet ascertained, the shares were held in such a manner that each might separately dispose of his own shares. The respondents, who are purchasers under a subsequent deed of sale, and who impeach the deed of sale to Shere Mohammed, contend that the last-mentioned deed cannot be read in evidence because it was not properly registered. The deed has been in point of fact registered, and it lies upon the respondents who impeach that registration to show the facts which invalidate it. They have not proved that the shares were held jointly, nor does it appear that that point was made in either of the appeals below.

The Subordinate Judge of Bareilly and the Judge of Bareilly to whom the case went from the Subordinate Judge on appeal, found that the mother had not executed the deed, but that the two sons had done so, and a decree was given by the Subordinate Judge, which was affirmed by the Judge in these terms: "That a decree be given to the plaintiff for the completion of the sale deed dated 14th January 1874, to the extent of the rights of Hyat Mohammed and Salamuttoolah, defendants, in the shares of Mouzahs Tah and Kishanpur Maupur against the said defendants and the vendees, and the claim for possession of the said shares, and for the rights of Mussamat Maborak Jan, be dismissed." That decree may be taken to be a declaration that the appellants, as the heirs of the vendee, are entitled to the rights, whatever they were, of Hyat Mohammed and Salamuttoolah in these mouzahs. The decree goes no further, it refuses to decree possession; and, from the reasons given by the Judge for his decree, it would seem that the amount of the shares to which each was entitled had not been proved before him.

From these judgments there was a special appeal to the High Court, and the only question upon which the High Court decided, and which alone their Lordships think it material to consider, is that of registration. The High Court came to the conclusion that the registration of the deed of sale to Shere Mohammed was null, because the requisites of the Registration Act had not been complied with.

It appears that the deed was brought to the Registrar on the 15th January; the vendors did not attend, and it became necessary to summon them. The two sons appeared on the following day, and admitted their own execution, but denied that of their mother. The deed purports to have been executed by the two sons, each in his own handwriting, and by the mother, Mussumat Mobaruk Jan, by the hand of Hyat Mohammed. The sons admitted their own signatures and executions, but stated that their mother had not assented to the sale. The Sub-Registrar made the endorsements which are found upon the deed, and which consist of three separate paragraphs. The first endorsement was made on the 15th January, the day on which the deed was presented for registration, and is to the effect that the deed between the hours of 10 and 11 was presented for registration in the office of the officiating Sub-Registrar by Chotelal, the agent of the vendee, who also applied for the compulsory attendance of the vendors.

The two sons, having attended on the following day, and made the admissions and statement above referred to, the Sub-Registrar made this endorsement: "Hyat Mohammed and Salamuttoolah, sons of Amirulla (sect Shaikh Punjabi, occupation zemindary), and residents of Pilibheet, in the district of Bareilly, two of the three

vendors named in this sale deed, were identified," and so on, stating the identity, "and their written depositions were taken down on separate papers, according to the application of the manager of the vendee for the compulsory attendance of the vendors. The said vendors admitted before me, in their written deposition, that they had executed the sale deed now in the office, including therein the name of their mother, and completed it by having it duly signed and witnessed, but that they had this sale deed drawn up without consulting their mother, and she was not a consenting party to it; that they had not received any money from this vendee, and they, having received a larger amount of consideration from Byjnath, etc., executed a sale deed in their favor, and had it registered, and that they had no mind to have this sale deed registered." The last statement, that they had no mind to have the deed registered, appears to have been treated as a refusal on their part to endorse the document; but the Act gives power to the Registrar to register, notwithstanding such a refusal, and accordingly the Registrar did register the deed in the formal manner required by the Act, and made this formal endorsement of registration upon the instrument: "This document is registered at No. 40, page 299, vol. 11, Register No. 1, on 16th January 1874."

The deed of sale to the respondents, which also bears date on the 14th January 1874, had been brought to the Registry on the 15th; and all the vendors having admitted, either by themselves or their agent, that that deed had been executed, it was registered on that day. Nothing, however, turns upon the priority of the registration of this deed, because by the provisions of the Act a deed operates not from the time of its registration, but from the time when it would have commenced to operate if no registration had been required. If, therefore, a deed is tendered for registration within the time prescribed by the Act, and registered, it is immaterial that another deed has obtained priority of registration.

These being the facts of the case, the High Court have decided that the execution of the deed not having been admitted by the mother and her authority for its execution having been denied, it was improperly registered, and could not be received in evidence as against the sons. The decision is founded mainly on s. 35 of the last Registration Act, Act VIII of 1871. Before coming to that Section it will be right to call attention to the scheme of the Act, with a view to see whether the general provisions do not furnish a context by which to construe the language used in s. 35.

The 17th Section describes the documents required to be registered. The 23rd prescribes the time within which deeds are to be presented for registration, *viz.*, a period of four months after their execution; and there is a proviso to that Section to which it is material to call attention. It is this: "Provided that where there are several persons executing a document at different times, such document may be presented for registration and re-registration within four months from the date of each execution." It is plain that under that proviso a deed, say, by several vendors, may be registered as to one or two of them when one or two have executed the deed, and may be again registered when others have at a later period executed it. Then come the 34th and 35th Sections, which are the most important Sections to be considered. The 34th enacts that, "Subject to the provisions contained in this part and in ss. 41, 43, 45, 69, 76, and 86, no document shall be registered under this Act unless the persons executing such document or their representatives, assigns, or agents authorised as aforesaid appear before the registering officer within the time allowed for presentation." There the persons described are the persons executing the document;—not those who on the face of the deed are parties to it, or by whom it purports to have been executed, but those who have actually executed it. Then there is power to enlarge the time, and a provision that the appearances may be simultaneous or at different times. Then "the registering officer shall thereupon enquire whether or

not such document was executed by the persons by whom it purports to have been executed," and "satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and, in the case of any person appearing as a representative, assign, or agent, satisfy himself of the right of such person so to appear."

The 35th Section is: "If all the persons executing the document"—again, not "purporting to execute it,"—but "if all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document, or, in the case of any person appearing by a representative, assign, or agent, if such representative, assign, or agent admits the execution, or if the person executing the document is dead and his representative or assign appears before the registering officer and admits the execution, the registering officer shall register the document as directed in ss. 58 to 61 inclusive." Then comes the enactment which occasions the difficulty: "If all or any of the persons by whom the document purports to be executed deny its execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document." These words, taken literally, undoubtedly seem to require the registering officer to refuse to register a deed which purports to be executed by several persons if any one of those persons denies the execution. Such a construction, however, would cause great difficulty and injustice, which it cannot be supposed the Legislature contemplated, and would be inconsistent with the language and tenor of the rest of the Act; their Lordships, therefore, think the words should be read distributively, and be construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the execution of the deed, and *quoad* any person who appears to be a minor, an idiot, or a lunatic. There appears to be no reason for extending the clause further than this, so as to destroy the operation of the deed as regards those who admit the execution, and who are under no disability which would be the practical effect of a refusal to register at all. The proviso in the 23rd Section to which allusion has already been made shows that the Legislature contemplated a partial registration of a deed, that is, partial as to the persons executing it. Now it would be extremely difficult to give effect to this enactment in the 35th clause in its literal meaning, and at the same time to give effect to the proviso in the 23rd clause. To do so would certainly create an anomaly. Supposing three vendors live in different places, and are called upon at different times to execute the deed of sale, in that case there undoubtedly may be three several registrations. Supposing No. 1 and No. 2 attend the Registrar and admit the execution of the deed, and it is registered, but No. 3 afterwards comes and denies the execution of the deed, what is to be the consequence? Is the previous registration of the two to be rendered invalid? If so, effect could not be given to the proviso. And if that registration is not to be invalid, what difference in principle can there be between the case where three vendors appear at different times to admit or deny the execution, and where they appear at the same time to admit or deny the same fact? That which is required of them is precisely the same in both cases, and the admission and denial ought in reason to have the same effect in both.

Their Lordships cannot but think that considerable light is thrown upon the intention of the Legislature by the provision that there may be under the circumstances mentioned a registration and re-registration of the same document.

Again, the registering officer is to refuse to register, not only in the case of persons who deny the execution of the deed, but in the case of persons who appear—that is, who appear to him—to be minors, or idiots, or lunatics. Sup-

pose a deed executed by three persons, two of whom were under no disability, and who admit their execution, but the third had become a lunatic, it would follow, if the construction contended for by the respondents were to prevail, that that deed could not be registered against the persons who admitted their execution, and who were under no disability. The consequences of such a construction would be so injurious that it cannot be supposed that the Legislature intended to produce them. The consequences of non-registration are pointed out in the 49th Section, and are of the most stringent description:—"No document required by s. 17 to be registered shall affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." The effect, therefore, in the case which has just been supposed, would be that the deed could not be given in evidence against those who had executed it, and who were under no disability, because some other person interested in the property, and made a party to it, had become lunatic (it may be after the execution), or appeared to the Registrar to be lunatic. No injustice is done by admitting a deed to registration, because the effect is no more than to satisfy an onerous condition before the deed can be given in evidence; and when in evidence, it is subject to every objection that can be made to it precisely as if no registration had taken place; whereas when registration is refused, the effect may be to deprive the party altogether of perfectly good rights which he might have under the deed but for the Registration Act.

The Act gives little discretion to the Sub-Registrar. He is bound either to register or not to register when he is satisfied by the admission or denial of the parties that the deed has been executed, and no discretion is given to him to enquire further into the matter. He can only obtain from the parties or their agents the admission or the denial. But provision is made for an appeal from his refusal to register to the District Court, and that Court is empowered to go into evidence, and if the District Judge is satisfied that the deed was executed by the parties, he is then to order the registration. The power of that Court, however, does not and could not arise in this case, because in point of fact the Sub-Registrar did register the deed.

Their Lordships do not think it necessary to refer specifically to the other Sections in the Act. They have referred to those which furnish, in their view, a context to explain and cut down the generality of the words used in the 35th Section.

This point will of course dispose of the appeal. But there is another part of the judgment of the High Court which their Lordships think requires consideration. The High Court say, "It has been held by this Court more than once that unless a deed be registered in accordance with the substantial provisions of the law, it must be regarded as unregistered, though it may in fact have been improperly admitted to registration." Their Lordships think this is too broadly stated, if the High Court is to be understood to mean that in all cases where a registered deed is produced, it is open to the party objecting to the deed to contend that there was an improper registration,—that the terms of the Registration Act in some substantial respects have not been complied with. Undoubtedly it would be a most inconvenient rule if it were to be laid down generally that all Courts, upon the production of a deed which has the Registrar's endorsement of due registration, should be called on to enquire, before receiving it in evidence, whether the Registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed, and it is required under the penalty that the deed shall not be given in evidence unless it be registered. If it be registered, the party who has presented it for registration is then under the Act in a position which *primâ facie* at least entitles

him to give the deed in evidence. If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe. If the Registrar refuses to register, there is at once a remedy by an appeal; but if he has registered, there is nothing more to be done. Supposing, indeed, the registration to be obtained by fraud, then the act of registration, like all other acts which have been so arrived at, might be set aside by a proper proceeding. The 60th Section is, "After such of the provisions of ss. 34, 35, 58, and 59 as apply to any documents presented for registration have been complied with, the registering officer shall endorse thereon a certificate, containing the word 'registered,' together with the number and page of the book in which the document has been copied. Such certificate shall be signed, sealed, and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsements referred to in s. 59 have occurred as therein mentioned." The certificate is that which gives the document the character of a registered instrument, and the Act expressly says that that certificate shall be sufficient to allow of its admissibility in evidence. Then by the 85th clause, it is enacted that "Nothing done in good faith pursuant to this Act, or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure." No doubt, in this case, the fact of the non-admission of the mother's execution appears upon the endorsement made on the deed itself, and did not require to be proved *aliunde*; but the observations in the judgment go beyond the particular case.

This point does not come before their Lordships for the first time. It was a good deal considered in the case to which Mr. Cowie has referred, *Sah Mukhun Lall Panday v. Sah Koondun Lall* (2nd Law Reports, Indian Appeals, 210);* and although it was not there necessary to decide the point,—indeed the point did not arise, and the appeal was decided upon another ground,—yet the considerations to which their Lordships have just adverted were discussed in the judgment in this way:—"Now considering that the registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of ss. 19, 21, or 36, or other similar provisions." It may be observed that s. 36 in the former Act is the equivalent of s. 35 in the present Act. "It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words 'defect in procedure' in s. 88 of the Act,"—which is the same as s. 85 in the present Act—"so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal under s. 83, or upon petition under s. 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled, and may not discover until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights."

It is to be observed, with regard to the inconvenience which it is suggested may arise from a deed being registered when some only of the parties to it have executed it, that provision is made for disclosing the parties who have really executed the deed. A copy of the deed is to be made in a book, and there are to be indexes, and it is directed that "Index No. 1 shall contain the names and additions of all persons executing, and of all persons claiming under every docu-

* 24 W. R. 75; *ante*, p. 170.

ment copied into or memorandum filed in book No. 1 or book No. 3." So that anyone consulting the register would find a copy of this deed, and that the two sons only had executed it, and that the mother had not.

On these grounds their Lordships think that the decree of the High Court cannot be sustained, and they will humbly advise Her Majesty to reverse it, and to order that the appeal from the decree of the Judge of Bareilly to the High Court be dismissed, with costs, and that the last-mentioned decree be affirmed.

The appellants will have the costs of this appeal.

The 28th June 1877.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Purdanasheen Women (Deeds by)—Presumption—Endowment—
Act XX of 1863.*

On Appeal from the High Court at Calcutta.

Nawab Syed Ashgar Ali and others

versus

Dilrus Bannoo Begum.

It is incumbent on the Court, when dealing with the disposition of her property by a purdanasheen woman, to be satisfied that the transaction was explained to her, and that she knew what she was doing; and especially so where, for no consideration and without any equivalent, the lady, intending and desiring to retain the estate for her own life and to create an endowment by way of testamentary disposition of it after her death, executed a deed which deprived her of all her property, and thus not only did not carry out her intentions, but was entirely and absolutely opposed to them.

Although, if a person of competent capacity signs a deed, the presumption is that he understood the instrument to which he has affixed his name; yet in the case of a purdanasheen woman, who had no legal assistance, the ordinary presumption does not arise; and it is incumbent upon the Court to be satisfied, as a matter of fact, that she really did understand the instrument to which she has put her name.

Their Lordships saw no reason for disagreeing with the decision of the High Court that an endowment of the above description was not of such a public character as would sustain a suit under Act XX of 1863.

Mr. Leith, Q.C., and Mr. Doyne for Appellants.

Mr. Cowie, Q.C., and Mr. Mayne for Respondent.

Sir Montague Smith gave judgment as follows:—

This suit was instituted under Act XX of 1863 against the respondent, as the mutwali of a Mahomedan religious endowment, for malversation in wasting and misappropriating the estate. The plaintiffs (appellants) sought to obtain an account, the removal of the respondent from the office of mutwali, and the appointment of two of the plaintiffs, who are her nephews and next heirs, in her place. The allegation in the plaint, which is the foundation of the plaintiff's case, is as follows: "That the defendant has by a registered wuqfnamah of the 25th Zikad 1268 Hijri," answering to the 10th September 1852, "endowed the entire estate held and owned by her to the Imambara for religious purposes." The Judge of the Court of the Twenty-four Pergunnahs made a decree in favor of the plaintiffs, establishing the validity of the endowment, and granting the relief prayed. This decree was reversed by the High Court, on the ground that the allegation in the plaint which has just been cited was not established. It was also held that the endowment, if established, was not of such a public nature as would sustain a suit under Act XX of 1863.

The respondent inherited a large estate from her mother, Nigarara Begum,

having survived two brothers who died in their mother's lifetime. Two of the plaintiffs are the sons of one of these brothers; the other three plaintiffs are persons in no way connected with the family, but who claim the benefit of the endowment. The mother, Nigarara, died in 1850; and about two years afterwards the tauliutnamah relied on was executed. The family are Mahomedans of the Sheah sect. The tauliutnamah is dated the 10th September 1852, and the material parts of it are these: "I make a trustworthy declaration and a legal acknowledgment, and give in writing to the effect that I consider it indispensable and incumbent upon me to continue and perpetuate the ceremonies for pious uses of such description as 'fatiha' (offering prayers for the dead) 'hazrat,' on whom be the benedictions, etc., which is the fixed and settled usage of my family. I have no lawful children or grandchildren who may be my legal heirs, therefore talooka of Chitpore," describing certain property, "and all the compensation money, etc., the price of which at present is estimated at one lakh of rupees (100,000), which I hold in my possession, without anyone having any share therein, and without there being any other co-partner, as my legal hereditary right, having received the same from my ancestors in accordance with what is laid down in separate documents, the same for special pious purposes I have made wuqf in perpetuity with all inherent adventitious rights and interests, large and small, lying therein, attached thereto, and arising therefrom, with all appurtenances particularly of pious uses. As long as I live, the wife of my brother, of blessed memory, Mussumat Jigri Khanum, the daughter of the late Moonshi Hidayat Ali, shall remain mutwali of the afore-mentioned wuqf. If I, the endower, die before the aforesaid lady, then the affairs connected with tauliut shall, in a perfect form, revert to the afore-mentioned lady. Should the afore-mentioned lady die before me, I, the bequeather, alone will act as a mutwali of the wuqf endowed property. The one of us two who may survive the other shall, either at the time of death or previous to it, appoint whomsoever she finds most worthy and befitting as a trustee and (mutwali) to the endowment." Then the deed goes on, "The specification of the expenses is this:—All the income derived from the afore-mentioned endowment has, after the payment of the Government revenue, been divided into twenty-eight parts. Of these, fifteen parts are to be applied to the expenses of the fatiha of the Lord of the Universe, the last of the prophets (Mahomed) and the Imams, the blessing and peace of God be with them all, and the expenses of the ten days of Mohurram and all the holy days, the repairs of Imambari and tombs; seven parts thereof shall be received by all the amlahs and servants, whose names are inserted at the foot of this or other documents bearing the seal and signature of me, the declarant, which they may have in their possession, some from generation to generation, and others as long as they retain the service, as detailed in separate documents; and six parts thereof will be received by us, the mutwalis, in equal shares." Now, the effect of this instrument is to devote all the property which this lady possessed to religious uses, to destroy her rights as proprietor, and to constitute her one only of the mutwalis for the management of the endowment, giving her $\frac{15}{28}$ parts of the income of the whole property only for her management. The deed was written in Persian, a language the Begum did not understand. Her case is, that although she executed the instrument, its contents were not explained to her, and that she was ignorant that its effect would be that which has just been described.

Their Lordships are of opinion, agreeing with the High Court, that it is not established that the Begum understood the full import and effect of the document she executed. It is incumbent on the Court, when dealing with the disposition of her property by a purdanasheen woman, to be satisfied that the transaction was explained to her, and that she knew what she was doing; and especially so in a case like the present, where for no consideration, and without any equivalent, this lady has executed a document which deprives her of all her property.

was improperly made; by his first ground of appeal he contended that the suit ought to have been dismissed. If he were right on the former point, but wrong upon the latter, it became necessary for the Judicial Commissioner to make some decree, and therefore the question what decree was proper to be made upon the pleadings and evidence in the cause was necessarily open and raised before him.

A more substantial question is that raised by the first ground of appeal. Their Lordships do not think it necessary in this case to determine the question, whether, under the Mitacshara law, a father who has no child born to him is or is not competent to alienate the whole or part of the ancestral estate; whether the rights of unborn children are so preserved by the Mitacshara as to render such an alienation unlawful. When that question does come distinctly before them, it will of course be their duty to decide it; but upon the present appeal they abstain from laying down any positive rule one way or the other. It seems to them that the objection in this case goes only to the particular alienation by the sunnud, which stands upon a different footing. It appears to be unquestionably the law, that the illegitimate son of a person belonging to one of the twice-born classes, and the Rajah may be assumed to fall within that category, has a right of maintenance. Therefore, in assigning maintenance to Zalim Singh, his father was acting in the performance of a legal obligation. He could not consult his legitimate son, because at that time there was no legitimate son born, and therefore looking to the purpose for which the grant made by the sunnud, whatever may be its extent, was made, their Lordships think that it would not fall within the prohibition, supposing, which they are far from deciding, that a father, having no legitimate son, is by the Mitacshara law incompetent to alienate ancestral estate to a stranger. Their Lordships therefore, without, as has been said before, determining anything as to the extent of the grant, are of opinion that upon the question whether the Rajah Bahadoor had power to make it, the concurrent decisions of the three Courts in India were correct; and on the whole case they are of opinion that the decree of the Judicial Commissioner is right, and ought to be affirmed; and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal. There will be no costs, as the respondent has not appeared.

The 13th June 1877.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Registration—Priority—Act VIII of 1871 s. 35—Denial of Execution of
Deed—Refusal to Register—Improper Registration.*

On Appeal from the High Court at Allahabad.

Mahomed Ewaz and another

versus

* Birj Lall and another.

Where a deed is tendered for registration within the time prescribed by Act VIII of 1871, and registered, it is immaterial that another deed has obtained priority of registration.

The latter part of s. 35 of the same Act, taken in connection with the rest of the Act, should be read distributively and be construed to mean that the registering officer shall refuse to register a deed, *quoad* the persons who deny the execution of it, and *quoad* any person who appears to be a minor, an idiot, or a lunatic.

Their Lordships declined to lay down broadly, as a general rule, that, in all cases where a registered deed is produced, it is open to the party objecting to the deed to contend that there was an improper

registration, or that the terms of the Registration Act in some substantial respects have not been complied with.

Mr. Cowie, Q.C., and Mr. Graham for Appellants.

Mr. Doyne for Respondents.

Sir Montague Smith delivered judgment as follows:—

This is a suit brought by the appellants, the sons and heirs of Shere Mohammed, the vendee under a deed of sale which on the face of it purports to have been made by three persons, Mobaruk Jan, and her two sons, Hyat Mohammed and Salamuttoolah. The sale was of certain shares in two mouzahs, the shares which each held not being specified. It must be taken, however, on this appeal, that although the amount of the shares to which each of the parties was entitled is not yet ascertained, the shares were held in such a manner that each might separately dispose of his own shares. The respondents, who are purchasers under a subsequent deed of sale, and who impeach the deed of sale to Shere Mohammed, contend that the last-mentioned deed cannot be read in evidence because it was not properly registered. The deed has been in point of fact registered, and it lies upon the respondents who impeach that registration to show the facts which invalidate it. They have not proved that the shares were held jointly, nor does it appear that that point was made in either of the appeals below.

The Subordinate Judge of Bareilly and the Judge of Bareilly to whom the case went from the Subordinate Judge on appeal, found that the mother had not executed the deed, but that the two sons had done so, and a decree was given by the Subordinate Judge, which was affirmed by the Judge in these terms: "That a decree be given to the plaintiff for the completion of the sale deed dated 14th January 1874, to the extent of the rights of Hyat Mohammed and Salamuttoolah, defendants, in the shares of Mouzahs Tah and Kishanpur Maupur against the said defendants and the vendees, and the claim for possession of the said shares, and for the rights of Mussamat Maborak Jan, be dismissed." That decree may be taken to be a declaration that the appellants, as the heirs of the vendee, are entitled to the rights, whatever they were, of Hyat Mohammed and Salamuttoolah in these mouzahs. The decree goes no further, it refuses to decree possession; and, from the reasons given by the Judge for his decree, it would seem that the amount of the shares to which each was entitled had not been proved before him.

From these judgments there was a special appeal to the High Court, and the only question upon which the High Court decided, and which alone their Lordships think it material to consider, is that of registration. The High Court came to the conclusion that the registration of the deed of sale to Shere Mohammed was null, because the requisites of the Registration Act had not been complied with.

It appears that the deed was brought to the Registrar on the 15th January; the vendors did not attend, and it became necessary to summon them. The two sons appeared on the following day, and admitted their own execution, but denied that of their mother. The deed purports to have been executed by the two sons, each in his own handwriting, and by the mother, Mussumat Mobaruk Jan, by the hand of Hyat Mohammed. The sons admitted their own signatures and executions, but stated that their mother had not assented to the sale. The Sub-Registrar made the endorsements which are found upon the deed, and which consist of three separate paragraphs. The first endorsement was made on the 15th January, the day on which the deed was presented for registration, and is to the effect that the deed between the hours of 10 and 11 was presented for registration in the office of the officiating Sub-Registrar by Chotelal, the agent of the vendee, who also applied for the compulsory attendance of the vendors.

The two sons, having attended on the following day, and made the admissions and statement above referred to, the Sub-Registrar made this endorsement: "Hyat Mohammed and Salamuttoolah, sons of Amirulla (sect Shaikh Punjabi, occupation zemindary), and residents of Pilibheet, in the district of Bareilly, two of the three

According to the Hindoo law in Madras, two or more lawful widows take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyment; and though they have no right to enforce an absolute partition of the joint estate between them, they may agree to an arrangement for separate possession and enjoyment of their respective shares, leaving the title to each share unaffected.

*Mr. Leith, Q.C., and Mr. Grady for Appellant.
Mr. Norton and Mr. Mayne for Respondent.*

Sir James Colville gave judgment as follows :—

This is an unfortunate case, inasmuch as, though reduced to a question of the interest of two Hindoo widows in that which seems to be an inconsiderable estate, it now comes for the third time before this tribunal.

It is not necessary to go at any length into the earlier history of the case. It is sufficient to say that the litigation arose out of the construction to be given to the document constituting a certain family arrangement by which Gopinadha and Krishna, the two sons of one Padmanabha, had held the talook Tekkali. Each of these sons appears to have questioned at one time the legitimacy of the other, but ultimately their disputes were settled by this family arrangement, and after the death of the surviving brother, Gopinadha, his widow took exclusive possession of the whole talook. The question then arose whether she was entitled to hold that possession, one of the widows of Krishna claiming his share, and certain illegitimate sons of the two brothers also claiming to share in the estate. The construction of the document came before the Courts in India, and the High Court of Madras, dealing chiefly with this clause of it: "If the legal widows of both of them should have no male issue, and if there be any sons born out of wedlock, the talook shall be divided in equal shares," declared that on the true construction of the agreement the estate was to be equally divided between the wives and the sons born in concubinage, and remanded the suit to be treated as a suit for the administration of an estate, directing the Civil Judge to enquire who were the parties "entitled on the construction aforesaid, and to make the parties to the present suit and to Regular Appeal 26 of 1862, and all other claimants, parties to that enquiry."

The case went down upon that remand, and the present respondent having come in and claimed to be a widow of the younger son, Krishna, the Civil Court found that the estate was to be divided into five equal portions, one of which was to be given to the possession of each claimant, those claimants being the two illegitimate sons, the two widows who had been parties to the previous litigation, and the widow Radhamani, who had come in in order to establish her title upon the enquiry.

Immediately after the passing of that order the appeal to Her Majesty in Council appears to have been allowed, and it came on in due course in the year 1870,* and this Committee putting a different construction upon the family arrangement, and in particular on the Clause which has been read, ordered that the decree of the High Court should be reversed and "a decree made declaring that, according to the true construction of the agreements of the 26th November 1838 and 29th July 1844, the widow of Gopinadha, the appellant, and the respondent, the widow of Krishna, upon the deaths of Gopinadha and Krishna without male issue, became entitled from and after the death of Gopinadha as Hindoo widows, each to one moiety of the estate; and decreeing possession of the moiety claimed to the respondent, Nilamani Patti, but without costs." In the course of that judgment, which was delivered by Lord Cairns, it was observed, "The result of this enquiry," that is, the enquiry directed by the High Court, "has been that two other illegitimate sons having been reported to exist, the estate has been decreed to be divided into five shares, to be enjoyed equally by the two widows and three illegitimate sons respectively." The inaccuracy in this

* See 14 W. R. P. C. 33; 2 Suth. P. C. R. 865.

statement may be accounted for by the fact that the order of the Civil Judge, which was all that appeared on one of the records, does not specify who the five claimants were. It is true that in another of the records, there being altogether three, it appeared more distinctly from the judgment of the Civil Judge, upon which his order was made, that he had found there were not three illegitimate sons and two widows, but three widows and two illegitimate sons. The Committee, however, was not set right at the time by the Counsel on the appeal, who were probably equally deceived, and thought that the effect of the Judge's order was correctly stated.

In that state of things the first order of Her Majesty went out to India to be executed. Difficulties then arose, and the execution of part of the order was suspended until the widow Radhamani, who may be called the junior widow of Krishna, should have applied to this Board in order to have any misapprehension concerning the effect of the first order of Her Majesty corrected. That application was opposed by the other widow, Nilamani. The rights of the widow of Gopinadha had been finally determined, and she had disappeared from the litigation. Their Lordships' report to Her Majesty on this application was in these terms: "Their Lordships being of opinion that the respondent Nilamani Maha Devi represented in these appeals not only her own interest but also the interest of all the lawful Hindoo widows (if more than one) of Krishna, and that the order of Your Majesty of the 9th August 1870, declaring the title of Nilamani as Hindoo widow to the moiety of the estate, was an order enuring to the benefit of any other (if there should be found to be any other) such lawful widow, and that the High Court, executing the said order, ought to have taken and ought now to take all necessary steps to give to the petitioner (if one of such lawful widows of Krishna) such share, interest, or other benefit as under the law applicable to the case she would have been entitled to as such widow, along with Nilamani, of, in, or out of the one moiety of the said estate and the profits thereof, do not think fit to advise Your Majesty to make any further order in the present petition." This report was confirmed by an Order in Council of the 3rd March 1873; and the case then went back, and the High Court having to execute the original order of Her Majesty, as explained by this subsequent order, made the order of the 11th March 1874, which is the subject of the present appeal.

Before considering the particular terms of that order, it may be desirable to see what are the objections that were taken to it in India, and at their Lordships' bar. It was contended that the High Court was in error in treating as an ascertained fact that Radhamani was a widow, in the proper sense of the term, of Krishna, and that it ought to have directed an issue in order to ascertain whether she was the lawful widow of Krishna or whether her connexion with him was only by means of a Gandharva marriage, which would not be a valid marriage according to Hindoo law. The other point was, that assuming her to be a widow she was only a junior widow, and therefore, under the Hindoo law, was only entitled to maintenance. Hence the two points raised in the Court below, and the two principal points now raised before their Lordships, concern, first, the status of Radhamani as a widow, and secondly, her rights, if a lawful widow of Krishna.

Their Lordships are of opinion that as far as the status of Radhamani is concerned, the finding of the Court below is correct, and that it was not bound to direct any further enquiry upon that point. It appears to their Lordships that there was a sufficient *contestatio litis* between the two parties upon the enquiry which was directed to the Civil Court, to make the finding of that Court binding on both widows. It follows that there having been no appeal, it would have been conclusively found between those two persons, but for the effect of any order of the Crown that has since been made, that Radhamani was a joint widow with Nilamani. It is contended, however, that the effect of that finding has been swept away by the first order of Her Majesty in Council. That argument appears

to their Lordships to be erroneous. The judgment on which the Order in Council was founded, although it recognised the proceedings which had taken place before the Civil Judge, did not in terms recommend the reversal of his finding. The order reversed no doubt the decree of the Court which made the remand, and substituted a new decree for it, but by that new decree it directed the High Court to "take all necessary steps to undo what may have been done under the decree reversed inconsistent with the rights thus declared." It therefore by implication assumed that things might have been done under the decree which were not inconsistent with the rights declared, and that what had been so done was to remain; and if the decision ascertaining the *status* of the widow was to remain, it would have been a very idle proceeding on the part of the High Court to institute a new enquiry in order to retry that question. It is however contended that at least the second order of Her Majesty in Council has made it imperative upon the High Court to take the course which the appellants argue ought to have been taken. That order simply confirmed the report, which is more in the nature of an expression of opinion than of an order; is very cautiously expressed; and seems to avoid the decision of any question in the cause. It certainly did not order the High Court to institute any enquiry which would otherwise be unnecessary. It declared that the former order was to enure for the benefit of all the widows if more than one of Krishna, "and that the High Court executing the said order ought to have taken and ought now to take all necessary steps to give to the petitioner (if one of such lawful widows of Krishna), such share, interest, or other benefit as under the law applicable to the case she would have been entitled to." This assumes that the Court ought to have taken proceedings in order to ascertain the number of Krishna's widows; and if it had in fact done so by means of the enquiry directed by the original decree, it can hardly be said to have been afterwards in error in treating as conclusive evidence of the status of Radhamani the finding of the Civil Court which stood unreversed. Their Lordships desire to add that they would have been extremely sorry to find themselves compelled to give way to any technical objection founded upon the mere words of the Order in Council, since from the other earlier proceedings which have been put in by the appellant, for another purpose, it appears clearly that as early as the year 1856 or 1857 there were disputes between these ladies about a certificate and other matters: that in the proceedings arising out of those disputes there was no serious contest as to the status of Radhamani as the junior widow of Krishna; and that the suggestion that she was not lawfully married to her husband seems to have been an afterthought.

Having disposed of this first objection, it now becomes necessary to consider what are the legal rights of Radhamani; whether she has a right to share, as one of the widows, jointly and upon the same footing with the other widow in the enjoyment of her husband's estate; or whether, as she is junior widow, her right is limited to maintenance. Their Lordships have already, in the course of the argument, intimated that this question was perfectly open to the appellant; and was in no degree concluded by the order of Mr. Morris, the Civil Judge, which has been already alluded to, because his finding that the estate was to be divided into fifths, though consistent with the construction put upon the family arrangement by the High Court, which divided the estate among the members of a certain class *per capita*, was inconsistent with the order of Her Majesty in Council which divided the estate into moieties, giving the share of each brother to the widow or widows of that brother. This point of law has now been ably and fully argued before their Lordships, and in their opinion the law of Madras must be taken to be in accordance with the decision in the 3rd Madras High Court Reports, in what may be called the *Tanjore Case*. That there had been a notion that the law of Southern India on this point differed from the law of Hindostan, it is impossible to deny; but that notion seems to have been mainly founded upon the

passages which have been cited from the work—a work of very high authority—of Sir Thomas Strange. Those passages are open to the observations that have been made upon them, namely, that even Sir Thomas Strange seems by his note on the first passage to have thought that the proposition was in some degree questionable; and that although the doctrine is repeated in the subsequent passage without qualification, it is not consistent with one of the cases, which is set forth in the second volume, *viz.*, the *Salem Case*, at page 91, or with the opinion of the pundits and the opinion of Mr. Colebrooke there stated.

There are, however, two decisions which are relied upon as having been made consistently with the doctrine laid down by Sir Thomas Strange, and which it is argued settled up to a certain time the law of Madras. It appears, however, to their Lordships, that although the learned Chief Justice in his elaborate judgment in the *Tanjore Case* accepts those cases as decisions in point, and as confirmatory of the doctrine laid down by Sir Thomas Strange, they really are not authorities of that character. The first of them is clearly a case in which the question was which of several widows was to succeed to an impartible zemindary which could only be held by one. It appears upon the face of the report that that zemindary had been held by two brothers in succession, and therefore there can be no doubt that the subject of the litigation was an impartible zemindary. That was the last of the decisions and was passed in 1835. In the other decision, which is of as early date as 1824, the subject of litigation would seem to have been also a zemindary; but the contest there was not between several widows, and did not relate to their rights *inter se*. A person claiming as nearest male heir had obtained possession of the zemindary, and had been ejected by the eldest widow of the zemindar. At her death this male claimant appears to have regained possession, and the question was whether the right of the elder widow had not survived to the second widow. It was held that it had so survived, and therefore the decisions merely affirmed the proposition of law, that where there are two or more widows, there is a right of survivorship between them. On the other hand, their Lordships find that in that portion of India which is emphatically governed by the Mitacshara, namely, Benares, it is settled law that the widows take jointly. This view of the law is also consistent with Mr. Colebrooke's own opinion as expressed in the *Salem Case*. In order to support the appellant's contention it ought, in their Lordships' opinion, to be shown either by a course of decision, by custom, or by reason of some treatise which is of authority in Madras and not in the north of India, that the law of Madras is different from what it is in the north of India. Their Lordships have dealt with the only two decisions cited; so far as treatises go, the *Smriti Chandrika*, which is of authority in Madras, seems to show the contrary; and although the authority of the translation of that treatise has been impugned by Mr. Leith, his argument at most would show that the *Smriti Chandrika* is not a conclusive authority against him; it certainly would not show that that treatise is an authority in his favor. It seems to their Lordships by no means impossible that, as has been argued by Mr. Mayne, the dictum of Sir Thomas Strange was founded upon a misapprehension of the law that prevails in Bengal as laid down by Jimûta Vâhâna. The proposition is not confirmed by the Mitacshara or by any treatise of paramount authority in the presidency of Madras, and it is to be observed that in Mr. Strange's Manual, published as early as 1856, and in other works, the accuracy of the law as laid down by Sir Thomas Strange appears to have been questioned. It is, therefore, incorrect to say that the settled law of Madras was first changed by the decision of the *Tanjore Case* in 1867.

Their Lordships think, that in this state of the authorities they would not be justified in treating the *Tanjore Case* as improperly decided, or in dissenting from the proposition which the learned Chief Justice finally expressed in these words: "On this review of the authorities we come satisfactorily to the conclusion

that the sound rule of inheritance is that two or more lawfully married wives (patnis) take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyment." As to the mode of enjoyment, it has no doubt been decided both in the *Tanjore Case* and in the case reported of *Bhugwandeem Doobej v. Myrna Bae*, 11 Moore, I.A., p. 487,* that widows taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the joint estate between them. But in the *Tanjore Case*, after affirming this proposition, the learned Chief Justice said: "But we are at the same time of opinion that a case may be made out entitling one of several widows to the relief of separate possession of a portion of the inheritance. We have no doubt that such relief can and ought to be granted when from the nature or situation of the property and the conduct of the co-widows or co-widow it appears to be the only proper and effectual mode of securing the enjoyment of her distinct right to an equal share of the benefits of the estate." It also appears that in the case in the 11th Moore, the widows had made what was called a partition; that they had separately enjoyed their respective shares of the estate during their joint lives; and that it was not until the death of one of them that the question arose whether she had a right to dispose of her share, and whether if she had no right to dispose of it, it did not pass by survivorship to the other widow. It was held there that there was no objection to a transaction which was merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected; although the widows nevertheless remain co-parceners, with a right of survivorship with them, and there could be no alienation by one without the consent of the other. Their Lordships make these observations in order to meet the objection which though not raised by the petition of appeal, and apparently never raised in the Court below, has been taken to the form of the decree. They think it sufficiently appears that in this case the state of things contemplated by the *Tanjore Case* exists; that these widows could not go on peaceably in the joint enjoyment of the property; and that they have acted as if they had agreed that they are separately to enjoy, in the manner above indicated, their respective shares. Therefore, their Lordships guarding themselves against being supposed to affirm by this order that either widow has power to dispose of the one-fourth of the estate allotted to her, or that they have any right to a partition in the proper sense of the term, are not disposed to vary the form of the order under which one-fourth of the profits of the estate will go to each widow during their joint lives, their respective rights by survivorship and otherwise remaining unaffected.

The only other point that was taken is that which relates to the costs of the former litigation, and their Lordships upon that are of opinion that whatever equity the widow who conducted the litigation might originally have had to recover a portion of the costs from the younger widow, that equity cannot be said any longer to exist in this case, in which the elder widow, who if considered to have sued as a trustee for the younger widow, has long and persistently repudiated any such trust; and by resisting the claim of the younger widow has occasioned all the costs of the litigation that has since taken place.

Upon the whole, then, their Lordships are of opinion that it will be their duty to advise Her Majesty to affirm the order under appeal, and to dismiss the appeal, with costs.

* 9 W. R. P. C. 23; 2 Suth. P. C. R. 124.

The 6th July 1877

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Construction—Grant for Indefinite Period—Mourosee Pottah—Hereditary
Interest.*

On Appeal from the High Court at Calcutta.

Baboo Lekraj Roy and others

versus

Kunhya Singh and others.

If a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime, and passes no interest to his heirs unless there are some words showing an intention to grant an hereditary interest.

Where a clause in the kubooleut of what was called a mokurruree lease acknowledged a power in the Government to put an end to the lease at the end of one year, but the Government had not done so, it was held that, although it was not properly a mokurruree inasmuch as practically the Government could enhance the rent, it must be regarded, as long as it went on, as an hereditary lease, a mourosee pottah; and that as the interest of the grantor, which had not been determined by the Government, was an hereditary interest, there seemed no reason why, upon the construction of the pottah in question, it should be held to be limited to the life of the grantee.

Mr. Leith, Q.C., and Mr. Doyne for Appellants.

Mr. Cowie, Q.C., and Mr. J. Cutler for Respondents.

Sir Montague Smith delivered the following judgment:—

This suit was brought by the present appellants to obtain possession of an eight annas share of Mouzah Toe, and the plaint also prays for the annulment of the mokurruree tenure which the respondents claim to have in the mouzah under a pottah granted by one Choonee Lall. The appellants are the purchasers under a decree obtained against some persons who had become possessed of part of the interest of Choonee Lall in the eight annas share of the mouzah. The respondents are the heirs of Nirput Singh, who was the grantee under the pottah. The single question in this appeal is whether, upon the true construction of this pottah, and upon the evidence in the case, the grant was one to endure for the life of Nirput Singh only, or whether it was to endure so long as the interest of Choonee Lall existed. That involves also an enquiry into what the interest of Choonee Lall was.

The lease or pottah in question is dated in April 1808, and the material parts of it are in these terms: "The engagements and agreements of the pottah on the kubooleut of Nirput Singh, lessee of Mouzah Toe, Pergunnah Malda, Zillah Behar, are as follows:—Whereas I have let the entire rents of the mouzah aforesaid,"—describing what he had let,—“at an annual uniform jumma of Sicca Rs. 606, without any condition as to calamities, from the beginning of 1215 Fusli to the period of the continuance of my mokurruree.” That is the term fixed in the pottah. It is a term “from the beginning of 1215 Fusli to the period of the continuance of my mokurruree.” Then it is required that the lessee should cultivate, “and pay into my treasury the sum of Sicca Rs. 606, the rent of the mouzah aforesaid, for the period afore-mentioned, according to the instalments year after year.” Then there is this provision, “If hereafter the authorities desire to make a settlement of the property at that time, he shall pay the jumma thereof separately according to the Government settlement.” It concludes, “Hence these few words are written and given as a pottah, to continue during the term of the

mokurruree, that it may be of use when required. The annual jumma malguzari, including the malikana, Rs. 606."

To ascertain what is the term granted by this pottah, we must see, in the first place, what is the interest which the grantor Choonee Lall had. He calls it a mokurruree interest; but whether it be a true mokurruree interest or not, it was evidently the intention of the parties that the grant should enure during the term of his interest. If it can be ascertained definitely what that term is, the rule of construction that a grant of an indefinite nature enures only for the life of the grantee would not apply. If a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime, and passes no interest to his heirs unless there are some words showing an intention to grant an hereditary interest. That rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained.

Now it appears that as early as 1788 the Government granted what has been called a mokurruree lease to Mahomed Buksh, and that lease after various intermediate assignments was ultimately purchased by Choonee Lall, the grantor of the pottah in question. Choonee Lall is said to have purchased it in 1807 or 1808. It is also said that he had purchased the proprietary interest in two annas of the mouzah. From the document which has been produced from the Collector's office, other persons appear to have been proprietors of the remaining annas, but nothing is heard of them in this suit. However that may be, it does not really affect the present question, because the interest pointed at in the pottah in question is a mokurruree interest. The kubooleut of the lease of 1788, signed by Mahomed Buksh, is as follows:—"Whereas I have obtained a lease of Mouzah Toe, Zillah Kosra, Pergunnah Malda, the area whereof, by estimation, is 709 beegahs 10 cottahs, from 1196 (one thousand one hundred and ninety-six) Fusli, at a jumma of Sicca Rs. 400"—with certain exceptions—"I do acknowledge and give in writing that I shall continue to pay the rent of the mouzah aforesaid at the said jumma, year after year, according to the kubooleut and the kistbundi. If any one establish his zemindari (proprietary) right in respect of the said mouzah in his own name before the authorities, I shall continue to pay, year after year, to him or his heirs, the 'malikana' (proprietary allowance) thereof at the rate of Rs. 10 per cent. on the jumma aforesaid, in addition to the Government revenue." The lessee is to pay a jumma of Rs. 400, and a malikana of 10 per cent. on the jumma. Of course, if Mr. Leith is right, that Choonee Lall became the owner of the proprietary interest, the malikana would go into his own pocket. Then at the end there is this clause, which has given occasion to considerable discussion: "If the present officers of the British Government, or any authority who may come hereafter, do not accept my mokurruree lease to be hereditary, I acknowledge that this kubooleut is only for one year, thereafter it shall be cancelled." That undoubtedly acknowledged a power in the Government to put an end to this lease, which is called a mokurruree lease, at the end of one year. But it appears that the Government have not done so. It may be that it was contemplated that the Government would settle in the ordinary way with the proprietors for the revenue, and in that case would put an end to this mokurruree. But it appears that no settlement has been made, and that this lease has been allowed to go on without being put an end to; and although it is not perhaps properly a mokurruree, inasmuch as practically the Government could enhance the rent, it must be regarded, as long as it goes on, as an hereditary lease, a mourosee pottah. This being the interest of Choonee Lall (he having become the purchaser of this pottah), he grants this lease to Nirput Singh to enure during the continuance of it. That interest, which continues, and has not been determined by the British Government, being an hereditary interest, there seems to be no reason why, upon the construction of the pottah in question, it should be held to be limited to the life of Nirput Singh. As already observed, the duration of the term is capable of being definitely

ascertained by reference to the interest which the grantor himself has in the property.

Their Lordships think that this case may be decided upon the construction of the document, and that it is not necessary to have recourse to the exposition of it to be derived from the conduct of the parties. It is satisfactory, however, to find that the view which has been taken by their Lordships of the construction of this document is that which the parties themselves evidently entertained, because for twelve years after Nirput Singh's death his heirs were allowed to remain in possession of the property precisely in the same way in which he had held it, paying the same rent.

Their Lordships agree with the judgment of the High Court given upon review, and they will humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal with costs.

The 12th July 1877.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Deed of Sale—Fraud—Misrepresentation—Fiduciary Relation—Inadequate
Consideration.*

On Appeal from the High Court at Calcutta.

The Administrator General of Bengal

versus

Juggeswar Roy and others.

Plaintiff, a putneedar and durputneedar, granted certain sub-tenures by way of durputnee and seeputnee (reserving the minerals) to the defendants, to whom he, by deeds of sale executed some ten or twelve years afterwards, transferred all the superior interest which he had, together with the minerals which had been reserved in the former deeds. In a suit to set aside the conveyances, it was held that the defendants were not, at the time of the execution of the deeds, in a fiduciary capacity or character to the plaintiff or in a position unduly to influence his judgment; that there was no satisfactory evidence that the defendants had represented to him that he was not parting with his mining rights by these deeds; and that the evidence of inadequacy of price was not such as to lead to the conclusion that the plaintiff did not know what he was about, or was the victim of some imposition.

Mr. Cowie, Q.C., Mr. Doyne, and Mr. Lowe for Appellant.

Mr. Bompas, Q.C., and Mr. Graham for Respondents.

Sir Montague Smith gave judgment as follows:—

This suit was instituted by Mr. Robert John Jackson, who upon his death has been succeeded on the record by the present plaintiff, for the purpose of setting aside certain conveyances by him to the three first defendants of his interest in Mouzah Luchhipore, in the district of Ranigunge, on the ground, in the first place, that he was under age, and in the second place, that he was induced by the defendants, who were trusted servants, but who had abused their fiduciary character, to part with his property without fully understanding the nature of the transaction, and without adequate consideration. Mr. Robert John Jackson was the adopted son of a Mr. Robert Gwynne Jackson (who will be called Mr. Gwynne Jackson), who appears to have been of European extraction. The date of his adoption is one of the questions in the cause, the plaintiff alleging the adoption to have been about the year 1855, and the defendants as far back as 1850. Mr. Gwynne Jackson appears to have resided a great number of years in the

neighbourhood, and to have been well acquainted with coal mining. He in 1860 was the manager of the coal mines of Messrs. Apcar and Company, who, it may be observed by the way, entered into an agreement with Jackson the plaintiff to supply him with funds for prosecuting this suit, in consideration of, in the event of his succeeding, his granting them a coal lease.

Mr. Gwynne Jackson left the employment of Messrs. Apcar and Company in 1860, on account of their being dissatisfied with him, but he continued afterwards up to about 1867 to some extent in their employment in a subordinate capacity, when he finally left it. He appears to have acquired some property, and to have been interested in other coal mines in the neighbourhood.

Shortly before the year 1860, which is the first date material in this case, Mr. Gwynne Jackson bought certain putnee and durputnee rights, including the coals in Mouzah Luchhipore, partly from the defendants. It is not disputed that by a deed bearing date the 20th September 1860, he, being such putneedar and durputneedar, granted certain subtenures by way of durputnee and seeputnee, reserving the minerals, to three of the defendants; but one question in the cause has been, whether that deed was executed at the time it bears date, or at a later date, not very clearly indicated on the part of the plaintiff, but which the Judge in the Court below has found to be the year 1869.

Gwynne Jackson made a will in 1860, leaving all his property to his son. Subsequently in 1863 he executed a hibba, which would have the effect of revoking that will, giving all his property, some of which had been acquired since the date of the will, to his son, and in fact denuding himself of all his property, if that hibba is to be taken as intended by him to be then operative.

The deeds, the subject of this suit, were executed in 1870 and 1871, and the last in 1872. These deeds may be divided into two classes. One class is that in which the plaintiff confirms the durputnee and seeputnee rights, which were dealt with by the deed bearing date the 20th September 1860; the other class of deeds, which bear date in 1871, and one of them as late as June 1872, are deeds of sale, whereby he transfers all the superior interest which he had, together with the minerals which had been reserved in the former deeds.

With respect to one of the main questions in this case, which has been already indicated, namely, whether the conveyance bearing date the 20th day of September 1860 was executed then or at a subsequent date, their Lordships have intimated, in the course of the argument, that, on the whole, they concur with the finding of the High Court that that deed must be taken to have been executed at the time when it bears date. If that be so, being prior in time to the hibba, it is unaffected by that instrument, and the subsequent deed of 1870, being merely confirmatory of it, and conferring on the defendants no greater interest than they took under it, is obviously of no importance, and may be allowed to stand with it.

The question remains whether the deeds of 1871 and 1872, conveying, as has been before stated, the remaining and superior interest, together with coals, are to be set aside on any of the grounds which have been alleged. With respect to this point their Lordships also intimated, during the course of the argument, that they saw no sufficient reason to differ from the conclusion of the High Court that the plaintiff had failed to sustain the burden of proof which lay upon him that he was a minor at the time of the execution of these deeds.

The question then arises, in the first place, whether it has been shown that the three first defendants (for it should be stated that the two last defendants are the sub-lessees under them) were in a fiduciary capacity or character to the plaintiff at the time of the execution of these deeds, and were therefore in a position to exercise undue influence over him. Upon this question their Lordships also have come to the same conclusion as the High Court. There is indeed some evidence that Haradhun Misser, the father of Juggeswar Misser, and the two Roy defendants were at times employed in collieries in which Gwynne Jackson had a share; and

there is also some evidence of the latter having acted as his *gomashtas* with respect to the property comprised in the deed of 1860, but the decision which their Lordships have come to, concurring with the High Court, on the subject of this deed, in a great measure disposes of this class of evidence. Their Lordships see no reliable evidence on the record that at the time of the execution of these documents by the plaintiff they were in any fiduciary character *quoad* him, or in a position unduly to influence his judgment. If that be so, the question is narrowed to whether a fraud was practised upon him.

It is contended, in the first place, that the nature of the transaction was misrepresented to him; that the defendants represented to him that he was not parting with his mining rights by these deeds, whereas he was, and that the deeds were not explained to him; further, that the sale price was inadequate.

With respect to the deception so alleged to have been practised upon him, the only evidence to be found of it is the evidence of the plaintiff himself, and that evidence is described as untrustworthy by the learned Judge of the Inferior Court, who found in the plaintiff's favor. There is no confirmatory evidence of this, and there is contradictory evidence to the effect that the deed was read over and explained to him, and that he understood the language in which it was written.

The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennant v. Tennant* (2nd Law Reports, Scotch Appeals, page 9), in which Lord Westbury very shortly and clearly stated the law upon this subject. He says: "The transaction having been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition."

Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about, or was the victim of some imposition. It should be borne in mind that his father Mr. Gwynne Jackson was at hand, and their Lordships concur with the view of the High Court, that Mr. Gwynne Jackson, by the *hibba* of 1863, did not intend to denude himself of all his property in favor of his son, whom he represents at that time to have been eight years old, and who could not have been more than twelve or thirteen. It probably was a device for the purpose of defeating existing or possibly future creditors. Gwynne Jackson himself acted in contravention of that deed, for he sold a property soon after its date without any reference to it, and there is evidence that he continued to act as if he were the owner of the property. Gwynne Jackson was very conversant with coal mining and the character of property in the district, and their Lordships are not satisfied that he was unable to manage his own affairs or to give competent advice to his son until the year 1872, in the early part of which he was admitted to an hospital with an incurable disease of which he died in about the middle of that year. He had granted his property to his son by a *hibba*, intending nevertheless to keep in his hands the control of it through his life, but very probably intending it to operate after his death in favor of his son. His son no doubt had an interest in the property as well as himself, and probably the true view of these transactions in 1870 and 1871 is that they were in substance joint transactions by the father and the son. Their Lordships cannot therefore regard the son at these dates as altogether in the position of a minor without anyone to advise him. It may be observed that the deed in 1872 was but the completion of the previous transactions.

Independently, however, of this consideration, it cannot, their Lordships

think, be said that the purchase money was so grossly inadequate that its inadequacy amounts to proof of an imposition upon the plaintiff. It is true that there is some evidence, the value of which it is difficult precisely to estimate, that property with coal sold in the neighbourhood for some years' purchase greater than the number of years' purchase for which this property sold, which was with respect to a portion of it twelve years' purchase, and with respect to another portion of it ten years' purchase; and there is evidence, which perhaps is the strongest on this part of the case, that soon after the purchase by the defendants they let a portion of this property on mining leases at a considerable rental, or more properly speaking royalty. It should be observed, however, that these leases give the power to the lessee to terminate them at any time, and *non constat* how long the high rental would continue.

It has been suggested that the defendants must have known that there was coal under the land, and that they concealed their knowledge from the plaintiff. Even if it were so, putting aside their fiduciary character, and in the absence of any proof of fraud, that would not be enough to vitiate the transaction; but in point of fact their Lordships can find no evidence of this. All the evidence is the other way, namely, that they did not discover the coal until after they had made the purchase; and it may be observed that Gwynne Jackson himself had tried for coal without being able to discover it. It appears, therefore, to their Lordships that this last ground on which it is sought to impeach the validity of the deeds also fails.

On the whole, therefore, their Lordships are of opinion that the High Court was right in affirming the validity of these deeds and dismissing the plaintiff's suit; and they will therefore humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

The 19th July 1877.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Oudh Estates Act (I of 1869) s. 22 cl. 4—Man Singh's Talook—Succession of his Daughter's Son—Revocation of Will by Parol.

On Appeal from the Court of the Commissioner of Fyzabad.

Maharajah Pertab Narain Singh

versus

Maharanee Subhao Kooer and others.

The object of cl. 4 s. 22 Act I of 1869, taking the whole Section together, was held to be that wherever it is shown by sufficient evidence that a talookdar, not having male issue, has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question.

In this case their Lordships were of opinion that the late talookdar died, as he intended to die, intestate (his will whereby he gave his wife power of nominating a successor having been revoked, as the will of a Hindoo may be, by parol); and that the appellant, his daughter's son, was the person who, under the clause of the Act above-mentioned, was entitled to succeed to the talook.

Mr. Leith, Q.C., and Mr. Graham for Appellant.

Mr. Cowie, Q.C., Mr. Doyne, and Mr. Thomas for Respondents.

Sir James Colville gave judgment as follows :—

The question raised by this appeal is the right of succession to the talook of the late Maharajah Sir Man Singh, one of the most considerable, if not the most considerable, of the great landholders of Oudh, whose status and rights are the subject of Act I of 1869.

The Maharajah died on the 11th October 1870. He had no male issue. His nearest surviving relatives were his widow, the Maharanee Subhao Koor, a daughter by a deceased wife, and the appellant, the son of that daughter. The Maharajah had also brothers, and brothers' sons, of whom some survived him. His grandson, the appellant, was known in the family as "Dadwa Sahib," by which name he will be generally designated in this judgment.

The property which is the subject of this litigation belonged to Man Singh before the annexation of Oudh. He was one of the first who made their peace with Government on the restoration of the British power in 1858, and his title as talookdar was duly confirmed by sunnud. The estate is said to have been originally one which, according to the custom of the family, was descendible to a single heir, not necessarily determined by the strict rule of primogeniture. It had certainly passed from Buktowar Singh, the preceding proprietor, to his nephew, Man Singh, though the youngest of three brothers. Accordingly, when the lists prescribed by s. 1 of Act I of 1869 were made up, the name of Man Singh, as talookdar, was inserted in the first and second of those lists.

Some years before the passing of this Act, and on the 22nd April 1864, Man Singh, under the circumstances which will be afterwards considered, executed and delivered to the Commissioner of the district the document at p. 8 of the Record, which is in these words :—

"I, Maharajah Man Singh, etc., Talookdar of Shahgunge, Gonda, etc., do hereby declare that, as I have not yet come to any determination as to what boy is to become my successor, I, for the present, declare my wife to become my successor, and inherit the whole of my property, whether moveable or immoveable. She will, until she nominates a successor, have the same power over the property as myself, except that she will not be authorised to make a transfer. There is no partner of mine in my moveable or immoveable property. I have, therefore, executed this will, and deposited it in a public office, that it may serve as a document, and prove of use when required."

Mr. Simson, the then Commissioner, made the following endorsement on the will :—"April 22nd, 1864. Maharajah Man Singh this day in person signed this document in my presence, and then delivered it to me as his last will and testament;" and wrote on the envelope within which it was inclosed, "Within this sealed envelope is Maharajah Man Singh's will. I forward the envelope to the Deputy Commissioner of Fyzabad, with instructions to lodge it, sealed as it is, in the Treasury; and each Treasury officer will note it in his receipt on giving or receiving charge. Of course the Maharajah may reclaim this on a written application properly authenticated at any time."

After the death of the Maharajah, and in November 1870, this will was opened, and under it the Maharanee was put into possession of the talook. She afterwards, by a document dated August 16th 1872, exercised the power which the will gave her of "nominating a successor" in favor of the respondent Triloki Nath, who was a son, then under age, of one of the late Maharajah's brothers, and had married her own niece.

Shortly after this transaction the appellant, Dadwa Sahib, instituted this suit, praying for a declaration of his title to the succession to the Maharajah's estate, and for the cancellation of the document of April 22nd 1864 (the will); that of August 16th 1872 (the appointment); and the order of the revenue authorities of November 11th, whereby the Maharanee was put in possession.

It is now admitted on all sides, if it were ever seriously disputed, that the

appellant can only succeed in his suit by establishing both the following propositions:—

1. That the testamentary disposition which the Maharajah unquestionably had power to make, and did make in April 1864, was revoked or became inoperative in his lifetime.

2. That the appellant is entitled to succeed to the talook as the son of a daughter of the Maharajah, who had "been treated by him in all respects as his own son" within the meaning of cl. 4 of s. 22 of Act I of 1869; it being clear that as a mere grandson by a daughter he would not be the heir *ab intestato* to the talook under the special canon of succession to intestate talookdars established by that Section of the Statute.

The Court of First Instance and the Appellate Court in Oudh have concurred in determining the first of these issues against the appellant. The second of them was found in his favor by the Court of First Instance; but that decision was reversed by the Appellate Court.

In dealing with this appeal, their Lordships propose to consider, in the first instance, whether the appellant has established that he was treated by the late Maharajah "in all respects as his own son," within the meaning of the enactment in question, and is consequently the person entitled to inherit the talook, if the Maharajah died intestate.

The clause is perhaps not very clearly or happily expressed, and considerable doubt appears to prevail in Oudh as to the construction to be put upon it. One passage in the Commissioner's (Mr. Capper's) judgment almost implies that, inasmuch as the actual treatment of a son by his father varies in all countries according to the characters of the parent and the child, it is impossible to say what the Legislature meant by the treatment of a grandson "in all respects as a son." Other passages of the same judgment seem to assume that the treatment must in some way be tantamount to an adoption under the Hindoo Law, involving the legal consequences of such an adoption as, *e.g.*, the subjection of the grandson to prohibitions as to marriage which would not otherwise attach to him. And the appellant's own plaint affords some colour to such a construction, by describing his mother and guardian as his "sister."

Their Lordships are disposed to think that the clause must be construed irrespectively of the spiritual and legal consequences of an adoption under the Hindoo Law. They apprehend that a Hindoo grandfather could not in the ordinary and proper sense of the term adopt his grandson as a son. Nor do they suppose that, in passing the clause in question, the Legislature intended to point to the practice (almost, if not wholly, obsolete) of constituting, in the person of a daughter's son, a "*patricá-puttra*," or son of an *appointed* daughter. Such an act, if it can now be done, would be strong evidence of an intention to bring the grandson within the 4th clause, but it is not, therefore, essential in order to do so. Moreover, it is to be observed that the 4th, like every other clause in the 22nd Section, applies to all the talookdars whose names are included in the second or third of the lists prepared under the Act, whether they are Hindoos, Mahomedans, or of any other religion; and it is not until all the heirs defined by the ten first clauses are exhausted that, under the 11th clause, the person entitled to succeed becomes determinable by the law of his religion and tribe.

It is necessary then to put a general as well as a rational construction upon the provision advisedly introduced by the Legislature into this statutory law of succession. And, taking the whole Section together, their Lordships are of opinion that wherever it is shown by sufficient evidence that a talookdar, not having male issue, has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son, he has indicated an intention that the person so treated shall be his successor. The son will be brought within the enactment in question.

Their Lordships will now proceed to consider the effect of the evidence as to the treatment of the appellant by the Maharajah.

It is unquestionable that the appellant was from the first brought up in the house of his grandfather, and not in that of his father. This circumstance, of itself, does not go far to prove his case. It may be accounted for by the fact that the social position of the father, though respectable, was very inferior to that of the Maharajah. But, whatever may be its value as evidence, this is a circumstance in the treatment of the boy which involved a departure from the ordinary usages of Hindoos.

On the other hand, it must be admitted on the evidence that the Maharajah had not, in 1864, formed a clear intention that Dadwa Sahib, who was then between seven and eight years old, should be his successor.

It has been said that the making of his will was the result of pressure on the part of the authorities. However that may be, the act was a natural one. At that time nothing was definitely fixed as to the course of succession to the newly constituted talooks, except that the talookdars had an absolute power of disposition over them. The family custom which had previously regulated the succession to the Maharajah's talook was one which implied selection. It was, therefore, in every way desirable that the Maharajah should make some provision as to his successor. The will, which was clearly his own act, indicates that he intended his successor to be a male, though he had not yet made up his mind as to the person. His words are: "As I have not yet come to a determination as to what boy is to become my successor." He, therefore, made his wife provisionally his heir, delegating to her the power of selection, which, in his then state of mind, he did not feel able to exercise himself.

That state of mind is the more conceivable if we suppose that he had then begun to entertain the notion that Dadwa Sahib should ultimately succeed him. Had he then resolved that the successor should be taken from his male relations *ex parte paternâ*, it would have been comparatively easy to nominate a brother or brother's son. In that case his only reason for delaying his choice would have been the desire to be more fully assured of the fitness of the person selected. But a predilection for his grandson would introduce fresh and more serious grounds for hesitation and delay. Independently of his affection for the boy, he might feel that the estate, being separate property, would, according to the *Shasters*, devolve upon him in preference to collaterals, though in the male line. On the other hand, he may have felt reluctant to depart from the family custom and offend his relations by allowing the estate to pass out of his own "gotra." And if, as is stated on the record, he were a man apt to prefer an indirect to a direct course, he might well determine to shift the responsibility of selection to his widow, to whom he might confide his real and final intentions, trusting to her for the performance of them. That the above was really the state of mind and feeling of the Maharajah when he made his will appears in some measure from the evidence of Anunt Ram, his Dewan, whom the Deputy Commissioner considered to be a trustworthy witness.

In 1867, the ceremony of the Janeo, or investiture of the appellant with the Brahminical thread, took place. That this was done with considerable pomp in the Maharajah's house, that the Maharajah took that part in the ceremony which, in the ordinary course of things, would be assumed by the boy's natural father, seems to be established. That what was done operated either in law or in fact as a transfer of the boy from his own into the Maharajah's *gotra*, their Lordships, upon the conflicting evidence in the cause, and against the opinion of Mr. Capper, are unable to affirm.

The next important event in Dadwa Sahib's history was his marriage in 1868 to the daughter of Darogha Ramdan. It seems to be clearly established that on that occasion the Maharajah wrote the two following letters to the father of the bride. The first is in these words:—

"Lallah Tulsiram came to me and verbally mentioned to me all the facts. I have, in my former letter, already stated what I wished to communicate to you, and you should attach great weight to that statement. I had fully weighed all the ups and downs before I embarked in this affair. In short, when I have candidly declared Dadwa to be my heir, and am about to celebrate his marriage, with a view that he may stop here, you can have no cause to entertain any apprehension.

"The will contains no such derogatory clause as you have heard. Every sentence in it has a peculiar meaning. Moreover, I have made my intentions known to Colonel Barrow, which you should consider quite correct; you should be quite satisfied."

The other letter is as follows:—

"I have received your letter and become acquainted with its contents. You have some doubt regarding the marriage of Dadwa, but you know very well that I have declared no one to be my heir except Dadwa, and this is known to the authorities. This is the reason that my brothers are displeased with me. You are entirely in fault. As I have made him my heir, and am about to celebrate his marriage here, how is it possible that any other person can become my successor? Dadwa has no reason to go to his native place. You should rest satisfied, and consider what I write to you to be of great weight. I have fully made my views known to my wife, so you should be satisfied, and make preparations for the marriage."

These letters no doubt are no legal revocation of the will. They seem rather to recognise the continued existence of a will. But they are pregnant evidence to show that the Maharajah's inclinations in favor of his grandson had then ripened into a confirmed intention to make him his successor. They are consistent with the hypothesis that the Maharajah at that time either thought that he had named Dadwa Sahib in the will as his successor, or had instructed his wife to exercise her power of appointment in Dadwa's favor. They are inconsistent with the hypothesis that at that time he was in doubt as to the person who should succeed him; or intended to leave to the Maharanee a discretionary power to name any other successor.

There remains, no doubt, the possibility that these letters, written to remove the apprehensions of his correspondent, and in order to bring about the proposed marriage, were written with a dishonest intention to deceive. But nobody has sought to cast upon the Maharajah's character the imputation which such a supposition implies.

These letters hardly require the confirmation supposed to be afforded by what has been called the "red letter," being the invitation to attend the marriage, which was addressed by the Maharajah to the late Nowring Singh, and contains the words:—"Do not regard this as a customary invitation. Dadwa Sahib is the light of my eyes, and heir to my property." Their Lordships, however, think it right to state that they see no reasons to doubt the genuineness of that document. The original is produced by the widow of the person to whom it was addressed, and it corresponds with a copy of it in the Maharajah's letter-book.

The documentary evidence which has just been considered is far more important, as direct evidence of this intention of the Maharajah, than any parol testimony touching the manner in which the marriage ceremony was conducted. It also goes far to corroborate the testimony of the plaintiffs' witnesses on this point, when that is in conflict with the testimony adduced by the defendants.

There is, again, some conflict of evidence as to the fact whether the appellant bore the title of Kowar. There is, however, some evidence that the title was often conceded to him, though he is not uniformly so designated in the Maharajah's own letters. He is so designated in the "red letter." There is also evidence, which their Lordships see no reason to doubt, as to his having on important

occasions sat on the Guddee with the Maharajah ; of his having been introduced by the Maharajah's desire to European officers high in authority ; of his having been taken to the durbar of the Governor-General and put prominently forward there ; and it cannot be doubted that the effect of the Maharajah's treatment of him was to produce a strong impression on the minds of the officials that he was the intended successor.

So matters stood when the Maharajah, as one of the leading members of the British Indian Association of talookdars, went down to Calcutta in order to take part in the discussions and negotiations which resulted in the passing of Act I of 1869. This must have been in the latter half of 1868.

Imtiaz Ali, the vakeel concerned in the drafting and preparation of this Act on the part of the talookdars, has sworn that cl. 4 of s. 22 originated with the Maharajah ; that it was opposed by some of the talookdars, but finally approved of by the Select Committee of the Governor-General's Legislative Council on the Bill, and passed into law. He also says that he was told by the Maharajah that his object in pressing this clause was to provide for the Dadwa Sahib.

There is some contradictory evidence on this point on the part of the defendants. One of their witnesses, however, Chowdree Niamut Khan, at page 63 of the Record, seems to admit that the Maharajah was the author of the clause in question, though he represents that it was inserted for the benefit of Mahomedan rather than for that of the Hindoo talookdars. He says, "I asked Maharajah Man Singh what the object was of the clause in question, and he informed me that in the absence of a near relation, grandsons on the daughter's side can have no claim under the Hindoo law, but under the Mahomedan law they have ; and that the clause in question was inserted with the view that the followers of neither religion might suffer, and that the provisions of the Hindoo law might not be contravened." It is not easy to see why the Maharajah should have been thus anxious to originate a clause that was to enure only for the benefit of Mussulman talookdars.

The scale, however, is conclusively turned in favor of the testimony of Imtiaz Ali on this point by the evidence of Mr. Carnegie.

Mr. Carnegie, whatever may be the effect of his evidence upon the questions of revocation, which will be hereafter considered, cannot, their Lordships think, be disbelieved as to the fact that a conversation did take place between him and the Maharajah in January 1870, and that in the course of that conversation the Maharajah did make a statement to the effect that he had had a clause inserted in Act I of 1869 to suit the identical case of the Dadwa. That statement is very material, inasmuch as it shows that the Maharajah considered that he had treated his grandson in all respects as a son.

The Deputy Commissioner (Mr. King), speaking possibly in some measure from personal knowledge says : "It is not saying too much, the Court believes, to say that if the plaintiff had not existed, the clause as it stands would never have been enacted." Their Lordships, weighing the evidence in the cause, and proceeding on that alone, would come to the same conclusion.

It appears, then, to their Lordships that, however uncertain it may be when the notion of making the Dadwa Sahib his successor was first conceived, or when that notion first became a fixed intention, it is established that the Maharajah had that intention as early as the date of the Dadwa Sahib's marriage ; that, with that intention, he continually treated his grandson, in fact, as the son of the house would be treated, and not as a mere grandson by a daughter ; and that, in order to effectuate his intention by operation of law, rather than by will, he caused the clause in question to be inserted in the Statute.

They are further satisfied that the treatment, in point of fact, was such as the words of the clause, upon the true construction of it, must be held to contemplate ; and that, in the events that have happened, the appellant was the

statutory heir to the talook, if the Maharajah is to be held to have died intestate.

They now approach the more difficult question, whether there was a revocation of the will.

If the finding of their Lordships upon the question of "treatment" is correct, it follows that the Maharajah, from the time of his return from Calcutta, would presumably have, with regard to his will, the *animus revocandi*. It is unreasonable to suppose that having been at so much pains to make Dadwa Sahib his heir *ab intestato*, he would wish to leave that arrangement liable to be defeated at the will, and by the act, of the Maharanee. Moreover, his conduct, and what we are told of his character, make it probable that, even if he thought the succession of Dadwa was secured either by the terms of the will or by further instructions given to the Maharanee, he would now desire it to be effected by operation of law rather than by a voluntary disposition, certain to offend his relatives in the male line, likely to provoke criticism and censure, and not unlikely to cause dissension and litigation in the family.

Nor have we, in this instance, as in ordinary cases of revocation, to account for a change in the testator's intentions, whereby his bounty is diverted from one object to another. The disposition by this will was, on the face of the instrument, only provisional. It argued no fixed intention to benefit the Maharanee, for it provided for the substitution of a male successor in her place. The Maharajah had since made up his mind who that successor should be, and believed that he had provided for effecting his intention by operation of law. In these circumstances, the provisional disposition by this will, if not an obstacle to the carrying out of his wishes, had at least become useless and superfluous. These considerations render it highly probable that the conversation to which Mr. Carnegie has deposed did pass between him and the Maharajah. Their Lordships will now consider that gentleman's testimony and the objections that have been taken to it.

The passages material to the question of revocation in Mr. Carnegie's deposition are the following:—

"He spoke to me about having it (the will) withdrawn from the treasury on the eve of my departure on tour across the Gogra (Mr. Sparks's evidence fixes the date of this as some time in January 1870), and expressed a wish that I should examine the deed and see what provisions he had made for the adoption of an heir. He said he had authorized the Maharanee to name an heir, and it was his wish that the power to adopt or name an heir should be limited to the Dadwa Sahib; that he was apprehensive that he had given her a personal power to adopt any one of the lads of the family; and that if, on examination of the document, I found that his apprehensions were just, he wished me to destroy it, because his intention was, and always had been, that the Dadwa should succeed him; and he had had a special clause inserted in Act I of 1869 to suit the identical case of the Dadwa; so his wishes would be fully met by the document being destroyed and the law being allowed to take its course. Next morning I crossed the Gogra on tour and was absent several weeks. I wrote demi-officially to Mr. Sparks, the Deputy Commissioner, to get out the will and send it to me, and I also discussed the subject with the Chief Commissioner, Mr. Davies, who, I remember, said that if the will was sealed up and deposited by the Commissioner, I, as officiating Commissioner, might open it; but, if sealed and deposited under orders of the Chief Commissioner, I had better not open it myself. Mr. Sparks unfortunately overlooked the matter, and it escaped my memory during the rest of my tour, and when I returned to Fyzabad I found the Maharajah's health, physical and mental, to be such that I deemed it expedient to take no further steps in the matter, and there it remained. This was in the cold weather of 1869-70."

And in cross-examination he said: "The Maharajah wished his will to be

destroyed that the Dadwa Sahib might get the benefit of s. 22 of Act I of 1869. He said there was no need of the document, as the clause secured his wishes.

The first objection to Mr. Carnegy's evidence is that it is not corroborated by that of Mr. Sparks, which is also given in the cause. He says, touching this point, "To the best of my recollection, Mr. Carnegy never wrote to me to send him the will. Mr. Carnegy, either verbally or by note, asked me to get out the will and see by whom it was deposited. I requested the Treasury Office to get out the will and see by whom it was deposited, which copy I despatched to Mr. Carnegy. I did not receive any letter, official or demi-official, to return the will to the Maharajah. I did not receive any letter from Mr. Carnegy asking me to return the will, nor did I receive any khutt from the Maharajah. I don't remember receiving any."

Upon this testimony, it is to be remarked, that it confirms that of Mr. Carnegy as to the fact that at the time in question he made some communication to Mr. Sparks touching the Maharajah's will, though there is a material discrepancy between the two depositions as to the precise terms and nature of that communication. To that extent then it corroborates Mr. Carnegy's general statement that he had had a conversation with, and some instructions from, the Maharajah about the will, for otherwise there would be no apparent reason for any correspondence between the two officers on the subject. Mr. Carnegy was examined on the 19th April 1873, when on the eve of his departure for Europe. Mr. Sparks was examined on the 2nd of the following July, and there was no opportunity of recalling Mr. Carnegy, and getting him to explain, if he could, the before-mentioned discrepancy. It is conceivable that the deposition of each officer may be partially accurate and partially defective; that Mr. Carnegy, after the discussion with Mr. Davies to which he deposes, may have written to Mr. Sparks to the effect deposed to by the latter, and may on another and possibly subsequent occasion have written to the effect to which he himself deposes. The letter or letters (if any) that did pass are not in evidence, and the question of what really passed rests on the accuracy of the recollection of the two witnesses. It may further be observed, as bearing on the general credibility of Mr. Carnegy, that he has expressly sworn to a discussion on this subject with the Chief Commissioner, Mr. Davies. He has, therefore, vouched that gentleman, who might have been called to contradict him, and the discussion, if it took place, presupposes that Mr. Carnegy had some instructions from the Maharajah concerning the will.

Other objections to the testimony of Mr. Carnegy are founded on his conduct. It has been asked why, if he had this alleged authority to destroy the will, he did not exercise it; why, after his return from his official tour, he did not even inform the Maharajah (who lived until the following October, and, notwithstanding frequent attacks of epilepsy, was occasionally equal to the transaction of business) that the will was still in existence; and, above all, why, after the death of the Maharajah, he allowed the widow to be put into possession of the talook, under the will, upon the assumption that the disposition made by it was still in force.

It is impossible to deny that these objections have more or less weight. The following is the explanation which may be set against them. It is clear that the will, from one cause or another, did not reach Mr. Carnegy whilst on his tour; that, according to his own account, he allowed the matter, though of such great importance, to escape his memory, and omitted to press for the dispatch of the document; that after his return he found the Maharajah on the occasion of his visit to him in a deplorable state of health, and wholly unfit for business. So far Mr. Carnegy is confirmed by Mr. Sparks. Mr. Carnegy seems then to have jumped to the conclusion that the Maharajah's health, physical and mental, was such as to make it inexpedient to take further action in the matter. If this were Mr. Carnegy's sincere conviction, it may well account for his not acting after his

return on the antecedent authority by destroying the will. To destroy a will on the parol authority of the testator would in any case be an extremely delicate matter. A man who would have done the act, if assured that it would be confirmed, if necessary, by a person in the full possession of his faculties, would naturally abstain from doing it, if he felt that the confirmation (if obtained) might be questioned as proceeding from one of enfeebled capacity, if not of absolute incapacity for business. His conviction of the Maharajah's continuous incapacity for business, though erroneous in point of fact, might also account for his omission to renew the subject, or to inform the Maharajah that the will was still in existence. His conduct after the Maharajah's death seems to be explicable only on the assumption that he may have thought the actual destruction of the instrument was essential to its legal revocation ; and that, if he objected to the Maharanee's title on the ground of what had passed between himself and her late husband, he would expose himself to criticism and censure without benefiting the Dadwa Sahib, whose interests he may have supposed, in common with other officials, and many of the dependants of the family, would be secured by the Maharanee's exercise of her power in accordance with her husband's intentions.

Their Lordships do not say that this explanation is wholly satisfactory. But the question which they have to determine is not whether Mr. Carnegie's conduct can be completely explained, but whether it be such as renders his evidence untrustworthy. Their Lordships, considering the position and general character of the witness, are of opinion that this is not the case. Upon his general truthfulness neither the Commissioner nor the Deputy Commissioner has cast any suspicion. The former was of opinion that, considering all the circumstances, he could not depend on the accuracy of Mr. Carnegie's recollections of the conversation with the Maharajah. The other Judge says expressly "that the conversation, such as related by Carnegie, passed between him and the Maharajah I have no doubt." Reviewing, however, Mr. Carnegie's subsequent conduct, he came to the conclusion that "Man Singh only expressed an intention that the Dadwa Sahib should succeed him, and of inspecting his will for the purpose of seeing what he had actually written in it regarding his wife's power to adopt, but did nothing more." He also expresses a doubt "whether, supposing revocation had been clearly proved, it would be proper to let this outweigh the existence of the will," implying that something in the nature of cancellation was necessary. Upon these judgments their Lordships observe that, if Mr. Carnegie be accepted as a truthful witness, the more important portion of his testimony can hardly thus be explained away. His recollection may possibly deceive him as to the terms and nature of his communication with Mr. Sparks; but mere imperfection of memory can hardly account for his imagining that the Maharajah gave him authority to destroy the will if no such authority was given. The authority was in itself a thing so unusual and so important, that the words which conveyed it were likely to stamp themselves on the memory. Nor is it easy to see how such an authority, if not clearly expressed, could be honestly inferred from other words imperfectly remembered. Their Lordships have, therefore, come to the conclusion that Mr. Carnegie's statement of what passed between him and the Maharajah may be accepted as substantially accurate.

If this be so, their Lordships are of opinion that what so passed amounted to a revocation of the will. "It cannot, they think, be doubted that the will of a Hindoo may be revoked by parol. The cases cited at the Bar show that this was the law of England before the Statute of Frauds was passed. Their Lordships are very sensible of the danger of acting upon such evidence as is ordinarily produced in the Courts in India in order to establish such a revocation, and they desire to say nothing which may induce those Courts to apply the law in such cases otherwise than with extreme caution. Even in the present case their Lordships have come to the conclusion upon which they are about to act with some

hesitation, not because they are not perfectly satisfied that the Maharajah had the *animus revocandi*, but because the testimony of Mr. Carnegie is open to the objections which have been considered. It was hardly disputed at the Bar that, if definitive authority to destroy the will was given to him by the Maharajah, that would be sufficient in law to constitute a revocation, although the instrument was not in fact destroyed. In truth, the case would then be almost on all fours with that of *Walcott v. Ochterlony*, 1 Curteis, 580, the only difference being that the authority was given here by words, and there by a writing sufficient to satisfy the Statute of Frauds. In that case, as in this, the authority was not exercised by the actual destruction of the will.

Their Lordships see no grounds for not accepting that part of Mr. Carnegie's testimony which says that the Maharajah gave him authority to destroy the will, if on examination he should find that it contained a certain disposition. Nor do they think that this qualification of an absolute order to destroy is material, because the will, being what it was, the authority would have clearly justified its destruction. And they are disposed to think that even if the direction to destroy were not, as, upon the whole, they think it is, satisfactorily established, the declaration made by the Maharajah to the principal officer of the district in whose custody the will was, of his desire and intention that the Dadwa Sahib should succeed him by virtue of the newly-passed Statute, and in supersession of the will, would have been in law a sufficient parol revocation.

Upon the whole, then, their Lordships are of opinion that the Maharajah died, as he intended to die, intestate; that the appellant is the person who, under cl. 4 of s. 22 of Act I of 1869, was entitled to succeed to the talook; and that he has made out his claim for a declaratory decree to that effect.

The declaration, however, must, their Lordships think, be limited to the talook and what passes with it. If the Maharajah had personal or other property not properly parcel of the talookdari estate, that would seem to be descendible according to the ordinary law of succession.

They will, therefore, humbly advise Her Majesty to reverse the decree of the Commissioner of Fyzabad dated December 24th 1873, and that of the Deputy Commissioner of Fyzabad dated July 28th 1873; and to declare that the will of the late Maharajah Man Singh of April 22nd 1864 was duly revoked by him in his lifetime; and that the plaintiff, Maharajah Pertab Narain Singh, *alias* Dadwa Sahib, was and is entitled, under cl. 4 s. 22 of Act I of 1869, to succeed, as *ab intestato*, to the talookdari estate of the late Maharajah, including whatever is descendible according to the provisions of the said Statute. Their Lordships are of opinion that, under the peculiar circumstances of this case, the Commissioner exercised a sound discretion in making the costs of the litigation payable out of the talookdari estate; and that the costs of both parties of this appeal ought to be taxed as between solicitor and client, and similarly dealt with. And they will advise Her Majesty accordingly.

The 25th July 1877. •

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Hindoo Law (Mitacshara)—Joint Family Estate—Execution Sale (against one Co-sharer)—Voluntary Alienations—Auction Purchaser—Partition.

On Appeal from the High Court at Calcutta.

Baboo Deendyal Lal
versus
Baboo Jugdeep Narain Singh.

Under the law of the Mitacshara, the share of one co-sharer in a joint family estate can be taken and sold in execution of a decree against him alone.

However nice the distinction between the rights of a purchaser under a voluntary conveyance, and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them.

The purchaser of undivided property at an execution sale during the life of the debtor for his separate debt acquires his share in such property with the power of ascertaining and realizing it by a partition.

Mr. Graham for Appellant.
No one for Respondent.

Sir James Colvile gave judgment as follows :—

The respondent in this case is the only son of one Toofani Singh, and, the family being governed by the law of the Mitacshara, is joint in estate, in the strict sense of the term, with his father. On January 28th 1863, the father being indebted to the appellant to the amount of Rs. 5,000, executed to him a Bengali mortgage bond for securing the repayment of that sum with interest at the rate of 12 per cent. per annum. The appellant afterwards put this bond in suit, and on May 30th 1864 obtained a decree against Toofani Singh for the sum of Rs. 6,328 : 13 : 8. He took no proceedings to enforce this decree, which was in the form of an ordinary decree for money, against the property especially hypothe- cated ; but in September 1870 caused " the rights and proprietary and mokurruree title and share of Toofani Singh, the judgment debtor " in the joint family property which is the subject of this suit, to be put up for sale in two lots for the realization of the sum of Rs. 11,144 : 6 : 4, the amount alleged to be then due on the decree ; and himself became the purchaser of those lots for the sums of Rs. 900, and Rs. 10,100. Objections were taken to this sale by the judgment debtor, which, after going through all the Courts, were finally overruled, and the appellant obtained the usual certificate title, and in January 1871 succeeded in taking possession thereunder of the whole of the property now in dispute. Thereupon, in February 1871, the respondent brought the suit out of which this appeal arises for the recovery of the whole property on the ground that, being according to the law of the Mitacshara, the joint estate of himself and his father, it could not be taken or sold in execution for the debt of the latter, which had been incurred without any necessity recognized by the Shasters or the law. The father was joined as a defendant.

The issues on the merits settled in the cause were—

1. Did Toofani Singh borrow money from the defendant (the appellant) under a legal necessity or without a legal necessity ? and are the auction sales and other proceedings taken in satisfaction of the debt all illegal, and ought they to be set aside or not ?

2. Under the Mitacshara law, is the plaintiff entitled to the entire property sold in satisfaction of his father's debts, or to how much ?

3. Was some portion of Mouzah Domawun personally acquired by the plaintiff's father, or was it acquired by the ancestral funds and property ?

A good deal of evidence was given in the Court of First Instance as to the nature of the debt incurred by Toofani Singh, and upon the issue whether it was borrowed under a legal necessity. Upon the face of the bond the debt is ostensibly that of the father alone ; there is no statement that the money was borrowed for the purposes of the joint family, or so as to bind co-sharers in the estate. The oral evidence adduced by the plaintiff was directed to show that his father, who had passed five years in jail on a conviction for forgery, had both before and since his imprisonment lived an immoral and disreputable life, not residing with and rarely visiting his family ; and that the money was borrowed on his sole credit,

and spent by him in riotous living. On the other hand, the defendant (the appellant) brought witnesses to prove that part at least of the money, *viz.*, Rs. 1,500, was expressly borrowed in order to provide for the marriage expenses of one of the daughters of the family; and, generally, that the plaintiff was cognizant of his father's transactions, and the whole debt one which bound both co-sharers.

The Subordinate Judge does not appear to have thought it necessary to come to any definite conclusion upon this issue. In one passage of his judgment he says, "The sale being held by the Court, it is unnecessary to see whether it was held under a legal necessity or not." In another passage he says, "The sale held by the Court, according to the laws in force, of the ancestral estate, as the rights and interests of the judgment debtor, cannot be regarded as including the right of the son of the judgment debtor which he derived under the Shasters; and so far as the plaintiff's share is concerned, the sale cannot be confirmed." This seems to be the ground on which he proceeded; for he gave the plaintiff a decree for one moiety of all the property claimed, except a small portion which he held was the separate acquisition of the father.

On appeal this decree was reversed by the Zillah Judge of Gya, who dismissed the suit on the ground (amongst others) that a legal necessity to borrow the money had been established, and consequently that not merely the particular share of the property that may have belonged to Toofani Singh, but the whole undivided estate was liable for the debt.

The respondent then brought his case before the High Court by special appeal, which, by its decree of the 14th June 1873, reversed the decree of the Lower Appellate Court, and ordered that the plaintiff should obtain possession from the defendants of the property which was the subject of suit for the benefit of the joint family. The present appeal, which has been heard *ex parte*, is against that decree.

A good deal of the argument at their Lordships' bar was addressed to the question of the nature of the judgment debt, and whether or not there was "legal necessity" for the loans of which it was composed. Whatever may be their Lordships' opinion of the finding of the Zillah Judge upon this point, they must, for the purposes of this appeal, treat it as conclusive. The appeal is only from the order on special appeal; and on that special appeal the High Court could not have disturbed the finding of the Lower Appellate Court on this question of fact, unless there was no evidence at all to support it. And this, whatever was the character and weight of the evidence, cannot be affirmed.

This issue, however, seems to their Lordships to be immaterial in the present suit, because whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the execution sale more than the right, title, and interest of the judgment debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, *viz.*, the right, title, and interest of the father. If any authority be required for this proposition, it is sufficient to refer to the cases of *Nugenderchunder Ghose v. Srimutty Ramunee Dossee*, 11 Moore I. A., p. 241; * and *Baijun Doobey v. Brij Bhokun Lal Awasti*, L. R. 2 I. A., p. 275.†

The first and principal question, however, that arises on this appeal is, whether the appellant acquired a good title even to the right, title, and interest of the father; whether under the law of the Mitacschara, the share of one co-sharer in a joint family estate can be taken and sold in execution of a decree against him alone. In Lower Bengal, where this question can arise only between brothers or other collaterals (sons not having as against their father in his lifetime,

* 8 W. R. P. C. 17; 2 Suth. P. C. R. 78.

† 21 W. R. 306; *ante* p. 207.

under the law of the Dayabhaga, the rights which they have under the law of the Mitacshara), it is settled law that the right, title, and interest of one co-sharer in a joint estate may be attached and sold in execution to satisfy his personal debt; and that the purchase under such an execution stands in the shoes of the judgment debtor, and acquires the right as against the other co-sharers to compel a partition.

That a similar rule prevails in the south of India, though the law there administered is founded on the Mitacshara, is shown by two cases decided by the High Court of Madras, *Virasvami Gramini*, 1 Madras, H.C.R., 471; and *Palani Valappa Ramdan v. Manara Naickan*, 2 Madras H.C.R. 416. The latter case was one in which, as here, the co-parceners were father and son. And that the law is to the same effect in the Presidency of Bombay was ruled in the two cases which are reported at pp. 32 and 182 of the first volume of the Bombay High Court reports.

All these cases, however, affirm not merely the right of a judgment creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his co-parceners. This latter proposition is certainly opposed to several decisions of the Courts of Bengal.

In 1869 the question was carefully considered by the High Court of Calcutta. A Division Bench of that Court referred it to a full Bench in the case of *Sadabart Persad Sahu v. Phoolbash Koer*.

The decision of the full Bench is reported in the third volume of the Bengal Law Reports, Full Bench 'Rulings, p. 31.* The Chief Justice, after reviewing all the authorities, came, with the concurrence of his colleagues, to the conclusion that under the law of the Mitacshara, as administered in the Presidency of Fort William, "Bhagwan Lall," whose act was in question, "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family." The full Bench so reported to the Division Bench, and the latter then made its final decree in the cause, which involved many other questions. From that decree there was an appeal to Her Majesty in Council, which was heard *ex parte*. This Committee, for the reasons stated in their judgment, which is reported in L. R. 3 I. A., p. 7,† did not think it necessary or expedient either to affirm or disaffirm the ruling of the full Bench on this point. Their Lordships (p. 30) said they "abstained from pronouncing any opinion upon the grave question of Hindoo law involved in the answer of the full Bench to the second point referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued. That question must continue to stand, as it now stands, upon the authorities, unaffected by the judgment on this appeal."

It is, however, to be observed that even the full Bench, in the case under consideration, recognized a possible distinction between the sale of a share in a joint estate under an execution and an alienation by the voluntary act of a co-sharer, and thought that the former might be valid, though the latter was invalid. In dealing with the first question referred to the full Bench, the Chief Justice, at p. 37 of the Report, says:—

"It is unnecessary for us to decide whether, under a decree against Bhagwan in his lifetime, his share of the property might have been seized, for that case has not arisen. According to a decision in Stokes' Reports, it might have been seized, but the case as against Bhagwan and that against the survivors are very different. So long as Bhagwan lived he had an interest in this property which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate."

The decision in *Sadabart's* case has been followed by, amongst others, that of

* 12 W. R. F. B. 1.

† 25 W. R. 285; ante p. 236.

Mahabeer Persad v. Ramyad Singh, 12 Bengal Law Reports, p. 90,* being the case referred to in the judgment under appeal as No. 209 of 1872.

That was a decision by the two learned Judges who passed the decree now under appeal, and the circumstances of the one case are nearly the same as those of the other. In that of 1872, the father had borrowed the money ostensibly on his sole credit, and given a Bengali mortgage bond to secure it. The bondholder had sued on his bond, obtained a decree, taken out execution against joint property, and become the purchaser of it at the execution sale. The distinction between that case and the present is that the property seized and sold was that which was specially hypothecated by the bond. The sons sued to recover the property. There was a clear finding against the alleged "necessity" for the loan. The Court laid down in the strongest terms (see p. 94)† the law as established by the full Bench ruling in *Sadabart's* case, and other decisions, and appears to have assumed that a title acquired by means of an execution sale stood on no higher ground than one founded on a voluntary alienation.

It asserted, however, the power of imposing equitable terms upon the son, whom they held entitled to recover; and these terms were, in effect, that the property, when recovered, should be held and enjoyed by the family in defined shares; and that the share of the father, the judgment debtor, should be subject to the lien of the judgment creditor for the money advanced, with interest. In the present case the same Judges have refused to recognize any such equity, proceeding on the ground that the execution was taken out not against the property specially hypothecated, but against the general estate.

It is difficult to see upon what principle the hypothecation of the property in question can be taken to improve the position of the creditor; since the very act of hypothecation implies a violation of the rule laid down in *Sadabart's* case. It is further to be observed that in one respect the equity of the creditor is stronger in the present case than it was in that of 1872; since here it has been found by the Lower Appellate Court that "legal necessity to borrow the money existed"; whereas, in the case of 1872, there was a clear finding the other way. Their Lordships, therefore, are of opinion that the reasons which the learned Judges have given do not justify their refusal to give to the defendant in this case the benefit of the equity which they enforced in the other.

But what is the effect of the decision of 1872? It is a clear authority for the proposition that, although by the law as settled in that part of the Presidency of Fort William which is governed by the *Mitacshara*, a member of a joint family cannot encumber his share in joint property without the consent, express or implied, of his copartners, the purchaser of it at an execution-sale nevertheless acquires a lien upon it to the extent of his debtor's share and interest.

There appears to be little substantial distinction between the law thus enunciated and that which has been established at Madras and Bombay, except that the application of the former may depend upon the view the Judges may take of the equities of the particular case; whereas the latter establishes a broad and general rule defining the right of the creditor.

Their Lordships, finding that the question of the rights of an execution-creditor, and of a purchaser at an execution-sale, was expressly left open by the decision in *Sadabart's* case, and has not since been concluded by any subsequent decision which is satisfactory to their minds, have come to the conclusion that the law, in respect at least of those rights, should be declared to be the same in Bengal as that which exists in Madras. They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in *Sadabart's* case as to voluntary alienations. But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution-sale may be, it is clear that a distinction may, and in some cases does,

* 20 W. R. 192.

† See *ibid.* 194.

exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution-sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value.

It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindoo estate; and that it may be so applied without unduly interfering with the peculiar *status* and rights of the co-parceners in such an estate, if the right of the purchaser at the execution-sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.

In the present case their Lordships are of opinion that they ought not to interfere with the decree under appeal so far as it directs the possession of the property, all of which appears to have been finally and properly found to be joint family property, to be restored to the respondent. But they think that the decree should be varied by adding a declaration that the appellant, as purchaser at the execution-sale, has acquired the share and interest of Toofani Singh in that property, and is entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition. And they will humbly advise Her Majesty accordingly. They desire to add that they cannot make any more precise declaration as to Toofani Singh's share, since, if a partition takes place, his wife may be entitled to a share; and, further, that there will be no order as to the costs of this appeal.

The 10th November 1877.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Oudh—Title to Land—Trustee.

On Appeal from the Court of the Commissioner of Ray Bareilly, Oudh.

Thakoor Shere Bahaḍur Sing

versus

Thakoornain Dariao Koer.

Although the title conferred by the British Government, after the general confiscation of the land of Oudh, is absolute and over-rides all other titles, nevertheless the grantee under the Government may, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee.

Mr. Doyne for Appellants.

Mr. Leith, Q.C., and Mr. A. Souttar for Respondents.

Sir Robert Collier gave judgment as follows:—

This case has not been tried in a manner altogether satisfactory. Without, however, referring to the previous proceedings, their Lordships think it enough to advert to the final judgment appealed against. The learned Commissioner gave his judgment in these terms:—"Busant Sing died during the rebellion of 1857, and the alleged adoption of the plaintiff is said to have taken place in April 1858. Before this the general confiscation of the land of Oudh had been declared by the British Government, and it was only in May 1858 that a summary settlement was made with the defendant. At the time, therefore, of the alleged adoption, the title to the estate vested neither in the deceased Busant Sing nor in the plaintiff, nor in the defendant, but in the British Government. Even if it be

allowed that there was adoption of plaintiff, and that this, in accordance with Hindoo law, conferred upon him all the right of a posthumous son of Busant Sing, still neither he, nor Busant Sing himself, if he were to rise from the dead, can assail the title under which the defendant holds." So far their Lordships agree with the learned Commissioner, but they are not able to agree with him in the view which he expresses in the second paragraph of his judgment. The learned Commissioner appears not to have been sufficiently acquainted with the tenor of some recent decisions, whereby, although undoubtedly the doctrine is affirmed that the title conferred by the Government is absolute and over-rides all other titles, nevertheless it has been held that the grantee under the Government may, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee. The learned Commissioner proceeds in these terms:—"It has, however, been held by the Courts on various occasions that a free gift was made by the Government, and I am entirely of this opinion. The adoption of two letters, said to have been written by the defendant, both of which are set forth in the plaint, placed, it is contended, the defendant in the position of trustee. One letter addressed to the plaintiff implies nothing more than a promise to put him in possession of the estate on his becoming of age. The second letter, addressed to Baboo Amrez Sing, between whose daughter and plaintiff a marriage was arranged, is to the same effect as the letter addressed to the plaintiff. I can see nothing in these letters to place the plaintiff and defendant in the position respectively of beneficiary or *cestui que trust* and trustee."

Their Lordships are of opinion that the letters here referred to, if proved (and, as far as they are at present informed, they do not seem to have been proved or disproved), may, coupled with surrounding circumstances, constitute sufficient evidence on which the Court would be justified in holding that the defendant had declared herself or had agreed to be a trustee on behalf of the plaintiff. They think it desirable, therefore, that the suit should be sent back to the Courts in Oudh for the purpose of determining this question. Those Courts will enquire, in the first place, whether the letters are genuine; in the next place, as to the date on which they were written; and thirdly, as to the circumstances under which they were written and other surrounding circumstances; and among those circumstances undoubtedly will be the question of the adoption or non-adoption by the defendant of the plaintiff under the will of her husband;—this question being, as before explained, material only as a circumstance bearing upon the question of whether or not she has agreed to be or declared herself to be a trustee, but not in itself constituting any title on the part of the plaintiff.

Their Lordships, in the imperfect acquaintance which they have at present with the facts of the case, think it more convenient to remand the case in these general terms than to settle issues themselves. Either party will be at liberty to propose for the consideration of the Court any issues which they may think material to raise the questions which have been just indicated, and the Court will doubtless raise the proper issues, and determine the questions according to the law as now laid down.

Their Lordships think it right to add that the delay of the plaintiff in not having brought the action until ten years had passed after he had become of age, and his laches in this respect will not entitle him to an account for a period before the commencement of this suit.

Their Lordships will therefore humbly recommend Her Majesty to discharge the decree and orders appealed from, and to remand the suit to the Court of the Commissioner of Ray Bareilly for him to retry and determine the same, each party being at liberty to propose such issues as they may think material to be settled for trial by the Commissioner.

The costs of both parties of the appeal will be taxed, and a certificate sent with a direction to the Court below to deal with them as costs in the cause.

The 20th November 1877.

Present :

Sir James W. Colville, Sir Barnes Peacock, and Sir Montague E. Smith.

Oudh Estates Act (I of 1869) s. 3, and s. 22 cl. 11)—Kablas Koer's Talook—Hindoo Law (Mitacshara)—Woman's Separate Property.

On Appeal from the Commissioner and Judicial Commissioner of Oudh.

Brij Indar Bahadur Singh

versus

Ranee Janki Koer.

Lal Shunker Buksh

versus

Ranee Janki Koer,

Lal Seetla Bux

versus

Ranee Janki Koer,

HELD that the sunnud to Kablas Koer conferred a full proprietary and transferable right in the estate therein described upon her and her male heirs according to the law of primogeniture, and that by virtue of s. 3 Act I of 1869 she must be deemed to have acquired by the sunnud a permanent heritable and transferable right in the estate without any trust for the benefit of the reversionary heirs of her husband; and that, on her dying intestate, under cl. 11 s. 22 of the same Act, and according to the Mitacshara law, the estate descended as her separate property to her daughter.

Mr. Cowie, Q.C., and Mr. Cowell for the Appellant, Brij Indar Bahadur Singh.

Mr. Joshua Williams, Q.C., and Mr. Graham for the Appellant, Lal Shunker Buksh.

Mr. Mayne and Mr. Thomas for the Appellant, Lal Seetla Bux.

Mr. Leith, Q.C., Mr. Doyne, and Mr. C. W. Arathoon for Respondent.

Sir Barnes Peacock gave judgment as follows :—

These three appeals were argued together. In each of them the appellant was plaintiff in a separate suit instituted by him against the respondent in the Court of the Deputy Commissioner of Pertabghur, to recover possession of Talooka Pawansi, in Pergunnah Dingwas, in the province of Oudh. In each case the plaintiff claimed to have become entitled to the talook, by right of inheritance, upon the death of Thakoorain Kablas Koer, the mother of the defendant.

The property in dispute was formerly part of the estate of Rai Chein Singh, the great-grandfather of Mypal Singh. Mypal Singh held it under the Native Government down to the time of his death, in 1260 Fuslee, corresponding with the year 1852-53.

Upon his death he left two widows; the first married was Mussamat Subhao Koer, and the second the above-mentioned Thakoorain Kablas Koer. By his first wife, Subhao Koer, he had two daughters, of whom the elder, Jaganath Koer, was the mother of the appellant, Brij Indar Bahadur Singh. The other died without issue. By his second wife, Thakoorain Kablas Koer, he had one daughter, Ranee Janki Koer, who married Rai Bajai Bahadur Singh, and is the defendant in the suits, and the respondent in each of the three appeals.

At the time of the annexation of Oudh the estate was in the possession of the aforesaid Kablas Koer, to whom it had descended as the surviving widow of her deceased husband, Mypal Singh.

In 1858 the estate was confiscated by the British Government by virtue of Lord Canning's Proclamation of the 15th March in that year.

The summary settlement for 1858-59 was made with Kablas Koer. In the kubooleut dated 20th April 1858, executed on her behalf on that occasion, she was described as the widow of Lall Mypal Singh, and it appears from an administration paper put in evidence in Brij Indar's Case (Record, page 8), that Kablas Koer admitted that in virtue of the ancestral right of her husband the regular settlement had been made with her.

A sunnud was afterwards granted to her by Government, by which the full proprietary right, title, and possession of the estate was conferred upon her and her heirs for ever, subject to certain conditions which are not material with reference to the present case. It was also declared to be another condition of the grant that in the event of her dying intestate, or of any of her successors dying intestate, the estate should descend to the nearest male heir, according to the rule of primogeniture, but that she and all her successors should have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest, or adoption, to whomsoever she should please. It was also further declared that as long as the obligations imposed by the grant should be observed by her and her heirs in good faith, so long would the British Government maintain her and her heirs as proprietor of the estate.

It is extraordinary that this sunnud is without date, at least it so appears in the copy put in evidence in each of the three suits; but it must have been subsequent to the date of the letter from Major MacAndrew, the Deputy Commissioner, of the 4th February 1861 (Record Seetla Bux's case, page 4), for he there states that if Kablas would file a deed of will in the terms of the proposal therein contained, she would receive a sunnud for the estate from Government. It must also have been after the date of her petition in answer, dated 15th March 1861, in which she asks to have a sunnud for life granted to her. It is exceedingly inconvenient, but it often happens in records sent up from the Courts in Oudh, that documents are without dates. Their Lordships mention this that the attention of the Judicial Commissioner may be drawn to the subject.

The letter from Colonel MacAndrew, to which reference has just been made, and the petition of Kablas in answer to it, were relied upon in the argument on the part of the appellants, in order to show that under the grant to her and her heirs the heirs of her husband must have been intended. They appear, however, to their Lordships strongly to support the view that the grant to Kablas and her heirs was not made through inadvertence, and that her heirs were intended.

In the letter Colonel MacAndrew says, "Among the Thakoors of Dingwas there is no one next of kin to the husband of the Thakoorain who may be declared as heir, and according to the Circular Orders she has power, after the receipt of the sunnud, to alienate her estate by will to anyone." He gives reasons why she should make a will in favor of Seetla, and concludes by saying, "If you file a deed of will in terms of the above proposal, you will receive a sunnud for the estate from the Government." (Record, p. 4.) In her petition in answer, after pointing out her objection to execute a will in favor of Seetla Bux, she concludes, "I myself am at a look-out, and as soon as I get a person of high family, good character, and condescending manners, such as will answer my choice, I will let your honor know. Meanwhile, it will be an act of grace on your part to confer a sunnud on me for life. On no account am I willing to adopt Seetla Bux and Shunker Buksh. I therefore pray that, on receipt of the report from Pertabghur district, my objections herein laid down may be fully taken into consideration."

The Government after this, and after having had time for considering the expediency of granting to Seetla Bux the succession to the estate upon the death

of Kablas, conferred the estate upon her and her heirs male, according to the law of primogeniture, without even mentioning the status of Kablas as a widow, either in the operative words or in describing her. If, therefore, the letter and petition could properly be taken into consideration in construing the Sunnud, with a view to ascertain the intentions of Government, they would operate more against than in favor of the claims of Seetla and Shunker.

Upon the death of Kablas, in August 1872, the appellant, Brij Indar, claimed to inherit as the son of Jaganath Koer, the daughter of Subhao, the first wife of Mypal, and the rival wife of Kablas.

Lal Shunker Buksh and Lal Seetla Bux each claimed as a distant collateral relative of Mypal, the deceased husband of Kablas. Each was a son of Ragnath Singh, who was a great grandson in the male line of Rai Chein Singh, who was the great-grandfather of Mypal Singh.

Seetla was the son of the first wife of Ragnath, and Shunker, who was born before Seetla, was the son of the second wife. Each claimed to be male heir according to the law of primogeniture.

The Deputy Commissioner dismissed the suit of Brij Indar, and also that of Shunker Buksh, and his decrees in those suits were affirmed by the Commissioner. There was, therefore, no appeal to the Judicial Commissioner in either of those cases, and in each of them the appeal to Her Majesty in Council is from the judgment of the Commissioner. In the case of Seetla Bux, the Deputy Commissioner decreed for the plaintiff. The Commissioner, upon appeal, reversed that decree, and decreed the talooka to the defendant, Janki Koer, and upon appeal to the Judicial Commissioner he affirmed the decree of the Commissioner. The appeal of Seetla Bux to Her Majesty in Council is, therefore, from the decree of the Judicial Commissioner.

The case is an important one, and was very ably argued on behalf of each of the parties, and their Lordships have very carefully considered all the arguments which were urged, and the authorities which were cited in support of the claims of the several appellants.

The first question to be considered is whether the estate, in the event of the intestacy of Kablas, descended to her heirs or to the heirs of her husband. Upon this point their Lordships entertain no doubt.

They consider that the sunnud conferred, and was intended to confer, a full proprietary and transferable right in the estate upon Kablas and her male heirs according to the law of primogeniture, and not merely to confer upon her an estate for life, with full power of alienation, and with remainder to the male heirs of her husband, in the event of her dying intestate without having alienated it in her lifetime.

If the interest which Kablas, as the widow of her deceased husband, originally took in the property had remained unaltered, she would have had no power of alienation either in her lifetime or by will. The estate would have descended to the heirs of her husband, and not to her heirs; but her interest as widow and that of the reversionary heirs were absolutely destroyed and put an end to by the confiscation under Lord Canning's Proclamation, by which it was declared that "the whole proprietary right in the soil is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting." In disposing of that right by the sunnud, the Government granted to Kablas and her heirs male, according to the law of primogeniture, the full proprietary right and title to the estate.

The title, however, does not depend entirely upon the sunnud, for in 1869 Act No. I of that year was passed to prevent, as appears from the preamble, doubts as to the nature of the rights of certain talookdars and others in the estates which had been conferred upon them by the British Government, and as to the course of succession thereto.

By s. 2 the word "talookdar" was defined, and it was declared to mean "any person whose name is entered in the first of the lists mentioned in s. 8."

The name of Thakoorain Kablas Koer was entered in the first of such lists. It was also entered in the second of the lists mentioned in s. 8 as one whose estate, according to the custom of the family on and before the 13th February 1856, ordinarily descended to a single heir.

By s. 10 of the Act, list No. 1 is conclusive evidence that Kablas was a talookdar within the meaning of the Act, and there can be no doubt that the estate in dispute is one of the estates referred to by the Act, and that by virtue of s. 3, Kablas Koer must be deemed to have acquired by the sunnud a permanent heritable and transferable right in the estate in dispute.

It was contended by Counsel that a trust was created, and that Kablas took the estate upon trust for those who would have been entitled to it if it had not been confiscated. To hold that such a trust arose would reduce to a nullity the confiscation and the disposal by the Government of the property confiscated. The power of alienation by sale, mortgage, gift, or bequest, was wholly inconsistent with an intention on the part of Government to create a trust for the benefit of the reversionary heirs of her husband. Their Lordships are of opinion that no trust was created by the sunnud or by the Act of 1869; and there is no evidence that a trust was created in any other manner.

As regards the succession, their Lordships are of opinion that the limitation in the sunnud was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of s. 22 of that Act. By that Section it was enacted that if any talookdar whose name should be inserted in the second, third, or fifth of the lists mentioned in s. 8, or his heir or legatee, should die intestate, such estate should descend in manner therein described.

Their Lordships do not consider that the positive limitations in that Section are in any way controlled by the provision in s. 3 of the Act, that the right acquired by virtue of the talookdary sunnud should be subject to all the conditions affecting the talookdar contained in the sunnud under which the estate is held. They understand the conditions referred to in cl. 4 of that Section to be the conditions of loyalty and good service mentioned in the letter of the 19th October 1859, republished in the first schedule of the Act, and to the other conditions of a similar nature, such as those of surrendering arms, destroying forts, etc., contained in the sunnud.

It was contended in the Lower Court, on the part of Brij Indar, that he being the son of a daughter of a rival wife, and having been treated by Kablas in all respects as her own son, came within the meaning of cl. 4 of s. 22; but it was found by both the Lower Courts that there was no proof that he had been so treated, and their Lordships entirely agree in that finding. It is unnecessary, therefore, to express any opinion as to whether he was the son of a daughter of Kablas Koer, the talookdar, within the meaning of the Clause.

It having been decided that Brij Indar did not come under cl. 4 s. 22, neither of the plaintiffs is within the description contained in cls. 1 to 10, both inclusive.

The case is therefore to be governed by cl. 11, which is as follows:—

"Or in default of any such descendant, then to such persons as would have been entitled to succeed to the same under the ordinary law to which persons of the religion and tribe of such talookdar or grantee are subject."

In the absence of any special custom applicable to the particular tribe or family to which Kablas belonged (as to which advertence will be made hereafter), the ordinary law applicable to persons of her religion and tribe is the Mitacshara.

Chapter 2 s. 11 treats of the separate property of a woman, and of the distribution of it. In par. 1 of that Section it is said, "What was given to a woman by the

father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition), is denominated a woman's property."

It was stated in the course of the argument by the learned Counsel for Shunker Buksh, that in the original of par. 1 cap. 2 s. 11 of the Mitacshara, and of par. 12 cap. 4 s. 1 of the Dayabhaga, the words translated as "separate acquisition" are not used, and that the proper translation is "and the like," or "and such like." It does not appear to their Lordships to be important whether this is so or not. The learned Counsel may be correct. But the words "and the like" or "in such like" would show that the author did not intend to limit his definition to the particular kinds of property therein enumerated. This is very clear when the subsequent paragraphs are referred to.

At par. 4 cap. 2 s. 11 of the Mitacshara it is said, "The enumeration of six sorts of woman's property by Menu, 'What was given before the nuptial fire, what was presented in the bridal procession, what has been bestowed in token of affection or respect, and what has been received by her from her brother, her mother, or her father, are denominated the sixfold property of a woman' (Menu, 9, 194), is intended, not as a restriction of a greater number, but as a denial of a less."

The Dayabhaga is to the same effect. Par. 18 cap. 4 s. 1 is as follows:—

"Since various sorts of separate property of a woman have been thus propounded without any restriction of number, the number six as specified by Menu and others is not definitely meant. But the texts of the sages merely intend an explanation of woman's separate property. *That alone is her peculiar property, which she has power to give, sell, or use, independently of her husband's control.*"

Again, in the Mitacshara, par. 2 ch. 2 s. 11, it is laid down that property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by Menu and the rest "woman's property."

Again, par. 3, "The term 'woman's property' conforms in its import with its etymology, and is not technical; for if the literal sense be admissible, a technical acceptance is improper."

There is a note to par. 2, above quoted, with reference to property obtained by inheritance, and their Lordships' attention was called to it by the learned Counsel for Shunker Buksh; but as the estate in dispute did not come to Kablas by inheritance, it is unnecessary to determine whether immoveable property acquired by a woman by inheritance is "woman's property." It has been decided that a woman cannot, even according to the Mitacshara, alienate immoveable property inherited from her husband, and that upon her death it descends to the heirs of her husband, and not to her heirs—*Mussumat Thakoor Deyhee v. Rai Baluk Ram*, 11 Moore's Indian Appeals, 175.*

The question does not arise in this case whether if the grant had been made to Kablas in her husband's lifetime the property would have been her peculiar property, over which her husband would have had no dominion or control (see Dayabhaga, chap. 4 s. 1 pars. 20 and 23); for the property was granted to Kablas after her husband's death. The talooka must, in their Lordships' opinion, be considered to have been the property of Kablas at the time of her death.

A woman's property having been described in the first eight paragraphs of the Section, the distribution of it is then propounded—"her kinsmen take it if she die without issue;" but it is only in the event of her dying without issue that her kinsmen succeed.

Par. 9 goes on: "If a woman die 'without issue'—that is leaving no progeny—in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest, as will be forthwith described."

Par. 10. "The kinsmen have been declared generally to be competent to succeed to a woman's property." The author now distinguishes different heirs, according to the diversity of the marriage ceremonies. The property of a *childless* woman married in the form denominated Brahma, or in any of the four unblamed modes of marriage, goes to her husband; but if she leave progeny it will go to her daughter's daughters. In other forms of marriage, as the Asura, etc., it goes to her father and mother on failure of her own issue."

The words "daughter's daughter" are made clear by par. 15: "On failure of all daughters, the granddaughters in the female line take the succession, under the text; 'if she leave progeny it goes to her daughter's daughter.'" And, again, by par. 12, "In all forms of marriage, if the woman leaves progeny—that is, if she have issue—her property devolves on her daughters. In this place, by daughters, granddaughters are signified; for the immediate female descendants are expressly mentioned in a preceding passage: 'The daughters share the residue of their mother's property after payment of her debts.'"

Par. 13. "Hence, if the mother be dead, daughters take her property in the first instance.

Par. 16 deals with the case of a multitude of granddaughters, and is not applicable to the present case.

A custom of the tribe was set up and relied upon to the effect that the property of a Bissein could be inherited only by a Bissein, and that it descended to collateral male heirs in preference to a daughter.

The Commissioner in his judgment said that the custom among Chattris that collaterals are preferred to daughters is no doubt true, but it cannot be said to be specially proved in the case of Bissein Chattris. The Judicial Commissioner, however, was of opinion that the plaintiff had failed to prove the special usage and custom which he had set up, and that there was no sufficient evidence to warrant the Courts excluding daughters from the succession (Record in Seetla Bux's Case 100).

Their Lordships concur in that view, and are of opinion that there was no sufficient evidence to prove the custom set up. Beyond all doubt there was no such custom proved as regards the separate or absolute property of a woman. Their Lordships are, therefore, of opinion that, under cl. 11 s. 22, the estate descended to the defendant (respondent) as the person entitled under the ordinary law to which persons of her mother's religion and tribe were subject; and being of that opinion, it is not necessary to consider whether, if Kablas had died without issue, either of the plaintiffs would have been entitled to succeed to the estate.

The Judicial Commissioner held that the persons entitled to succeed must be sought amongst the heirs of the husband, and not of the widow. Record, p. 100.

In this view of the case their Lordships, for the reasons above stated, cannot concur. The decree of the Judicial Commissioner was notwithstanding correct; for he, holding that the defendant was heir to her father, Mypal, dismissed the appeal against the decree in her favor.

Their Lordships hold that that appeal was properly dismissed upon the ground that the talook descended to her as heir to her mother, who, at the time of her death, was the talookdar, and had a permanent heritable right in the estate.

Their Lordships will therefore humbly recommend Her Majesty to affirm the decrees of the Commissioner in the respective cases of Brij Indar and of Shunker Buksh, and to affirm the decree of the Judicial Commissioner in the case of Seetla Bux.

The appellants in each of the appeals must pay the respondent's costs in that appeal.

The 22nd November 1877.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Reg. XVII of 1806, s. 8—Mortgage—Foreclosure—Notification—Onus Probandi
—Year of Grace—Service (upon some of the Mortgagors)—Purchasers
(not in Possession)—Conditional Sale.*

On Appeal from the High Court at Calcutta.

Norender Narain Singh

versus

Dwarka Lal Mundur and others.

Considering that the duties of the Zillah Judge in the matter of a foreclosure are of a ministerial nature, and considering the vast importance to mortgagors of the notification by the Judge required by s. 8 Reg. XVII of 1806, and the consequences which follow if they do not redeem within the prescribed time, their Lordships were of opinion that the service of it should be established by evidence in a suit brought to enforce the foreclosure, and that it would be going too far to say that the finding of the Judge is *prima facie* evidence of the fact of service, shifting the *onus* of proof upon such an important point, and relieving the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate.

The Full Bench decision in 10 W. R. 27, that the year during which the mortgagor may redeem his property runs, not from the date of the perwannah or the issuing of it by the Judge, but from the time of service, adopted.

Service upon some only of the mortgagors would be insufficient to warrant the foreclosure of the whole property or any of it where it is sought to foreclose the whole estate as upon one mortgage against all.

The mortgagee, when he seeks to foreclose, must discover and serve the persons who are the then owners of the estate, not excepting purchasers who have not taken possession.

Where a vendee took a deed of conditional sale from the vendors to act upon it in case he should think it right, but did not think it right to do so, and having kept it for a long time without acting upon it in his lifetime, it was held that there was sufficient evidence in this and other circumstances of the case leading to the conclusion that it was not a *bonâ fide* conveyance as against *bonâ fide* purchasers.

Mr. Leith, Q.C., and Mr. Doyle for Appellant.

Mr. C. W. Arathoon for Respondent.

Sir Montague Smith gave judgment as follows :—

This is an appeal in a suit brought by the heirs of Rajah Tek Narain Singh against certain parties, who may be described as the family of Dass, forming one set of defendants, and persons called Mundur who formed another set, the latter being purchasers of the property in question from the Dasses. The suit was brought for possession and for registration of names (as stated in the plaint), "with respect to 3 annas 7 gundas 3 cowries 1 krant out of 5 annas 3 gundas 1 cowrie 1 krant, of Mouzah Dooram Mudehpore 'usli' with 'dakhili' Pergunnah Nesingpore Koora, the property referred to in the deed of conditional sale, after deducting 1 anna 15 gundas 2 cowries, the right and interest of Sri Narain Dass, Bachee Lal Dass, Rajah Ram Dass, Muhtab Dass, alias Laljee Dass, and Chunehal Kishore Dass, purchased by your petitioner's ancestor, and the right and interest of Shunker Batti purchased at auction on the 10th January 1868, subsequent to acquiring the deed of conditional purchase, at an execution sale by your petitioner." The conclusion of the plaint is: "Since the principal and interest of the mortgage was neither deposited nor paid by the vendors pursuant to the terms of the mortgage bond, the foreclosure in accordance with Reg. XVII of 1806 was formally effected in the Judge's Court at Bhaugulpore by a proceeding dated the 23rd June 1867, and the period of one year fixed by the above law expired on the 27th February 1868, and within that period the amount entered in the

bond and interest were not paid, and the conditional sale aforesaid became absolute on the 27th February 1868, corresponding with the 19th Falgoun 1275 F.S., and the cause of action for possession and mesne profits arose from the same date."

This action, therefore, is brought after proceedings for foreclosure had been taken upon the deed of conditional sale referred to in the plaint, and to give effect to those proceedings. This deed is dated the 30th November 1858; it is from numerous members of the family of Dass, in all 19; the deed states that they had "sold and transferred all and every the 5 annas 3 gundas 1 cowrie 1 krant of the entire 16 annas original with dependencies in Mouzah Dorum Mudehpooora," in lieu of Rs. 5,000 which had been advanced by Rajah Tek Narain Sing. The further statement is, "We have received the consideration money in full in one lump sum in cash from the said vendee, and brought the same into our possession and enjoyment. We execute this deed of conditional sale for two years in lieu of the said consideration, and delivering it to the vendee hereby declare and give in writing that the said vendee shall enter into possession and occupancy of the property sold by right of purchase as proprietor. We promise that in the space of two years from the date of this deed of sale we shall pay the consideration money in question in cash in one lump sum to the vendee aforesaid, and take this deed of sale back. In case we do not repay the consideration in question the vendee shall, after the expiration of the time, be at liberty to foreclose and complete the sale under the provisions of Reg. XVII of 1806 A.D., and enter into possession and occupancy of the property sold, and to have his own name registered in the Government Records in the column of proprietor."

It seems that the Rajah did not take possession, and no interest appears to have been paid or demanded until proceedings were taken after the Rajah's death by the present plaintiffs to foreclose the property, under s. 8 of Reg. XVII of 1806.

The first question which arises (being the question upon which the High Court have decided the case in favor of the defendants) is whether the directions in that Section have been fulfilled. The High Court held that there was no sufficient proof of notification made to the defendants of the petition of the plaintiffs claiming foreclosure, and, that being the question, it will be right to look at the terms of the eighth Clause. The enactment is, "Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding Sections of this Regulation, may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorised vakeels of the Court to the Judge of the zillah or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it, and shall at the same time notify to him by a perwannah, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing Section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

The condition of foreclosure required by that Section is that the mortgagor should be furnished with a copy of the petition, and should have a notification from the Judge, in order that he may within a year from the time of such notice redeem the property; and in an action of this kind, which is brought to recover possession as upon a foreclosure, it is essential for the plaintiff to satisfy the Court that this condition has been complied with.

It has been contended on the part of the appellant that it is within the province of the Judge of the Zillah Court to determine whether the notice has been duly served or not, and, although it has not been urged, or only very faintly

urged, that his finding would be conclusive on the point, it has been strongly insisted that a finding of the Judge, recorded by him in the proceedings upon the foreclosure petition, would, at the least, be *prima facie* evidence of the fact of service.

The general nature of the proceedings under the above Regulation was succinctly stated in a judgment of this Committee, in which it was pointed out that the functions of the Judge under s. 8 are purely ministerial (*Forbes v. Ameeroonissa Begum*, 10 Moore I. A. 350).*

Their Lordships, considering that the duties of the Zillah Judge in the matter of a foreclosure are of a ministerial nature, considering the vast importance to mortgagors of the notification, and the consequences which follow, if they do not redeem within the prescribed time, are of opinion that the service of it should be established by evidence in a suit like the present, which is brought, in fact, to enforce the foreclosure. The proceedings of the Judge are *ex parte*, and even if the Judge examined the Nazir or person who served the notice, it would be unsatisfactory that the estate of the mortgagor should depend upon his opinion. The argument indeed was not pressed that it would be conclusive, but it would be going far to say that it is of such authority as to be *prima facie* evidence, which should shift the onus of proof upon such an important point, and relieve the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate.

In the present instance, however, the case shows that the Judge had no proof, properly so called, of the service. It is plain from the manner in which the entry of the service is made that nothing more occurred than this, that the Nazir having received the perwannah, made a return, as it is called, on the back of it stating what he had done with it. The substance of the return is stated in the proceedings of the Judge. After recording that "notices and copies of the petition for foreclosure of mortgage addressed to the opposite party, dated the 27th February 1866 A.D., were delivered to the Nazir under a perwannah to serve on the opposite party," it goes on, "thereupon the Nazir submitted a return on the back of the perwannah to the effect that he could not meet the opposite party, and that he had stuck up a copy of the notice and of the petition to the houses of each of the opposite party, along with two receipts in the Hindee character, severally dated 13th and 14th Cheyt 1273 F.S., written by Bunsu Chowki Dar and Bochhal Chamar 'Poneas,' inhabitants of Mouzah Khoksisyam, Pergunnah Nesingapore Koora, which were annexed on the record." Then it goes on,—"To-day the record of the case was brought up, and on a reference to the return submitted by the Nazir it appeared that the notice had been duly served." Therefore we have on the face of this document what the Judge considered to be proof of the notice, namely, the return of the Nazir, which is a mere statement of that officer, without apparently any verification upon oath, or any examination of the Nazir by the Judge.

Upon the trial no proof whatever was given by the plaintiffs of the service of the notification. They appear to have relied on the recorded return of the Nazir. But it was contended that the want of proof is immaterial, in consequence of certain admissions contained in two petitions filed on the part of the mortgagors, the Dasses. One is a petition signed by five and the other by six. They were originally 19 in number, and the remainder do not appear to have petitioned or to have made any admission. The first petition refers in this way, and in this way only, to the service: "The applicants caused a notice under Reg. XVII of 1806 to be issued on the 27th February 1866, clandestinely served without the knowledge and information of your petitioners. Now your petitioners having come to the knowledge of the case from some out-of-the-way sources, offer objections on the following grounds." This petition appears to have been presented a short time

* 5 W. R. P. C. 47; 1 Suth. P. C. R. 621.

only before the end of the year of grace, and contains no admission of the time, or sufficiency of the service. Their Lordships, therefore, consider that it does not amount to an admission that the notice had been properly served upon them at the time at which the mortgagee alleges it to have been, or that they had knowledge of it at a time which would have justified the foreclosure.

The other petition, no doubt, does contain an admission. There is this statement in it: "The petitioners have under a deed of conditional sale, dated the 9th Aughan 1266 F.S., for Rs. 5,000, had notice under Reg. XVII of 1806, in respect of 5 annas 3 gundas 1 cowrie 1 krant of Mouzah Dorum Mundehpoora, Pergunnah Nesingapore Koora, Zillah Bhaugulpore, issued to us. Therefore we beg to submit our objections." It is true they do not in terms admit the time at which they had notice, but with regard to those petitioners a Judge would not be wrong in holding that there was an admission by them of due service. But this petition is the petition of six only out of the 19 mortgagors.

The importance of requiring proof of the service of the notice and not trusting to a bare statement that notice had been duly served, is enhanced by the consideration that it has been held by a decision of the Full Bench of the High Court of Bengal that the year during which the mortgagor may redeem his property runs, not from the date of the perwannah or the issuing of it by the Judge, but from the time of service. (*Mohesh Chunder Pein v. Mussamut Tarinee*, 10 W. R. 27.) This decision overruled some cases in the late Sudder Courts, in which it had been held that the year was to run from the date of the notification. Their Lordships are quite prepared to adopt the decision of the High Court. It is obvious that if the year is to run from the date of the perwannah, the negligence of the Nazir, or other circumstances, may prevent its service for a considerable time after its date, and so the mortgagor would lose the benefit of the full time which it was intended by the Regulation to give him.

The necessity of proving service of the notice has recently been decided by two Courts in India, one a Division Court of the High Court of Bengal, and another a Division Court of the North-Western Provinces. In both it has been held that the service should be proved in the action which is brought to enforce the foreclosure. (*Syud Eusuf Ali Khan v. Mussumat Azumtaoissa*, Weekly Reporter, 1864, page 49. The case in the North-Western Provinces is in the 3rd High Court Reports of that Province, page 323.)

What their Lordships have held with regard to the service of the notice would be sufficient to dispose of the case against the appellants but for the fact, to which allusion has already been made, of the admission by some of the defendants that they had received the notice. This opens the question whether the foreclosure is complete as against all or any of the mortgagors. The High Court has held that the omission to serve any one of the mortgagors would be fatal to the validity of the foreclosure. Their Lordships think that in the circumstances of this case service upon those only of the mortgagors, whose petition admitted service, would be insufficient to warrant the foreclosure of the whole property or of any of it.

This is a mortgage for one entire sum, and the property, although held in certain shares, was mortgaged as a whole to the extent of five annas and a fraction, and was redeemable only upon payment of the entire sum. Each and every one of the mortgagors was interested in the payment of that money and the redemption of the estate, and each and every one of them had a right by payment of the money to redeem the estate, seeking his contribution from the others. The equity of redemption of those who were not summoned, and who had no notice that the mortgagee was demanding his money, cannot be foreclosed, because those who have been served have omitted to redeem. It is impossible for the mortgagee to obtain a foreclosure of the whole of the estate upon a service on some only of the mortgagors. Then with respect to the mortgagors who have admitted notice, it is to

be observed that it was not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate, as upon one mortgage, one debt, and one entire right against all.

Further, the Mundurs, the defendants of the second class, purchased some share of some of the Dasses before the foreclosure proceedings took place. It appears that in February 1861, two or three years after the conditional sale, and before the notice of foreclosure, two gundas and two cowries was sold to the Mundurs. It is said that they did not take possession, but they had become by this purchase the owners of the equity of redemption of the purchased shares, and notice of foreclosure ought to have been served upon them. Mr. Doyne has argued that a purchaser who has not taken possession need not be served. Their Lordships, however, think that that argument cannot be sustained. The mortgagee, when he seeks to foreclose, must discover and serve the persons who are the then owners of the estate.

A question of this sort came before this tribunal in the case of *Mohun Lall Sookool v. Goluck Chunder Dutt*, 10th Moore, p. 14.* Their Lordships say upon it, "It is quite clear upon the authorities, that if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser, and in the circumstances above stated their Lordships conceive that it ought to have been served upon the decree holder. Yet there is no evidence of any attempt to serve it upon anyone except the widow and heiress of the original mortgagor."

There are subsequent cases in India which show that the view taken by their Lordships has been followed in practice.

Without saying that there may not be cases of mortgages of separate shares, in which, by proceedings properly framed, foreclosure may take place in respect of some of such shares only, their Lordships think the proceedings in this case are not such as will sustain the present action as against any of the defendants.

What their Lordships have said is enough to dispose of this case, but they think it right to advert to the main question which arose upon the merits, whether this conditional sale was intended between the parties to be really operative as a *bond fide* instrument.

It seems that Rajah Tek Narain was a patron of the family of the Dasses. They were involved in debt, and he probably advanced money to them from time to time. But with regard to this particular instrument there is strong evidence, arising from the history of the case and from facts which are beyond dispute, for presuming that it was not intended to be acted upon by Rajah Tek Narain. The deed is dated the 30th November 1858. In its terms it provides for immediate possession. A question, indeed, was raised whether that was so. It was said that the construction was at the least doubtful, and that it was not intended that the Rajah should have possession until the two years mentioned in the deed for the payment of the money had elapsed. However this may be, possession was not taken. No provision is made in the deed for payment of interest, and none was demanded. The two years given by the deed for the payment of the money expired on the 30th November 1860. The petition to foreclose was not filed until the 2nd January 1866, and up to this date it is plain that the Rajah had not entered into possession, had received no interest, nor apparently had asked for any. He obtained what is called the order of foreclosure on the 14th September 1867. The note of the Judge that the foreclosure was "sanctioned" cannot indeed be properly regarded in the light of an order. He takes certain proceedings, and makes a record of them, but he can give no judgment in any way binding on the parties. However, the proceedings in his Court were complete on the 24th September 1867. Again no action is taken; possession is left where it was, no interest apparently is demanded, and this suit is not brought until the 1st

* 1 W. R. P. C. 19; 1 Suth. P. C. R. 533.

October 1872, nearly 14 years after the mortgage, and five years after the foreclosure proceedings came to an end.

Then the property is dealt with by the Rajah himself, in a manner which seems quite inconsistent with his having a deed of conditional sale which was intended to be acted upon. In 1861 a lease was granted by the Dasses to the Rajah (in the name of his servant Bijoz Dass) of six annas and certain fractions of annas of the same mouzah. Those annas must have included the whole of the shares which had been mortgaged—it appears to have included more; it is an ordinary lease, and part of the rent was to be deducted on account of a former zuripeshgee. Again in 1867, after the Rajah's death, his sons obtained decrees against the Dasses, and the right and interest of the Dasses in this estate were notified for sale under those decrees. It appears that just before the days when the sale was to take place the Dasses sold their shares to the Mundurs, who alone appear here as respondents, obtained a large sum of money from them, and paid over that money in discharge of the judgment debt. Those circumstances are not referred to to show that the conditional sale did not exist, but they are inconsistent with its existence as a document which was intended to be acted upon. Throughout the above transactions there is no trace that it was referred to, or that any notice was given of it, or that anybody knew anything of it. Again, the Rajah, after the conditional sale, as admitted in the plaint, purchased some of the shares of the Dasses which had been mortgaged. They are sales as if the Dasses had the absolute ownership. The deeds in no way refer to the mortgage, nor was any provision made respecting the mortgage debt.

It is not necessary for their Lordships to go further into these transactions. They have adverted to them because they were desirous of expressing the opinion they entertain of the extreme doubt, to say the least, which rests upon the *bona fides* of the conditional sale. They do not desire to impute fraud to either the Rajah or the Dasses. The Rajah had probably taken this deed from them to act upon it in case he should think it right, but did not think it right to do so; and having kept it for so long a time without acting upon it, there is strong evidence in this and in the other circumstances of the case which have been adverted to, leading to the conclusion that it is not a *bond fide* conveyance as against *bond fide* purchasers, which the defendants, the Mundurs, are.

On the whole case, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below, and to dismiss this appeal with costs.

The 29th November 1877.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Alluvial Land—Re-formations—Bed of River (to whom belongs).

On Appeal from the High Court at Calcutta.

No. 50 of 1874.

Radha Proshad Singh

versus

Ramcoomar Singh and others.

Mr. Leith, Q.C., and Mr. Doyne for Appellant.
Mr. Graham for Respondents.

No. 57 of 1874.

Radha Proshad Singh

versus

The Collector of Shahabad.

*Mr. Leith, Q.C., and Mr. Doyne for Appellant.**Mr. Cowie, Q.C., and Mr. Graham for Respondents.*

The doctrine in *Lopez's Case* (that lands re-formed upon old sites belong to the original owners) cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title.

Although, in the case of a wandering and navigable stream, the bed of the river may be said temporarily to belong to the public domain, that state of things exists only while the water continues to run over the ground.

Sir James Colville delivered judgment as follows :—

The appeals of which their Lordships have now to dispose are those which the appellant has preferred in two out of seven suits instituted by him in order to recover a large quantity of alluvial land lying now to the south of the Ganges, and accordingly transferred by order of the Government from the zillah of Ghazee-pore to that of Shahabad. Notwithstanding the great volume of the record, and the number of the proceedings contained in it, the facts essential to the determination of these appeals may be brought within a narrow compass. It appears that at the time of the perpetual settlement the river Ganges was not only the boundary, as it is still, between the two zillahs of Ghazee-pore and Shahabad, but also the boundary between the Mouzah Nowrunga, belonging to the plaintiff's ancestor, on the left or northern, and a number of mouzahs on the right or southern bank of the then channel of the river, which were settled with other proprietors. Immediately on the southern or Shahabad side of the river, and included in these mouzahs, was an area of low soft land, some six miles wide, favorable to the erratic habits of the Ganges, but bounded on the south by higher or harder land, that opposed itself to the further progress or invasion of the stream in that direction. The precise changes in the course of the river have been proved with greater clearness than is usual in cases of this kind, and are delineated in what has been called the Ameen's Map, No. 7. 2. From this, and from the evidence, it appears that in the year 1839 the river occupied a position considerably to the south of that which it occupied at the date of the settlement, and now occupies; that in 1844 it had travelled to an ascertained channel still further to the south, and in 1857 had for some years reached its southernmost limit, *viz.*, the high or hard bank which has been referred to. It is, moreover, clearly shown that towards the end of the rains of 1857 the river, when subsiding into its cold-weather channel, made a sudden change of that channel, intersecting the land to the north of its former course, and occupying the position designated upon the Ameen's map as "Bhagur 2." Its course, however, in that channel was not permanent; for, either by sudden change or by gradual recession, it travelled still further to the north until it returned to the bed from which it is supposed to have started at some time after the date of the perpetual settlement, being that which it occupied when the decrees under appeal were made.

Upon the sudden change of 1857-8, different persons, claiming to be the owners of some of the villages which had before been diluviated, seem to have taken possession of the land re-formed upon the sites of their old villages, so far as it was then south of the new channel of the Ganges. And when the river went further back, their Lordships presume that other persons similarly claimed and took possession of the additional land that had then become south of the Ganges. The result was that, after some discussion between the authorities of the two zillahs, a thakbust was made by the revenue officers of Shahabad in 1864, which apportioned the whole of this disputed land, as re-formation on the

sites of the ancient villages, among the representatives of the persons with whom those villages had originally been settled; and confirmed their possession of the plots allotted to them. Between 1858 and this thakbust of 1864 there had been various proceedings before the revenue officers of Zillah Ghazeepore, at the instance of the plaintiff as owner of Nowruna, under Act I of 1847; but to these it is now unnecessary to advert. After the thakbust of 1864, the plaintiff brought one suit against all the claimants of the disputed land. That was dismissed as improperly framed. He then instituted the different suits, with two of which their Lordships have now to deal. These it will be convenient to call suit No. 2 and suit No. 6; distinguishing them by the numbers whereby the lots claimed in them respectively are described on map No. 7. 2, rather than by the numbers which the suits themselves bore in the Indian Court. It lies, of course, upon the plaintiff to prove in each a superior title in order to dispossess the defendants.

Neither party originally put his case precisely in the form in which, after the decision in *Lopez's Case*,* and the second remand of the suits by the High Court, it assumed.

Their Lordships propose to treat that second remand as a new *départure*, and the commencement of the litigation upon which they have to form a judgment. And they may at once state that they cannot concur in the final judgment of the High Court in so far as that casts any doubt upon the propriety of directing the third and fourth of the issues for the trial of which the suits were remanded. The doctrine in *Lopez's Case* was doubtless in favor of the defendants in both suits; and, if they had in no way lost their rights, would give them a title to the land re-formed upon sites identified by the thakbust proceedings of 1864 as within the boundaries of their original mouzahs, which would *prima facie* override a title founded on the principle of the acquisition of that land by the proprietor of the northern bank of the Ganges by means of gradual accretion. Their Lordships conceive, however, that the doctrine in *Lopez's Case* cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title. In the present suits the plaintiff relies on an alleged adverse possession for more than twelve years of the lands after their re-formation; and therefore the real point to be decided in the suits was whether a title had been thus acquired by the plaintiff the proprietor of Mouzah Nowruna.

Now, for the purpose of considering this, which seems to be the only material issue, it will be convenient to travel, as the river originally 'did, from the north to the south. Their Lordships consider that the point to be determined is whether in 1857 such a new title existed as to all or any of the lands in dispute, because they think it is clearly proved that the change of the river in 1857-8 was a sudden change, which left the rights of the parties as they then existed unaffected thereby. The nature of the change in 1861 is perhaps not so clearly proved. The Zillah Judge certainly found that to have been also a sudden change; for he says that the river began to leave the channel in which it had gone from 1858, in 1267 F. or 1861, and in 1268 F. was found in the place in which it now is; a state of things which implies suddenness of change. Moreover, the evidence, on the whole, preponderates in favor of this last change having been also a sudden change. Their Lordships, however, do not think it very material to find one way or the other upon that point, because even if the river had receded from the channel, marked as Bhagur 2, gradually to the place which it now occupies,—if it had passed, for instance, over Mouzah Sreepore, submerging that mouzah again, the submergence and reappearance of the land both taking place within the three years,—if that were so, and the question was, who was entitled to the re-formation of the mouzah upon that site of Sreepore, upon this second reappearance, their Lordships conceive that, according to the strict doctrine in *Lopez's Case*, if the plaintiff had previously to 1857 acquired the proprietorship of that land it would

* 14 W. R. P. C. 11; 2 Suth. P. C. R. 336.

be he and not the original owner of Sreepore who would be entitled to claim the benefit of that doctrine.

Then going back to the application of the principle which has been already laid down to the lands in dispute in this case, their Lordships have to consider first whether the plaintiff had or had not in 1857 acquired such a title as has been described to the land north of the river as it ran in the year 1839; and they think that upon the evidence there can be no doubt he had such a title. They rely mainly upon the thakbust proceedings of that year. It appears to them clear upon those proceedings and the maps embodied in them, that the land down to the north part of the river as it existed in 1839 was then measured as belonging to Nowruna, and in possession of the plaintiff's ancestor; that the greater part of that land was laid out field by field as land which had been gained by accretion at that time; and that although there was a small portion which is described in the thakbust maps as "registran or sand," that too was measured into Mouzah Nowruna and the zillah of Ghazeepore. No objection or claim seems then to have been preferred on the part of any proprietor on the Shahabad side of the river. And it is clear that the plaintiff and his ancestors were afterwards, and up to 1857 or 1858, in possession of this land; that is, for a period of about eighteen years.

The whole of the land in dispute in suit No. 6 falls within the boundaries of Nowruna as thus defined in 1839. In that suit it has been attempted at the bar to raise some contention on the supposed effect of the confiscation of Koer Singh's estate, of which Mouzah Sreepore once formed part. But that is a point that never seems to have been raised in the Court below; and, so far as their Lordships can see, there can be no ground for the contention. It seems to them that the whole of this lot must have been diluviated, and that, when left dry as the river receded still further, it was assumed to have become by accretion part of Nowruna. It was measured as such in 1839; and if the second change of the river in 1861 was a sudden change, that land has ever since 1839 been dry land, and was up to 1861 in the possession of the plaintiff. Again, if the changes in the course of the river between 1858 and 1861 were not sudden but gradual, the subsequent diluviation and reappearance of the land could not, as has already been stated, defeat the title to the site which the plaintiff had gained before 1858. These considerations suffice to dispose of the appeal in suit No. 6.

With respect to the appeal first heard, that in the suit No. 2, the case is different. In order to substantiate the whole of the plaintiff's claim, it would be necessary to show that in 1858 he had been in possession of this land almost up to the extreme southern boundary for more than twelve years. Now their Lordships have felt no hesitation in concurring with both the Courts in so far as they have found that no such title was established to land beyond the course of the river in 1844. There is no clear evidence how, or in what particular year, that land accreted; and it is impossible to say that there has been a possession for twelve years, or any possession that would be sufficient to defeat what is *prima facie* the superior title of the defendants. Their Lordships have had more doubt as to the land lying between what was the northern bank of the river in 1839 and that which was its northern bank in 1844; but, even if they had been disposed to agree with the Zillah Judge in respect of this land, they could not have concurred in his judgment in so far as it gives to the plaintiff the bed of the river as it existed in 1844, and carries his boundary up to what was then the southern bank of the river. Although in the case of a wandering and navigable stream like this, the bed of the river may be said temporarily to belong to the public domain, that state of things exists only while the water continues to run over the ground; and it clearly appears on the face of the thakbust map of Mouzah Sohia which was made in the course of the survey of 1844 (and these proceedings are the strongest evidence, such as it is, which the plaintiff has given of his possession of the land now in question), that some land which had once formed

part of that mouzah was then on the northern bank of the river, and consequently that the ground over which the river then ran had also been part of Sohia ; and if this be so, when the bed of the river became dry, the right of the defendants to the new formation on that site would attach, and there is no proof of a length of possession of that re-formation which would defeat their title.

The point upon which their Lordships have felt greater difficulty is whether there was not sufficient proof of possession for twelve years on the part of the plaintiff of the land up to the northern bank of the river as it ran in 1844. It has been argued that the thakbust proceedings of 1844-5 were as strong to prove the possession of the plaintiff or his ancestor of the land north of the river as it then ran, as were those of 1839 to prove his possession of the land within the boundary then laid down, up to the line of the river in 1839. Their Lordships, however, do not think that this is so. The later thakbust proceedings related to Mouzah Sohia, and were made in Shahabad, and the river was then the boundary not only of the Zillah of Shahabad, but also of two provinces under distinct Governments—viz., the North-West Provinces and the lower provinces of Bengal. The authorities of Shahabad presumably had no authority to carry their thakbust beyond the southern bank of the river as it then ran. Again, upon the face of the thakbust map is the statement already referred to, wherein, after mentioning that the entire area of Sohia had been 2,451 beegahs, but that out of that only 400 beegahs existed which were under cultivation (that being, as their Lordships understand, the portion of Sohia that was then on the south side of the river), it is stated, "The remaining land"—that is 2,051 beegahs—"was washed away by the Ganges, and has now accreted on the north side of the river Ganges in a small quantity, and consists of sand." Therefore that which was out of the bed of the river on the northern bank seems to have then been, according to this statement, waste uncultivated land, over which no acts of ownership had been exercised, and in which the possession or the right of the plaintiff had been positively affirmed by no measurement on the other side of the river. The doubt their Lordships have had is whether there was not other evidence from which it might be properly inferred that cultivation had afterwards been extended and acts of ownership exercised over this land by the plaintiff between 1845 and 1857, without question, so as to establish an adverse possession of it as against the defendants for twelve years. But, upon the whole, looking to the uncertainty of the general evidence as to this strip of land ; to the not very clear finding of the Zillah Judge regarding it ; and to the fact that much better evidence as to payment of the rent and the like might have been given than was given ; they have come to the conclusion that they have not sufficient grounds before them for disturbing the finding of the High Court upon this part of the case. The plaintiff, therefore, must be taken to have failed to have made out a sufficient title to any land which was not north of the river as it ran in 1839.

The result is that in suit No. 6 (No. 57 of 1874), in which all the land claimed lies above the line of 1839, their Lordships must humbly advise Her Majesty to reverse the decision of the High Court in that suit, and to affirm the decision of the Zillah Judge, with the costs of the appeal in the High Court. When they delivered judgment they proposed to advise Her Majesty to dismiss the appeal, and to affirm the decision of the High Court in suit No. 2, inasmuch as they then understood that all the land claimed in that suit lay below the line of 1839. It having, however, been brought to their notice, before the report was drawn up, that, notwithstanding the statement of the Zillah Judge to the effect that no part of the land north of that line was in question in the suit, the maps which are in evidence in the cause, and particularly the Ameen's map No. 7. 2, afford ground for believing that a small portion of the land claimed, being part of that in the possession of the defendants as their Mouzah Pursownda, is, in fact, above the line of 1839, the order which their Lordships will recommend Her Majesty to make in

this suit is, "That the decree of the High Court be varied, by declaring that the plaintiff is entitled to recover, and ordering that he do recover, so much (if any) of the land claimed by him in this suit as lies to the north of the line delineated in the Ameen's map No. 7. 2, as the northern bank of the river Ganges in the year 1839; the amount (if any) of such land to be ascertained, in case of dispute, by proceedings in execution; but that in all other respects the decree of the High Court be affirmed." This order seems to their Lordships calculated to assure to the plaintiff, with the least risk of future litigation, that to which he may be entitled upon the principle laid down by them in their judgment. But, considering the manner in which the question concerning this, at most inconsiderable, portion of the land in dispute has been brought before them, they do not think it would be right to make any order touching the mesne profits of what may be recovered, or to vary the decree of the High Court as to the costs of the litigation. They think also that the plaintiff ought to pay the costs of the appeal to Her Majesty in this suit. The respondents in suit No. 6 must pay the costs of the appeal in that suit.

The 7th December 1877.

Present :

[Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Joint Hindoo Family Property—Presumption—Onus Probandi.

On Appeal from the Judicial Commissioner of Oudh.

Mussumat Bannoo and others

versus

Kashee Ram.

HELD in this case that the ordinary presumption of Hindoo law applicable to a joint family, namely, that property is ancestral and joint, not self-acquired and separate, was rebutted by the circumstances of the family; and that the *onus* of establishing the contrary, which lay on the member of the family who disputed it, had not been discharged by him.

Mr. Grady and Mr. C. W. Arathoon for Appellants.

No one for Respondent.

Sir Montague Smith gave judgment as follows:—

This is a suit brought in the Court of the Civil Judge of Lucknow, by Kashee Ram, a nephew of Ram Dyal, who died in the year 1873, against Mussumat Bannoo and Mussumat Munna, the widows of Ram Dyal, and Munna Lal his grandson, the son of his daughter. The claim is for an eight-annas share or one-half of all the property in possession of Ram Dyal at the time of his death. The property consists principally of moveable property, but the claim includes a pucca house and shop.

The claim is based on the foundation that Ram Dyal at the time of his death was a member of a joint family, consisting of himself, and of the plaintiff Kashee Ram and his brother Kasho Ram,—those two being the sons of Ram Buksh, a brother of Ram Dyal. Kasho Ram did not join in this suit. The state of the family was this: Ram Gholam left four sons, Sheo Buksh, Ram Bilas, Ram Bukah, and Ram Dyal. Sheo Buksh and Ram Bilas are dead; one dying without a widow or children, and the other leaving a widow only. Ram Bukah had two sons, Kashee Ram, the plaintiff, and Kasho Ram. Ram Dyal had no son. The

plaintiff admits in his plaint that his grandfather Ram Gholam divided the ancestral property amongst his four sons, though, according to his statement, the four sons did not take separately, but Sheo Buksh and Ram Bilas took one half jointly and so formed a separate family, and the other half was allotted to Ram Buksh and Ram Dyal. He contends that Ram Buksh and Ram Dyal remained a joint family. On the part of the present appellants, the defendants, it is stated that the division by Ram Gholam was not into two parts, as Kashee Ram contends, but that each of the sons took a separate share.

There is no distinct proof, one way or the other, as to the nature of that division, but undoubtedly a division was made, and it may be taken as against the plaintiff that at all events the family was divided into two groups at that time. It further appears that in the lifetime of Ram Dyal, Kashee Ram, the plaintiff, and his brother Kasho Ram, as between themselves, separated, and therefore the family was still further broken up. It also appears that, whatever the division of the property may have been by Ram Gholam, all the members of the family lived separately, and there was no commensality between them. In the case of an ordinary Hindoo family who are living together, or who have their entire property in common, the presumption is that all that any one member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the onus of establishing the contrary is thrown on the member of the family who disputes it. Having regard, however, to the state of this family when the present dispute arose, their Lordships think that that presumption cannot be relied upon as the foundation of the plaintiff's case, and therefore as he seeks to recover property which was in the possession of Ram Dyal, and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, *viz.*, that the property was joint property to which he and his brother Kasho Ram, as surviving members, were entitled.

It may be stated that the issue in the case, which is the only one material to be decided, raises distinctly that question. The issue is, "Was the plaintiff joint with Ram Dyal at his death?" The evidence is extremely scanty, and what there is of it is very unsatisfactory. That remark was made by the Commissioner upon the appeal from the Civil Judge, and was also made by the Judicial Commissioner when the question came before him on the right of appeal.

Now the evidence upon which the Civil Judge mainly relied in giving judgment in favor of the plaintiff consists of a statement in his petition, which it is said was admitted by Ram Dyal. That petition occurred in this way: it seems that eight annas of a mouzah called village Uttardhona had been purchased in the name of Ram Dyal. Kashee Ram applied to have a four-annas share of that village entered in his name in the khewat; and his petition, which contains the statement relied on, is this: "The eight-annas share in the village Uttardhona was purchased from joint ancestral money; that by virtue of inheritance the petitioner is also sharer of four annas in the same—nay, the petitioner is up to this day in possession of the entire eight annas; that on the land belonging to the village, petitioner has also established a gauj, etc.; that as the khewat has not, as yet, been financially prepared, the petitioner prays that, out of the eight annas share possessed by him, four annas may be recorded in his name in the khewat." Before commenting on this petition, it may be as well to see what Ram Dyal said in answer to it in his counter petition filed in the Settlement Department, which he afterwards verified by his deposition. His statement is to this effect: "That the plaintiff's nephew, Kashee Ram, had, on the 11th September 1868, instituted a claim in your Honour's Court, to have the four annas share out of the eight annas in village Mansipur entered in his name; that the plaintiff admits the claim; that the plaintiff has amicably divided the above village into two equal shares; that as the khewat of the aforesaid village is now under

preparation, the plaintiff files this petition as a confession of the claim, and prays that the four annas share may be entered in the name of the plaintiff in the khewat register." In his deposition he added, "That the four annas share claimed by Kashee Ram, plaintiff (who is the real nephew), may be recorded in the khewat in equal shares, in the names of both Kashee Ram and Kasho Ram, who are real brothers, and that he agrees to this, and has no objection whatever." An order was made upon these petitions, which is this: "As Ram Dyal has admitted that four annas belongs to him and the other four annas belongs to defendants, ordered that four annas be recorded in equal shares in the name of Kashee Ram and Kasho Ram (the real brothers), and the other four annas in the name of Ram Dyal alone."

The contention on the part of the plaintiff is that he, having stated that the eight annas of the village was purchased with joint ancestral money, and that statement not being denied, but admitted by Ram Dyal, there is proof that at that time the estate was joint. Their Lordships think that the statement in the petition was receivable in evidence. It was objected that it was not admissible, because it was a mere statement by Kashee Ram himself. If it had remained so, the objection must have prevailed; but it is a statement admitted and assented to by Ram Dyal, and an order, founded upon what is called an amicable settlement, was made upon it. It was, therefore, clearly admissible in evidence, and the only question is as to the effect of it and of the transaction itself.

Undoubtedly, it is an admission that at the time of the purchase, whenever that was, there was joint ancestral money, out of which the price came. The date of this purchase nowhere appears; but from the statement which occurs in the petition, it probably was in the lifetime of Ram Buksh, the father of Kashee Ram. Giving a reasonable construction to that statement, it by no means establishes that the whole of the property held by Ram Dyal was joint. It merely proves that there was some joint ancestral money which furnished the funds for this purchase. Taking, therefore, the admission alone, it is by no means conclusive or even satisfactory evidence of the case which the plaintiff must establish before he can succeed in this suit.

But the further statements in this petition, and the transaction itself, really make in favor of the defendant's case. Kashee Ram, the petitioner, whilst he says that the eight annas were purchased out of joint ancestral money, asserts that he is a sharer of four annas, and a sharer by virtue of inheritance. Now if the family were really joint at this time, he would not be entitled to any specific share of this property, and to come in and demand to have his name entered on the khewat for four annas, as his specific share; he would be in the position of a joint sharer in the whole, like any other member of the family. But he claims a specific share, as if, although there had not been a partition by metes and bounds, the family had previously agreed to divide the property into specific shares. His petition is assented to in those terms, and the order is made in conformity with it. But if this were not the inference to be drawn from the statement in this petition, the transaction itself by which they divide this property shows that they had then become separate, and leads very strongly to the presumption that they were not, from that time at least, a joint family. It should be stated that Kasho Ram did not join in the proceedings, but it appears that the fourth share was entered in the joint names of the two brothers.

Ram Dyal remained the owner of the other fourth, and this transaction afterwards took place regarding it. He entered into an arrangement with Kashee Ram to transfer to him these four annas, Kashee Ram engaging to pay Rs. 100 a year to Ram Dyal for his maintenance, and upon his death Rs. 50 a year to each of his widows,—the survivor to receive the whole £100; and further, if the estate was sold or mortgaged, he was to have half of the price if sold, or of the money raised upon it if mortgaged. That transaction was carried out by the

proceedings for mutation of names, which are set out in the Record at page 20. In his deposition in these proceedings, Kashee Ram stated that Ram Dyal "has a four annas share in the above village, which has been awarded to him by the Settlement Court, and recorded in the khewat." This transaction again seems utterly inconsistent with their remaining joint as to their property. The shares in this estate, which appears to have been of some value, were treated as the separate property of each; Ram Dyal dealing with one-fourth entirely as his own, transferring it to Kashee Ram, who put himself under the obligation to pay a price which may be taken as a good consideration for the transfer.

Then Ram Dyal's subsequent conduct is consistent with his supposing that he was the owner of the property which remained in his possession. On the 14th December 1869 he made the deed of gift to his grandson Munna Lall, which the present suit seeks to set aside. It was a gift of all his property, when he was desirous of constituting his grandson, who lived with him, his heir. He being then old, was apparently desirous of placing his property in the hands of those whom he wished to succeed to him. He had, as already stated, transferred to his nephew, upon the terms which had been adverted to, his share in the village; and the rest of his property, which was principally personal, he gave to his grandson.

That deed was made in the year 1869, and was registered immediately after its date, namely, on the 17th December. Kashee Ram certainly knew of the deed, because he filed a petition objecting to its registration. His petition is dated on the 17th December, the day on which the deed was registered, and in it he no doubt states that Ram Dyal and the petitioner's father had a joint interest in the property, but he contented himself with filing that petition, and took no proceedings whatever during Ram Dyal's lifetime to set aside the deed.

Now, if he was satisfied of the justice of his claim and his ability to prove it, one would have expected that in Ram Dyal's lifetime he would have taken some step to get rid of this deed, which dealt with property to which he was, according to his own case, entitled. However, he took none until Ram Dyal, who could have given the best explanation of the *status* of the family and nature of the property, was dead.

This being the state of things when Ram Dyal died, the plaintiff's case is certainly not assisted by what subsequently took place. On the contrary, presumptions against the truth of his case arise from some of these proceedings. The first proceeding is a petition under Act XIX of 1841,—a petition by the two brothers Kashee Ram and Kasho Ram, in which they claim as nephews of Ram Dyal to be his legal heirs. Their statement is "Ram Dyal, our uncle, died on the 6th April 1873, and we, the petitioners, are the legal heirs," and they pray in that petition to have a list of the property made, and that it may be placed in their charge, suggesting that the widows would squander it.

In the first place, the claim thus made is not in its terms a claim as surviving members of a joint family. They claim as Ram Dyal's legal heirs; but proceedings in Oudh not being always carefully and technically expressed, much reliance is not to be placed on that circumstance. But the remark which was made in one of the Courts belows, that the plaintiffs did not seem to know what property there was at the time of Ram Dyal's death, certainly affords ground for an inference against their claim. It appears that one of them at least was a man of business. Kasho Ram was a money-lender. There was a shop in which at one time the nephews seem to have had an interest; and if they had really during Ram Dyal's lifetime held all the property jointly with him, it is incredible that they should not have interfered with it during his lifetime to such an extent at least as to be able to say what it was at the time of his death. It appears from the evidence of the witnesses who were called by the plaintiff that the business of the shop was given up some time before Ram Dyal's death. There appears to

have been no demand for any account or any interference with what remained of the stock of the business, nor any claim to the profits which may have been derived from it.

The widows applied for the certificate of heirship, and, though opposed by Kashee Ram, the certificate was granted to the widows by the Court in June 1873. Then there was a suit by the widows for the Rs. 100 a year, which, under the arrangement before referred to, Kashee Ram was under an obligation to pay to them, and they succeeded in that suit. It is to be remarked that a defence was set up in that suit, which entirely failed,—a fraudulent defence, that by a subsequent deed Ram Dyal had cancelled the deed to Kashee Ram, and released him from the annuity, and had made a gift of the four annas to Kasho Ram. The Judge found that no such deed had been executed.

This is all the documentary evidence in the case. Beyond it there is some parol evidence by two witnesses; but when that evidence is looked at, it is utterly insufficient to sustain the plaintiff's case. Indeed, much of it is contradictory of it; and whilst it would be difficult to say that it proves the case of the defendants, there is no difficulty in asserting that it does not prove that of the plaintiff. The first witness, a man called Cheytram Chowdhri, says he knew the parties. He says, "I cannot say if their business were separate or joint, but when they worked by his advice it looks as if it were joint. I did not see any division, nor did I ever hear of division from ancestors." And then, lower down, he says, "Ram Dyal's dealings had ceased six months before the gift to Munna; he was ill; *he had no ancestral property.*" If this man had any means of knowledge, he negatives the plaintiff's case; if he had no means of knowledge, he cannot prove it.

The other witness was a partner of Ram Dyal, and he says, "I and Ram Dyal were partners up to five or six years ago. It lasted five years after the mutiny. I and he got eight annas share each." Therefore it seems that this witness had one half of the business. "I worked; money was credited in the name of Ram Dyal and Kasho Ram in Nowabee; after the mutiny Kasho Ram and Kashee Ram's names only were used." That may have been for some reason arising out of the mutiny. "No division occurred; he kept the shop for the boys. I can't remember their father's name." Now the utmost that this witness's evidence goes to prove is that the nephews had some interest in the shop; but that may have been the case without their being interested in the general property in the possession of Ram Dyal as ancestral property. They may have been partners in this shop, and if so, they would be entitled to a share of the proceeds; but this suit is not brought to ascertain the profits of the shop; and, as has been already said, if there were any profits of the shop it is strange they should not have been asked for and ascertained in the lifetime of Ram Dyal.

On the whole, therefore, their Lordships, if they had to form their opinion of the evidence as a Court of First Instance, would have come to the conclusion that it was insufficient to sustain the plaintiff's case.

With regard to the judgments, they are not of a nature to induce their Lordships to act on their authority, after the opinion they have themselves formed of the evidence. The Judges evidently felt great hesitation in coming to a conclusion in the plaintiff's favor, and their reasons for it are not altogether satisfactory. The Civil Judge appears to have based his decision upon the ordinary presumption of Hindoo law applicable to a joint family: He says the presumption of law is that property is ancestral and not self-acquired,—is joint and not separate. This, no doubt, is the ordinary presumption; but the Judge does not appear to their Lordships to have given sufficient weight to the circumstances of this family, which rebutted the ordinary presumption. If the Judge had not acted upon the presumption, it is plain that the evidence taken alone would have been insufficient, in his own opinion, to have led him to the conclusion at which he arrived.

Then the judgment of the Commissioner sustaining that of the Civil Judge is also placed on infirm ground. It will be sufficient to read the concluding paragraph, "The case is not a very satisfactory one, and I do not think Ram Dyal and Kashee Ram were joint at the death of the former, but there is fair proof that they were joint within limitation, and no separation is alleged. I therefore decline to interfere with the finding of the Lower Court, and dismiss the appeal, with costs." If this judgment is taken literally, it negatives the issue which was raised in the case; but what the Commissioner evidently means is, that there being, as he thinks, fair proof that the family were joint at the time of the proceedings respecting the entry in the khewat to which reference has been made, there was no subsequent evidence of separation. Well, if it could be taken as an ascertained fact that the family were joint at that time, there might not be sufficient evidence to show a subsequent separation; but, when the proof comes to be analysed, the error of the Commissioner's judgment seems to be in assuming that fact as a safe point of departure upon which he might decide the case.

The subsequent judgments of the Commissioner and of the Judicial Commissioner merely turn upon the question of the right to appeal to Her Majesty,—a question which has become immaterial in consequence of the special leave which has been obtained.

On the whole, therefore, their Lordships will humbly advise Her Majesty to reverse the judgments of the Courts below, and to direct that the suit be dismissed, with costs in all the Courts below; and the appellants will have the costs of this appeal.

The 19th January 1878.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Compromise—Mesne Profits—Interest—Act XXXII of 1839.

On Appeal from the High Court at Calcutta.

Hurropersaud Roy Chowdhry and another

versus

Shamapersaud Roy Chowdhry and others.

HELD in this case that the right to mesne profits, according to a stipulation in a deed of compromise, ran from a former decree affirming the compromise, and not from a subsequent decree which simply affirmed, with an explanation, the former decree.

As to interest on wasilat, referring to the proviso at the end of Act XXXII of 1839, and to the resolution come to by the Sudder Court in 1850 (as showing the present state of the law and practice), viz., that it may be awarded as of course from date of suit (special reasons being assigned in the decree for awarding interest from an earlier or a later date than of suit), and finding that this resolution had been to a great degree acted upon in subsequent cases whilst there had been subsequent cases in which interest had been given from a date prior to the institution of a suit, their Lordships declared themselves far from thinking that such cases had been wrongly decided; but, having regard to the circumstances of this case, and the very great delay (not thoroughly explained) in the prosecution of this appeal, awarded interest upon mesne profits from the commencement of suit to the date of decree.

Mr. Doyne for Appellant.

Mr. Leith, Q.C., and Mr. Souttar for Respondent.

Sir Robert Collier delivered judgment as follows :—

The transaction out of which this suit arose occurred nearly half a century ago, and from it has flowed a continuous stream of litigation, not in all respects creditable to the earlier tribunals of India, down to the present day. A history

of that litigation, given shortly and clearly, will be found in a report, in the eighth volume of Moore's Indian Appeals, of a judgment of this Committee, which was delivered on the occasion to be hereafter mentioned.* Their Lordships deem it enough to refer to that case without recapitulating the history, inasmuch as the facts necessary to the determination of the points now before them need no very lengthened statement.

Two brothers, Doorgapersaud Chowdhry and Tarapersaud Chowdhry, of whom Doorga was the elder, entered into an agreement of compromise for the purpose of settling disputes then pending between them on the 4th April 1829. That agreement of compromise may be sufficiently described for the present purpose as one whereby in substance the elder brother took ten-sixteenths of the ancestral property, and the younger brother six-sixteenths. Tara, the younger brother, disputed this compromise upon various grounds; but it was affirmed by the Court, which was then called the Provincial Court, on the 2nd September 1829. Tara appealed from that decision to the Court of Sudder Dewanny Adawlut, and the Court of Sudder Dewanny Adawlut affirmed the decision of the Provincial Court and directed possession to be given to Tara of his portion of the property. Tara accepted this decision and endeavored to obtain his rights under it, and his first step for that purpose was to apply to Mr. Ross, one of the Judges of the Court of Sudder Dewanny Adawlut, who, in concurrence with Mr. Walpole, each sitting alone, had given the judgment affirming the decree of the Provincial Court, to order wasilat to be given him. The decree had only decreed possession. The application was made under a circular order, which empowered the Court in such cases to award wasilat to be recovered by proceedings in execution; and it claimed wasilat from the date of the decision of the Provincial Court. Mr. Ross so far complied with this request as to order wasilat, not from the date when it was claimed, but from the 4th July 1832, the date at which the decision of the Sudder Dewanny Adawlut Court had been given.

The history of the litigation during the next twenty years may be thus summarised. Tara pursued every legal means in his power to obtain his rights under that decree; that is to say, to obtain possession of the property and wasilat or the mesne profits for the period during which possession of it had been withheld. The elder brother Doorga endeavored to defeat his claims by a variety of excuses and pretences, all of which have been found to be false. Tara succeeded in obtaining from time to time possession of certain portions of the property, but he never appears to have succeeded in obtaining any wasilat. It may be enough, however, to pass on to the year 1853, when Tara obtained an order from Mr. Money for a sum of Rs. 40,000 wasilat, and a considerable amount of interest. Doorga appealed against that order on the ground, which he appears to have raised then for the first time, that Mr. Ross, who made the original order in respect of the wasilat in 1832, had acted without jurisdiction, inasmuch as he could not make the order without the concurrence of his colleague Mr. Walpole, and the Court of Sudder Dewanny Adawlut gave effect to the objection. So that the Court of Sudder Dewanny Adawlut in effect ruled that all the litigation which had gone on for twenty years was absolutely fruitless.

Under those circumstances Tara instituted the present suit in December 1853. Tara and Doorga have long since died, and this appeal is now prosecuted and defended on behalf of their representatives.

The suit came on to be heard before the Principal Sudder Ameen of the day, and he decided that the Statute of Limitations was a bar to the claim of Tara to wasilat for more than twelve years before the commencement of the suit. But for those twelve years he gave him wasilat, calculated upon the footing of certain hustabood papers which were put in by the plaintiff. The plaintiff contended that he was entitled to avail himself of those hustabood papers on this ground:

* 4 W. R. P. C. 63; 1 Suth. P. C. R. 570; see also 3 W. R. P. C. 11; 1 Suth. P. C. R. 427.

he said, "The hustabood is my rent-roll of a certain portion of lands which have been made over to me by my brother. This is some evidence in the absence of contradictory evidence of what the rent was before it was handed over, and therefore of the wasilat or mesne profits to which I am entitled." These hustabood papers had been received in the abortive proceedings which have been referred to, and were received in this case by the Principal Sudder Ameen. There were cross appeals from this judgment, and the case came before the Sudder Dewanny Adawlut in the year 1857, whereupon that Court reversed the decision of the Principal Sudder Ameen, holding that the Statute of Limitations was not a bar to any portion of the claim, and remanded the case to be retried *ab initio*, as they expressed it. This judgment of the Sudder Dewanny Adawlut was on appeal affirmed by this Board in the judgment before referred to; their Lordships holding that the Statute of Limitations did not apply to Tara's demand, because he had instituted *bond fide*, though ineffectual, proceedings for the purpose of obtaining his rights,—not, as they expressed it, under the agreement alone, but under the judgment enforcing it.

The case was then tried on the remand by another Principal Sudder Ameen. He found that the plaintiff was entitled to wasilat from the date of the first judicial decision, in September 1829, of the Provincial Court. On the question of the amount of wasilat he rejected the hustabood papers, and valued the land at one rupee per beegah. With reference to the question of interest, he decreed interest to the plaintiff from the date of the decree, holding that the claim of wasilat must be considered as then for the first time settled and liquidated.

From that decree there was an appeal to the High Court, which varied the decision of the Principal Sudder Ameen as to the time from which the right of the plaintiff to wasilat commenced, decreeing that it commenced not from the decision of the Provincial Court in 1829, but from the decision of the Sudder Dewanny Adawlut Court in 1832; they affirmed the decree in other respects. From that judgment of the High Court the present appeal is preferred.

The questions now before their Lordships are—first, from what time the right to wasilat commenced; secondly, what should be the amount of wasilat; and, thirdly, what the amount of interest, if any, upon the wasilat. Upon the first question it is desirable to look to the terms of the two judgments that have been referred to. The first judgment affirming the compromise is to be found recited (it is nowhere found separately) in the judgment of the Court of Sudder Dewanny Adawlut in these terms: "It is ordered that the deed of compromise and release be admitted, that the case be struck off the file of this Court, and that the parties conform to these stipulations. The Court on becoming acquainted with it shall enforce the observance of the same on the refusing party.

Now, one of the stipulations was that Doorga, the elder brother, who was in possession of the property, should relinquish to his younger brother six sixteenths. It therefore appears to their Lordships that the direction to conform to these stipulations is a direction, though possibly an informal one, that Tara should be put in possession of that property. This decision was confirmed in these terms by the Court of Sudder Dewanny Adawlut: "Therefore, in concurrence with the aforesaid gentleman"—that is the Judge of the previous Court—"Ordered, that the appeal preferred by the appellant be dismissed, and that the decision passed in the Provincial Court of Appeal, dated the 2nd September 1829, be affirmed; that should the appellant, agreeably to the deeds of compromise, not have received possession of his share, he be put in possession of the same on the execution of the decree." It appears to their Lordships that this decree of the Sudder Dewanny Adawlut must not be taken as establishing for the first time any new right of either of these parties, but as simply affirming, with an explanation, for it is nothing more, the former decree. The rights of the parties, therefore, depend upon the former decree, and it is the former decree which is effective, and which

had to be executed. It appears to their Lordships, therefore, that Doorga after the first decree, receiving, as he did, all the rents and profits of the property, received the rent of six sixteenths of it for the use of his brother, and that he is bound to account to his brother for those rents and profits. They, therefore, agree with the view taken by the Principal Sudder Ameen upon this question, and disagree with that taken by the High Court.

The second question is as to the amount of wasilat. It has been contended that the Principal Sudder Ameen was bound to accept those hustabood papers as fixing the rate of wasilat, which undoubtedly was a good deal higher than the rate which he allowed. He was bound to do so, it is said, because they had been accepted by the previous Sudder Ameen, and by the Courts in former proceedings. But their Lordships do not concur in this view. It may be well here to read the terms in which the judgment of the Court remanding the case is couched. "As this judgment reopens the question of wasilat from the date of the deeds of adjustment, the whole evidence on that matter will require reconsideration. We therefore remand the case, that the whole question of wasilat may be taken up and considered *ab initio*."

If the Court had expressed themselves satisfied with the award of wasilat within the last twelve years, and only directed an enquiry as to the additional wasilat accruing before that time, they might have so expressed themselves, but their Lordships think it probable that they expressed themselves as they have because there was a cross appeal, in which the validity of these hustabood papers would have been disputed, abstaining from giving judgment upon that question, and remitting the whole matter to the Principal Sudder Ameen. The Principal Sudder Ameen expressed himself as dissatisfied with those hustabood papers, which appear to have been put in, but of which, as far as it appears, there does not seem to have been any proof given to him, although some proof seems to have been given of them on former occasions. He describes them as concocted at home by the plaintiff, and questions their genuineness chiefly on the ground that they give an annual value to the property greater than that which it bore at the time of his judgment; the value of land having notoriously very much increased since the wasilat claimed had accrued. He also observes that he directed, for the benefit of the plaintiff, an enquiry before an Ameen as to the value, which the plaintiff declined. Under these circumstances he forms, undoubtedly, a somewhat rough estimate of the annual value of the property as one rupee per beegah. It may be that, under the circumstances, the Principal Sudder Ameen might have been justified in accepting and acting upon these hustabood papers, but it is quite another question whether their Lordships are to say that he was bound to act upon them. It appears to their Lordships that this is a decision upon questions of fact, namely, the genuineness of these hustabood papers, and the actual value of the land, and that decision having been affirmed by the High Court, they see no sufficient reason to take this case out of the ordinary rule, whereby they affirm a decision on a question of fact come to by two Courts.

The remaining question is that of interest. And here it may be as well to refer to the terms of the Statute, Act XXXII of 1839, very much in accordance with the Statute of 3 & 4 William IV. in this country, which has given rise to a great number of decisions, all of which are not easily reconcilable. The words of the Section are: "It is therefore hereby enacted that upon all debts or sums certain, payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand

until the term of payment." If the Statute had stopped here it might be that the Principal Sudder Ameen and the Court were right in saying that there was no actual ascertained or liquidated demand until the *wasilat* was determined by the decree. But these words follow: "Provided that interest shall be payable in all cases in which it is now payable by law." And that refers their Lordships to the state of the law and the practice in India independently of the Statute. They have taken some pains to ascertain what that law and practice has been, and have been referred to a number of cases upon the subject. It may be enough now to quote a case, which is to be found reported in Carrau's cases in the Presidency Sudder Court of the date of 1850, where certain resolutions were come to at a sitting of all the Judges of the Court, and among those resolutions was this: "Interest on mesne profits may be awarded as of course from date of suit in a decree; when, however, interest is awarded from an earlier or from a later date than of suit, special reasons should be assigned in the decree." Their Lordships find that this resolution has been, to a great degree, acted upon in subsequent cases; indeed there have been subsequent cases in which interest has been given at a date prior to the institution of a suit, and their Lordships are far from saying that such cases have been wrongly decided. But having regard to the circumstances of this case, and among them may be stated the very great delay, which has not been thoroughly explained, in the prosecution of this appeal, their Lordships think it enough that the plaintiff should have a decree for interest upon the mesne profits decreed to be calculated from the commencement of the suits up to the date of the decree. The decree will carry interest on the whole amount decreed from its date, at the usual rate of 12 per cent.

They will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that the decree of the Principal Sudder Ameen be affirmed as to the amount decreed to the plaintiff for mesne profits, and reversed as to the residue, and that it be ordered that the defendant pay to the plaintiff interest on the amount decreed for mesne profits at the rate of 6 per cent. per annum, to be calculated from the date of the commencement of the suit to the date of the decree of the 18th February 1861, and that the costs in the first Court be ascertained and be paid by the parties respectively in proportion to the amount to be decreed and disallowed by the decree so to be amended, and that the defendant do pay interest at the rate of 12 per cent. per annum upon the total amount to be decreed by the decree so to be amended as aforesaid, from the date of the decree of the 18th February 1861 to the date of realization; that the costs of the appeal in the High Court be assessed and ordered to be paid by the parties to that appeal respectively in proportion to the amounts to be decreed and disallowed by the decree to be amended as aforesaid. And it will be ordered that the respondents do pay the costs of this appeal.

The 5th February 1878.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Hindoo Law of Succession—Benares School—Daughters (Barren or Childless Widows)—Adoption (of other than Brother's Son)—Quod fieri non debuit factum valet.

On Appeal from the High Court at Calcutta.

Srimati Uma Deyi
versus
Gokoolanund Das Mahapatra.

Their Lordships seemed to think that, according to the law of the Benares School, no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.

According to the same law, the omission to adopt a brother's son does not invalidate an adoption otherwise regularly made, so as to destroy the civil *status* of the person thus adopted even after years of recognition.

The maxim, "*Quod fieri non debuit factum valet*," though not recognized by other Schools in the same degree as in Bengal, is not applicable to Bengal only.

Mr. Leith, Q.C., and Mr. Doyne for Appellant.
Mr. C. W. Arathoon for Respondent.

Sir James Colville gave judgment as follows:—

The general question raised by this appeal is who was entitled to succeed to the estate of one Hulodhur Das Mahapatra, an Oorya Brahman, who died in December 1870. He left by his wife Jumona, who predeceased him some four years before that date, two daughters—Uma Deyi, the plaintiff in the cause, and Parbutti Deyi. Both had been married, but Uma Deyi was a childless widow, dependent upon and living with her father at the time of his death, whilst Parbutti was and is living with her husband, a man of some substance, by whom she had had children, still living. He also left the defendant, Gokoolanund Das, who claimed to be his son by adoption.

In January 1871, the last-named person applied to the Judge of Cuttack for a certificate under Act XXVII of 1860. His claim was resisted by Parbutti, who disputed the adoption, and also by Hurrihur Persad Das, the great-nephew of the deceased. The Judge held that the latter had no *locus standi* as an objector; and as between Parbutti and Gokoolanund, decided that the latter had *prima facie* established his title as the adopted son of the deceased, and granted the certificate to him.

Uma Deyi was no party to this proceeding, of which the effect was at most to confirm or put Gokoolanund in the possession of the property as the heir of Hulodhur, until displaced by a decree in a regular suit.

In June 1872, Uma Deyi instituted the present suit against Gokoolanund and Parbutti, seeking, as between herself and the latter, to be declared the preferential heir of their father, and, impugning the adoption of the former, to recover the estate from him. The questions raised in the cause are determinable by the law of the Benares School.

That law, in so far as it supports the claim of the plaintiff to succeed to her father's estate in default of a son, natural or adopted, is thus laid down by Sir William Macnaghten. ("*Principles and Precedents of Hindoo Law*," p. 22.) After stating the rule of the Bengal School, he says, "But there is a difference in the law as it obtains in Benares on this point, that school holding that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that in default of indigent daughters, the wealthy daughters are competent to inherit; but no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow. Nothing addressed to their Lordships at the bar induces them to think that this is an incorrect exposition of the law. Mr. Arathoon, indeed, in support of his contention that the plaintiff had lost whatever right to inherit her father's estate she would otherwise have possessed by reason of her being a childless widow, relied upon some passages in the "*Smrúti Chandrika*" (chap. xi. s. 21 pars. 21 and 28), in which the author of that treatise adopts and affirms the rule of the Bengal School in respect of the disqualification of a barren daughter. But on

these it is sufficient to observe that, according to Mr. Colebrooke and other high authorities, the "Smṛūti Chandrika" contains only an authoritative exposition of the law as it prevails in the south of India, and consequently that the passages in question are of no weight when set against the propositions which Sir William Macnaghten has deduced from the text of the Mitacshara and other authorities recognized by the Benares School. That the plaintiff, as compared with her sister, is an indigent, or, in the words of the Mitacshara, "an unprovided daughter," seems to be clear. Their Lordships, therefore, though in the view which they take of the other issues it is not necessary to affirm her title as against her sister conclusively, will assume that she has shown a sufficient title to maintain this suit against the defendant Gokoolanund, and to put him to proof of his alleged adoption.

Two distinct issues have been raised touching this adoption :—1. Whether it was ever made in fact; 2, whether, if so made, it is good in law. And as to the first issue it is to be remarked that the plaintiff has not been content to rely on any deficiency in the proof of the defendant's case. She has set up, and undertaken to prove, a substantive case of her own.

The case of the defendant is, that he was by birth the second son of Nath Das, a distant kinsman of Hullodhur Das; that at a very tender age he was taken into the house of Hullodhur with a view to his being adopted; that when about five years old, and in the year 1837, he was formally given by his natural, and received by his adoptive father, in adoption with the requisite ceremonies; that he was brought up and educated by Hullodhur as his adopted son, receiving from him at the proper age the investiture of the Brahminical thread, and being on a subsequent occasion given in marriage by him; that after he reached man's estate he continued to be recognized in the family as the adopted son, and took part in the management of its affairs; and that in the character of adopted son he performed the funeral ceremonies of Jumoona, and afterwards of Hullodhur himself.

On the other hand, the case of the plaintiff is that the defendant is not the son of Nath Das, that he was by birth a Kanouj Brahman, or other native of the North-Western Provinces; that when young he was brought by other pilgrims to Juggunnath, and left at first in a sort of hospice attached to the temple which belonged to the elder brother of Hullodhur; that he afterwards lived in the house of one Hira, who is stated to have been a concubine of Hullodhur; that he was never on terms of commensality with Hullodhur; that he never was, and, being the son of an unknown father, never could have been adopted by Hullodhur; that it was only as a gomashtra or dewan that he ever took part in the management of Hullodhur's affairs; that Hullodhur, some years after the alleged adoption, really adopted one Radakrishna, a son of one Bhika Das, who subsequently died; and that Hullodhur's funeral rites were performed by the plaintiff and the persons authorized by her to do the acts which a female cannot herself do.

Their Lordships might feel it difficult to pronounce with confidence for themselves which of these conflicting statements, supported as each is by the testimony of numerous witnesses, and in a greater or less degree by documentary evidence, is true. And their difficulty would be greatly increased if one of the Indian Courts had broadly affirmed the truth of the plaintiff's statement, whilst the other Court had pronounced in favor of the defendant. But that is not the way in which the case comes before them. The Subordinate Judge, though he decided against the fact of the adoption, did not affirm that the original *status* and subsequent history of the defendant were what the plaintiff's witnesses represented them to have been; he did not find that Radakrishna (as to whose adoption the evidence is of the most loose and general character) was ever adopted by Hullodhur; he did not find that the plaintiff, and not the defendant, performed the funeral rites of Hullodhur. It cannot therefore be said that the Judge before whom they were examined has pronounced the plaintiff's witnesses to be worthy,

and the defendant's witnesses to be unworthy, of credit. On the contrary (giving, perhaps, a little more weight to some supposed admissions by two of the plaintiff's witnesses than their words warrant), he expressed his belief "that the defendant Gokoolanund had for years lived with, and been brought up, and treated as a son, and married by Hullodhur." He held "it also to be clear from the evidence tendered for the defence that the defendant had frequently been acknowledged by others as the adopted son of Hullodhur, and was even so styled by Hullodhur himself in a written statement filed by him in an Act IV of 1840 case before the Magistrate of Balasore." We have therefore the Judge of First Instance affirming, contrary to the general evidence on the part of the plaintiff, facts most material to the defendant's case, and the genuineness of the documentary evidence produced in support of it. His finding against the fact of adoption proceeds upon the improbability that in 1837 Hullodhur, who might reasonably hope to beget, would adopt a son; upon the discrepancy between certain of the defendant's witnesses as to the presence of Nath Das at the ceremony; and upon the insufficiency of proof that all the requisite ceremonies were performed.

In this state of things their Lordships, at the close of the appellant's case, intimated that they could not see their way to a reversal of the very clear finding in favor of the fact of adoption to which the High Court upon a review of the whole evidence had come. Their Lordships conceive that the High Court was right in giving credit to the defendant's witnesses rather than to those of the plaintiff, who have deposed to a case which appears to be in many respects a false one. Their evidence is strongly corroborated, as the Subordinate Judge himself admits, by the documents to which he has given credit; and it seems to their Lordships to prove, as found by the High Court, the performance of the requisite ceremonies with as much certainty as can be expected some thirty years or more after the event.

Against a case so proved, the *prima facie* improbability of the adoption on which the Subordinate Judge so strongly relies cannot, in their Lordships' opinion, weigh very heavily. It must be recollected that it is met not merely by the story of the inference drawn by a pundit from the horoscopes of the husband and wife (a circumstance which, if it really occurred, might have had considerable force upon superstitious minds), but also by the fact that Hullodhur and Jumoonahad lived together as man and wife for a good many years before the final adoption without having issue.

Their Lordships must, therefore, deal with this case on the assumption that the fact of the defendant's adoption has been established.

The question whether such an adoption is valid in law is of greater difficulty, and, being one of general application, of far greater moment. It was in order to consider more fully the authorities cited upon this point that their Lordships reserved their judgment.

The objection to the adoption is that it was one of a very distant relation, not even within the class of Hullodhur's sapindas, made in violation of the preferential right of Denobundhoo, the only son of Juggunnath, who was Hullodhur's brother by the whole blood, to be adopted.

The plaintiff relies mainly upon certain texts of the Dattaka Mimansa, and the Dattaka Chandrika, of which the former is considered by the Benares School to be the more authoritative treatise on the subject of adoption.

The texts chiefly insisted upon are the 28th, the 29th, the 30th, the 31st, and the 67th slokas or paragraphs of the second Section of the Dattaka Mimansa; and the 20th, the 21st, the 22nd, the 27th, and the 28th paragraphs of the first Section of the Dattaka Chandrika.

It is unnecessary to set out these at length, because it may be conceded that they do in terms prescribe that a Hindoo wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption,

in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father, by saying that, in the case of a brother's son, he should, nevertheless, be adopted in preference to any other person as a Dvyámushayána, or son of two fathers.

The grave question, however, that arises in this case is whether the injunctions just referred to are merely binding upon the consciences of pious Hindoos as defining what they ought to do, or so imperative as to have the force of law, the violation whereof should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

Before considering this question, their Lordships think it right to observe that the two propositions just stated, or at least the last of them, may well be qualified by the incontestable fact that Hullodhur was separate in estate from his brother Juggunnath. The whole of the law supposed to affirm the necessity of adopting a brother's son seems to have been deduced by the ancient commentators, with what logical sequence it is unnecessary to consider, from a text of Menu, which says :—" If one among brothers of the whole blood be possessed of male issue, Menu pronounces that they all are fathers of the same by means of that son." The direct consequence of this might well be that in an undivided family (the normal state of a Hindoo family) the nephew, without further act of affiliation, would effectually perform the funeral obsequies of his uncle, whose share in the joint family property, in the absence of male issue, would pass to his coparceners by survivorship. But in the case of a separated Hindoo, the right of performing his obsequies, with the consequent right of succession, is in the absence of male issue in his widow, or, failing her, in his daughter and daughter's issue. Again, to constitute a Dvyámushyána there must be a special agreement between the two fathers to that effect; or the relation must result from some of the other circumstances indicated by Sir William Macnaghten at p. 71 of his " Principles and Precedents." And he there states the consequences to be different from those of an ordinary adoption, inasmuch as the children of the adopted sons would revert to their natural family. Hence the adoptive father fails by such an adoption to perpetuate his own line of male succession,—a circumstance which renders the consent of divided brothers to such an adoption the more improbable. In the present case there is nothing to show, and it is unreasonable to presume, that Hullodhur would have been content to receive, or Juggunnath would have been willing to give, the only son of the latter in adoption. And the presence of the name of the latter on some of the documents which describe the defendant as the adopted son of Hullodhur, is some evidence that Juggunnath recognized that adoption as valid. Moreover, for aught that appears in the cause, Denobundhoo may at the date of the adoption have become from age, marriage, or other like objection, incapable of being adopted by his uncle.

Reverting, however, to the general question whether the omission to adopt a brother's son is an objection which at law invalidates an adoption otherwise regularly made, and so destroys the civil *status* of the person thus adopted, even after, as in this instance, years of recognition, their Lordships have to observe in the first place, that they have been referred to no case in which a Court of Justice has so decided. The nearest authority of the kind is that of *Ooman Dutt v. Kunhia Singh*, 3 S. D. A. (Select Reports) p. 141. That case arose in a district governed by the Mithila law. The plaintiff claimed, under an adoption by his maternal grandfather, not in the Dattaka, but in the Kritrima form, which is recognized by the Mithila law, to dispossess the nephew and heir of that grandfather from the share of the latter in a joint family estate. Various objections, besides the one in question, were taken to the adoption; the case, after the fashion of those days, went from one Judge of the Sudder Court to another, who consulted different pundits and came to conflicting decisions, but ultimately the suit was dismissed. The marginal note no doubt says, " According to the Hindoo

law, while a brother's son exists, the adoption of any other individual as a son, either in the Dattaka or Kritrima form of adoption, is illegal." But the force of this note is very much weakened by the fact that Sir William Macnaghten, who, being the editor of the Reports, was probably the author of it, afterwards, and with a full recollection of the case, wrote the passage which will be presently cited. The decision itself was merely on an alleged adoption in the Kritrima form, which, in its inception and consequences, is very distinguishable from one in which the natural father parts with his son in the full faith that he will be effectually and for all purposes received into his new family, and acquire therein the rights which he absolutely loses in his own. The son adopted in the Kritrima form retains his rights of inheritance in his original and natural family.

The general question seems to have been considered by Sir Thomas Strange, Mr. Colebrooke, and other text writers of eminence.

Sir Thomas Strange, after recapitulating the rules which ought to guide the discretion of the adopter, including the authorities on which the plaintiff relies, says:—"But the result of all the authorities upon this point is, that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who upon spiritual considerations ought to have been preferred." And by his references to the cases collected in the second volume he shows that Mr. Colebrooke, and, more strongly, Mr. Ellis, were of this opinion.

Again, Sir William Macnaghten, just after referring to the case of Ooman Dutt, deals with the question thus:—"It would appear, however, that according to the law of Bengal and elsewhere where the doctrine of the Dattaka Chandrika is chiefly followed, and where the doctrine of 'factum valet' exists, a brother's son may be superseded in favor of a stranger; and even in Benares, and in the places where the Mimansa principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion. It may be held, then, that the injunction to adopt one's own sapinda (a brother's son is the first), and failing them to adopt out of one's own gotra, is not essential so as to invalidate the adoption in the event of a departure from the rule." (Prin. and Prac. of Hindoo Law, p. 68.)

It may be further observed that even Mr. Sutherland, in his "Synopsis" (see Stokes' Codes, p. 656), says:—"But though Nandita Pandita extends this principle (i.e., that proximity of kindred ought to determine the choice of an adopted son) with elaborate minuteness, it cannot be regarded as a rigid maxim of law vitiating the adoption of a remote when a near kinsman, or of a stranger, when a relative, may exist. The right, however, of a whole brother's son to be adopted in preference to any other person, where no legal impediment may obtain, seems to be generally admitted, and may be regarded as a received rule of law." It is not easy to see upon what grounds the distinction here taken rests. If what the Dattaka Mimansa enjoins is to be taken as imperative, and having the force of law, the language of the 74th Article of the second Section, which deals with the duty of selection where there is no brother's son, seems to be hardly less imperative than that of the Articles which affirm the preferential right of the brother's son.

It was urged at the Bar that the maxim "*Quod fieri non debuit factum valet*," though adopted by the Bengal School, is not recognized by other schools, and notably by that of Benares. That it is not recognized by those schools in the same degree as in Bengal is undoubtedly true. But that it receives no application except in Lower Bengal is a proposition which is contradicted not only by the passage already cited from Sir William Macnaghten's work, but by decided cases.

The High Court of Madras in *Chinna Gaundar v. Kumara Gaundar*, 1 High Court Rep., p. 54, and the High Court of Bombay, in a case reported in 4 Bombay, H. C. R. A. C. 191, acted upon it; and that upon the question of the adoption of an only son of his natural father, on which the High Court of Calcutta, 10 W. R. 347, has refused to give effect to it, considering that particular prohibition to be imperative.

Their Lordships feel that it would be highly objectionable on any but the strongest grounds to subject the natives of India in this matter to a rule more stringent than that enunciated by such text writers as Sir William Macnaghten and Sir Thomas Strange. Their treatises have long been treated as of high authority by the Courts of India, and to overrule the propositions in question might disturb many titles.

Upon a careful review of the authorities, their Lordships cannot find any which would constrain them to invalidate the adoption of the defendant, even if it were more clearly proved than it is that Hulloodhur Das could have adopted Denobundhoo, the only son of his brother. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal with costs.

The 5th February 1878.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Hindoo Widow—Maintenance—Practice (Privy Council).

On Appeal from the High Court at Calcutta.

Sreemutty Nittokissoree Dossee

versus

Jogendro Nauth Mullick.

Their Lordships expressed their extreme reluctance to interfere with the decision of the Court below upon a question of maintenance to which a Hindoo widow is entitled, in deciding which they thought that regard should always be had to the value of the estate, as well as to the position and *status* of the deceased husband and of the widow.

In this case, however, their Lordships raised the maintenance, because there was a departure by the Lower Court from the strict principles which ought alone to have guided it, inasmuch as it allowed as low a maintenance as possible as a kind of punishment to the widow for having groundlessly resisted the claim of her late husband's adopted son.

Mr. Leith, Q.C., Mr. Doynes, and Mr. Woodroffe for Appellant.

Mr. Cowie, Q.C., Mr. Graham, and Mr. Mayne for Respondent.

Sir Montague Smith gave judgment as follows :—

This is an appeal from a judgment of the High Court of Bengal sitting in its ordinary original jurisdiction. The action is brought by Jogendro Nauth Mullick, claiming to be the adopted son of Choytun Churn Mullick; and the defendant in the suit (the appellant) is Nittokissoree Dossee, the widow of Choytun Churn, and his heir in default of his leaving a natural or adopted son. The principal question in the suit was whether the plaintiff had been adopted by Choytun Churn or not. A great deal of evidence was gone into upon both sides upon the issue so raised. It is unnecessary for their Lordships to advert to that evidence, inasmuch as the learned Counsel for the appellant, upon his opening at their Lordships' bar, expressed his inability to overturn the judgment on that issue by any argument that he could raise before us upon the evidence. Their Lordships

think that in taking that course he exercised a wise discretion, and in no way injured the interests of his client. They have read the judgment of the High Court, and it appears to them that the case was very carefully tried. The judgment contains a lucid and elaborate analysis of the evidence, and assuming that analysis to be accurate their Lordships can have no doubt that the Court arrived at a sound conclusion in declaring that the adoption had taken place.

Another question arises, however, in the suit, namely, the maintenance to which the defendant is entitled as a widow, upon the assumption that the plaintiff was the adopted son of her husband. Their Lordships would be extremely reluctant to interfere with the decision of the Court below upon a question of maintenance, and they would hesitate very much to do so unless there were some special circumstances in the case which indicated that there had been a miscarriage in the way in which the maintenance had been arrived at. It appears to have been the usual course, when there was a Master attached to the Court, for the Court to refer to the Master the question of maintenance, and to consider the proper amount upon hearing the report. In this case the Court did not apparently make any separate enquiry with regard to the maintenance, but acted upon the facts as they appeared in evidence before them, upon the general case. An ordinary form of reference appears to have been this: "Refer it to the Master to settle the amount, regard being had to the value of the estate." Their Lordships think that another element to be considered is the position and *status* of the deceased husband and of the widow. The main subject of enquiry would be the value of the estate; and the question for the Master and ultimately for the Court to consider would be the due proportion which should be given to the widow out of it for her proper maintenance, including not only the ordinary expenses of living, but that which she might reasonably expend for religious and other duties incident to the station in life which she might occupy.

In this case, independently of the value of the property which has been disputed at their Lordships' bar, there were circumstances which the Court took into consideration, and which their Lordships think may properly be taken into consideration, not as conclusive upon the amount which ought to be awarded, but as affording some guide to the proper amount, if not a measure of it. It seems that the husband, Choyton Churn, about two years before his death, had given instructions for his will. That will was never executed, but the papers connected with it were given in evidence by the plaintiff, and were relied upon as affording strong corroboration of his adoption. Choyton Churn himself gave instructions for his will to a solicitor of the name of Sreenauth Chunder, who happened to be the brother of Jogendro, the plaintiff, and who was a partner in the firm of Swinhoe, Law, and Company. It seems that the testator in his first instructions desired that the interest of a lakh of rupees, in Government paper, should be given to his widow, and, in addition thereto, that she should live in the family house, and be maintained out of his general estate, as she had been in his lifetime. It seems that a draft was made in conformity with these instructions, which was copied; and after receiving the copy Choyton Churn had another interview with Sreenauth, and in that interview he altered the instructions which he had previously given, and instead of bequeathing the interest of one lakh of rupees to his widow for life, he desired that the lakh should be given to her absolutely. An engrossment was made of the will containing that bequest. Upon this question of maintenance the Court say, at the end of their judgment, after they had disposed of the principal issue that arose upon the adoption: "Under these circumstances, if it had been left to the Court to determine the sum which should be awarded to the defendant in the future for her maintenance we should only have given her the most moderate provision which, having regard to her husband's property and position, the law would allow." The circumstances to which the learned Judges allude are those contained in their summary of the case which

appears in the previous paragraph of their judgment, and there, after stating the main positions which they find in favor of the plaintiff and of the adoption, they add, "That the fact of the plaintiff being Choytun Churn's adopted son was perfectly well known to the defendant and to all the members of the family." The Court therefore seem to have thought that she was not justified in defending the claim of the plaintiff as she had done, and that opinion does appear to have influenced their judgment in awarding the maintenance which they thought sufficient to be allowed to her. They say, "We should only have given her the most moderate provision under those circumstances." One cannot read that passage without perceiving that the Court reduced as low as they could, upon the principle upon which they proceeded, the maintenance which they allowed, as a kind of punishment to her for having defended a suit which they thought she must have known was properly brought against her. That the Court, being under this influence, should have allowed its judgment to be affected by it, their Lordships think was a departure from the strict principles which ought alone to have guided it. That influence operating on the minds of the Judges, they proceed to consider what they would allow; and in coming to that conclusion they bear in mind the bequest of the lakh of rupees intended to be made to her absolutely, and they refer to an offer which had been made by the plaintiff. This is what they say:—"But the plaintiff himself has relieved us of what might otherwise have been an unpleasant duty. He has intimated to us through his Counsel that he desires the defendant to have the same provision as she would have had if her husband's will had been duly executed. This they state to have been the desire of the plaintiff. "And although, having regard to the plaintiff being an infant, we do not consider it right to hand over to the defendant absolutely a lakh of rupees out of the plaintiff's property, we think we may without impropriety award her as maintenance the annual sum of Rs. 4,000 payable monthly." If the objection was to handing over the corpus of a lakh of rupees, that might have been obviated by turning the value of the lakh of rupees into an annuity for the life of the widow, which would have produced a much larger sum than the interest merely at 4 per cent. upon the capital. Their Lordships do not say that the Judges were bound to do this; but on the principle on which they would apparently have acted but for the influence on their minds arising from the conduct of the defendant in the suit, it seems not improbable that that is a conclusion at which they might have arrived. However, what they did was to award a sum of Rs. 4,000. Their Lordships wish to guard themselves against its being supposed that they consider the plaintiff bound by his offer, or that the widow is entitled to the lakh of rupees because it was intended to be given to her by the will. They think both those circumstances can be regarded only as elements which may properly be considered in determining a suitable amount of maintenance; and inasmuch as the plaintiff at one time, through his guardian as it must have been, was willing to settle the matter amicably and to give the widow, and—as the Judges expressed it—desired that she should have the lakh of rupees, their Lordships entertain hope that when the matter is brought before him,—if it should be brought before him in India,—now he is of full age, he may be disposed to renew that offer, and if not to give the corpus of the lakh of rupees, to give an annuity which such a sum would produce. Their Lordships feel that they can do no more than send the case back with that intimation of their hope, and with this further intimation to the Counsel here that, judging, as they do, from what they have seen in the Record and what they have heard from the learned Counsel, they think that it would not be unfair to either of the parties if they could agree upon raising this sum of Rs. 4,000 a year to Rs. 6,000. Their Lordships feel that they cannot impose this arrangement upon the parties, but they throw it out as well worthy of their consideration to prevent any further litigation. If that sum is agreed to, then their Lordships would amend the decree here, by consent, by increasing the

sum to Rs. 6,000. If that is not assented to, their Lordships will have no other course but humbly to advise Her Majesty to remit the suit to the High Court of Bengal to determine, with reference to the considerations that they have thrown out, the proper amount of maintenance to be allowed to the widow.

On the 12th February it was intimated to their Lordships by Counsel on both sides that the parties in India adopted the suggestion made by their Lordships in the foregoing judgment, and their Lordships therefore agreed humbly to report to Her Majesty that, the parties having consented thereto, the decree of the High Court of Judicature ought to be varied by raising the allowance to the widow for maintenance from Rs. 4,000 to Rs. 6,000 a year, and further that in other respects the decree ought to be affirmed, each party paying their own costs of this appeal.

The 12th February 1878.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Hindoo Law of Succession—Palayapat of Padamattur—Suit for Possession—
Title of Plaintiff—Jus Tertii.*

On Appeal from the High Court at Madras.

Consolidated Appeals Nos. 82 to 84 of 1875.

Periasami *alias* Kottai Tevar and others
versus

The Representatives of Salugai Tevar.

HELD that, as between the descendants of Mutter Vaduga and Dhorai Pandian, the Palayapat of Padamattur was the separate property of the latter; that, on the death of Dhorai Pandian, his right, if he had any left undisposed of in the property, passed to his widow, notwithstanding the undivided *status* of the family (the rule of succession affirmed in the Shivagunga case applying); and that plaintiff, who claimed the Palayapat as an impartible and ancient zemindary descendible by inheritance to him on the death of Dhorai Pandian without issue, had no title to sue in the life of Dhorai Pandian's widow.

Their Lordships saw nothing in this case to take it out of the general and well-known rule relating to actions in the nature of actions for ejectment, *viz.*, that the plaintiff must recover by force of his own title; and thought that it would be in the highest degree unjust to allow the defendants, who had been for nearly the whole time of prescription in possession of villages of which they claimed to be purchasers for value, to be turned out of possession by any person other than one who had established a clear title to present possession.

Mr. Leith, Q.C., Mr. Norton, and Mr. Mayne for Appellants.

Sir James Stephen, Q.C., Mr. Cowie, Q.C., and Mr. Doyne for Respondents.

Sir James Colville delivered judgment as follows:—

The question common to the three suits which have been consolidated in the appeal before their Lordships is whether the plaintiff, one Salugai Tevar, was entitled to recover from the defendants in possession, all of whom claimed to be purchasers for value from the late proprietor Dhorai Pandian under different titles, seven villages, being in fact all that remained of the ancient Palayapat of Padamattur, which seems to have consisted originally of ten villages.

The various questions which were raised and determined in the three causes, in all of which there was judgment for the plaintiff, were substantially the same. Of these some are no longer contested, and of those that are contested the only one that has been argued before their Lordships is whether Salugai Tevar had established a sufficient title to maintain the suits. It is upon this question alone that their Lordships have now to express their opinion.

Before doing so, however, they wish to make some observations upon the manner in which the Courts in India dealt with this question, as appears from the following passage in the judgment of the High Court. The learned Judges say: "The defendants not only denied the legitimacy of the plaintiff, but also asserted that Dhorai Pandian, the last proprietor, having left a widow, Vellai Nachiar, who is still alive, the right of suit is with her and not with the plaintiff. The Subordinate Judge, regarding the suit not as raising any question between contending heirs, but as a suit brought to recover from strangers family property unlawfully alienated by a member, held that the plaintiff might sue, subject to any question between himself and others concerning the right to the inheritance. It appears to us that the right of Dhorai Pandian's widow, which was the only right urged in the Court below as prior to the plaintiff's, cannot be maintained, for the estate of Dhorai Pandian's was not a separate acquisition by him, following the course of succession prescribed for separate estate, but an ancestral estate of the character already mentioned, the right to which would vest on his death without issue in the next collateral male heir of the undivided family in preference to the widow. In this Court the defendants have urged a new ground of objection to the plaintiff's competency to sue, which is said to arise on the plaintiff's deposition given in the suit. It is urged here that 'there are preferential heirs to the estate, who are descendants of an elder branch of the family.' We find that the plaintiff, in his cross-examination, after mention of Muttu Ramalinga Shervai, the son of the istimidar zemindar, whose legitimacy was questioned in the suit of 1823, says that his, the deponent's, elder brother had two sons (by a kept mistress), and that there are three grandsons of his still living. The enquiry was not, so far as is shown, fully pursued, nor was the Court asked to decide upon the matter, and the issue already noticed respecting the prior title of Dhorai Pandian's widow was alone tried and disposed of. A decision unfavorable to the defendants having been given, they now seek in appeal to bring forward for the first time an objection to the plaintiff's right to sue, which they declined to urge in the Court below. We think they cannot fairly be permitted in this stage of the case to defeat the suit by such an objection. If there are other and nearer heirs, their rights will remain unaffected, and any decree to be now given may make reservation of such rights. The plaintiff for the purposes of the present suit may be regarded as entitled to the succession, and it is unnecessary to consider the arguments which were addressed to us on the subject of the course of descent of this property on the assumption that there were in existence descendants of his elder brother."

Their Lordships are of opinion that there is nothing to take these cases out of the general rule relating to actions in the nature of actions of ejectment, namely, the well-known rule that the plaintiff must recover by force of his own title. They think that it would be in the highest degree unjust to allow the defendants, who had been for nearly the whole time of prescription in possession of villages of which they claimed to be purchasers for value, to be turned out of possession by any person other than one who had established a clear title to present possession. To allow this on the ground that if there should turn out to be other persons with a higher title than the plaintiff those persons might recover over against him, is obviously to deprive the defendants of their undoubted right to defend their possession by setting up the *jus tertii*, and it is further to be remarked that those persons might possibly have been unable themselves to recover from the defendants by reason of having by lapse of time or acts of confirmation or acquiescence lost the right to question their title.

With these observations their Lordships will pass to the consideration of the question before them, with reference to which it will be sufficient to confine their observations to the proceedings in the first and principal suit.

The particulars of the claim, as stated in the plaint, are that the Palayapat

of Padamattur was an impartible and ancient zemindary descendible by inheritance, according to the custom governing other similar zemindaries and to the Hindoo law; that it was last ruled by a person with many aliases, being the Dhorai Pandian mentioned in the pedigree; and that he held the right of ruling it till the 7th November 1861, when he died at Padamattur without issue. The title of the plaintiff to succeed to him is thus stated: "The plaintiff being the son of the deceased Muttu Vaduganadha Tevar, who was the undivided brother of the said Gouri Vallabha Tevar, *alias* Muttusami, and of the deceased Bodhaguru Tevar, is the only son's son now surviving of Oiya Tevar," who was the common ancestor. The plaint therefore asserts a title in the plaintiff to succeed to the Palayapat on the death of Dhorai Pandian, and consequently the right to impeach the alienation of the villages made by him. The nature and impartibility of the estate have been found by the High Court confirming the decision of the Lower Court in these words: "We conclude that Padamattur is shown to be (apparently like other similar groups of villages in the Shivagunga zemindary) a Palayapat impartible, and therefore held by one member of the family and descending on a single heir." The question remains whether, on the death of Dhorai Pandian in 1861, the plaintiff of right became the Polygar. The facts stated in the plaint relating to his descent from the common ancestor are consistent with the pedigree set out in the appellant's case, and may be taken as proved. And it may be true that upon those facts he would have been, according to the ordinary course of the Hindoo law of succession, the next heir to Dhorai Pandian in the collateral line of succession if that person had left no widow, or if the widow were from the nature of her husband's estate incapable of inheriting it. It may however be a question whether, putting the widow's possible right out of question, he would be entitled to succeed to the Palayapat. Nothing has been found by either Court in India as to the rule which governed the abnormal descent of Padamattur to a single heir. There is some evidence that up to the date of the transactions to be next considered it was governed in the course of direct descent from father to son, by the rule of primogeniture; but as to the rule in the case of collateral succession there is no evidence.

It may be desirable, before their Lordships approach the direct question to be decided, briefly to recapitulate some of the facts relating to this estate. Oiya Tevar, the then zemindar of Padamattur, died in 1815. He was succeeded by his eldest son, Muttu Vaduga. That person had two brothers, and therefore, whether Oiya Tevar were previously joint with his brother Gouri Vallabha, the *istimirar* zemindar of Shivagunga, in respect of Padamattur or not, the latter estate must be taken to have descended to Muttu Vaduga, as ancestral estate. He would therefore necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindoo family in the case of a *raj* or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate, though impartible, was, up to the year 1829, in a sense the joint property of the joint family of the three brothers. In 1829, however, the uncle of the three brothers, who was zemindar of the great impartible zemindary of Shivagunga, died. Padamattur appears to have been a sub-tenure of that estate, paying rent to the zemindar, and it was supposed that if Gouri Vallabha, the deceased zemindar, left no male issue, that large estate would go, according to the Mitacshara law of succession in the case of joint family property, to his eldest nephew, Muttu Vaduga, the then Polygar of Padamattur. In consequence of this the family arrangement embodied in the document No. 77, set out at page 138 of the Record, took place. The true construction and effect of that document will be afterwards considered. At present it is sufficient to say that the effect of it was to transfer the Palayapat of Padamattur to the next brother, Muttu Sami, on

whose death it descended to his only son Dhorai Pandian, who enjoyed it till his death in 1861. In the meantime the great estate of Shivagunga was enjoyed, first by Muttu Vaduga, next by his eldest son and second son in succession, and lastly, by his eldest grandson by that second son. During all that time, however, the litigation concerning the title to Shivagunga, of which the history will be found in the 9th volume of Moore's Indian Appeals, at page 539,* was going on. That was finally determined in 1863, by the judgment of this Committee, which ruled that, though the zemindar of Shivagunga, who died in 1829, had continued to be generally undivided in estate with the family of his brother Oiya Tevar, the former Polygar of Padamattur, the zemindary of Shivagunga was his self-acquired property, and, therefore, descendible to his widows, and failing his widows, his daughter in preference to his nephew. The result of that decision was that Shivagunga passed from the line of Muttu Vaduga, who in 1829 had transferred the Polygarship of Padamattur to his next younger brother Muttusami.

In the present case the defendants, relying in some degree upon the final decision in the Shivagunga case, by their written statement insisted that the title of the widow of Dhorai Pandian to succeed to Padamattur on the death of her husband was preferable to that of the plaintiff. They founded this contention upon the transaction of 1829, whereby, as they alleged, Muttu Vaduga absolutely abandoned and renounced all his right to Padamattur in favor of Muttusami. They also alleged that for some time prior to 1829 and since the three brothers were divided in estate and interest, and were living as divided members of a Hindoo family. This part of the defence led to the settlement of the 2nd, 3rd, 8th, and 9th issues in the suit. The 2nd and 3rd are, "Whether Muttu Vaduga relinquished his interest in the estate sued for; and if so, what is the effect of such relinquishment upon the plaintiff's title?"

The 8th issue is, "If the plaintiff be found son of Muttu Vaduga, whether Muttu Vaduga and the last owner of Padamattur were divided or undivided." The 9th issue is, "Whether the plaintiff was entitled to bring this suit during the lifetime of the last owner's widow." Those issues of course involved two distinct questions, namely, first, whether Muttu Vaduga was for all purposes separated from his brothers; and secondly, whether he had not at least so parted with all interest in Padamattur as to make that particular property as between his descendants and Dhorai Pandian the separate estate of the latter and so subject to the rule of succession affirmed by the decision of this Committee in the Shivagunga case. In the course of the trial a further objection was raised to the plaintiff's case on facts which came out in the course of his cross-examination. That objection was briefly to this effect, that though he was the only surviving son of Muttu Sami, there were sons and grandsons of one of his elder brothers who, as the plaintiffs contended, would have a preferential title to Padamattur even on the assumption that Padamattur was to pass as joint property. That question, although no issue in the suit had been settled with respect to it, was distinctly raised by the grounds of appeal. The High Court nevertheless declined to adjudicate upon it, for the reasons stated in the passage of their judgment, which has been already read. Their Lordships think that if there were not sufficient materials before the Court to enable the learned Judges to decide the question thus raised, they ought to have directed an issue in order that the facts essential to such determination should be ascertained.

Their Lordships will consider in the first instance the first of the two objections which have been thus taken to the plaintiff's title, *viz.*, the preferential title of the widow. In doing this they will assume that the Indian Courts have correctly found that after 1829 the *status* of the family, consisting of Muttu Vaduga, his two brothers, and their children, continued to be joint and undivided; and, consequently, that the only question is whether by reason of the transaction

* 2 W. R. P. C. 31; 1 Suth. P. C. R. 520.

in 1829 the particular property of Padamattur ceased to be the joint property of the three brothers, and so upon the death of Dhorai Pandian became subject to the rule of succession already referred, as affirmed by this Committee in the Shivagunga case. That question, of course, depends on the construction to be put on the instrument at page 138 of the Record.

Now, various constructions have been put upon it. The first was that of the Subordinate Judge. He says, at page 296, "Although the relinquishment (taking it to be true) was thus rendered absolute,"—he is referring to the birth of the daughter of the deceased zemindar of Shivagunga,—“and kept Muttu Vaduganadha and his offspring out of the Padamattur estate for a time, yet, as they were judicially pronounced to come into the Shivagunga estate as usurpers, and were ousted from it, Muttu Vaduganadha's heir or heirs are entitled to revert to the Padamattur estate.” This construction, their Lordships think, cannot be maintained. There are no words which import a right of reversion. The true construction of the document cannot be affected by what happened subsequently. The grant, whatever its effect, was not necessarily avoided, because subsequent events disappointed the expectation in which it was made, namely, that the estate of Shivagunga would remain in the line of Muttu Vaduga. One consequence of that construction and of the adoption of the doctrine of reverter might be to give force to the defendant's second objection, because it would assume—if indeed such an assumption could be made consistently with what was ruled here in the *Tagore Case*—that a certain reversion remained in Muttu Vaduga; in which case it would be a grave question whether that reversion did not descend to his descendants in the direct line according to the law of primogeniture. Another construction was put upon the instrument by the High Court at page 329. Dealing with this part of the defence the learned Judges say:—“The appellants' contention on this part of the case we understand to be that the instrument of relinquishment precludes all claims on the part of Muttu Vaduganadha's descendants that the family can no longer be regarded, as they admittedly were originally, as a joint and undivided Hindoo family, and that under the terms of the Limitation Act XIV of 1859, the plaintiff's claim is barred, because Muttu Vaduganadha and his descendants are not shown to have participated in the income or profits of Padamattur since the year 1829. Although the fact of the division of the family in or before the year 1829 was alleged by the defendants in their written statement, no evidence of this was adduced, and it is only from the mode of enjoyment of the property and from the effect attributed to the instrument of relinquishment that this is inferred. We think it clear that the family must still be regarded as a joint Hindoo family, and that Muttu Vaduganadha's renunciation of his right in 1829, whatever its operation on himself and his descendants in possession of the zemindary of Shivagunga, cannot operate further, and that, upon the death of Dhorai Pandian without issue, the right of succession, which then opened to the members of this joint family, was not affected by such renunciation. The words ‘We and our offspring shall have no interest in the said Palayapat, but you alone shall be the zemindar, and rule and enjoy the same’ must be construed with due regard to the person using them, and the occasion when they were used. They refer to the estate and rights of the new so-called zemindar of Padamattur, and amount to a declaration that the Palayapat shall be enjoyed by him exclusively, the Shivagunga zemindar disclaiming any joint interest. They are not a release by the latter for himself and his heirs of all future rights of succession which might accrue to them as members of an undivided family.” The last two sentences do not appear to their Lordships to be quite consistent. If the Shivagunga zemindar had disclaimed any joint interest, his words of renunciation taken alone would seem to imply that he had given up whatever interest he had as a member of the joint family in that estate. Their Lordships agree that such a renunciation would not deprive the descendants of Muttu Vaduga of such future rights of

succession as they might afterwards have to that property, treating it as separate property *quoad* them, such a right of succession, for instance, as might accrue to them in the present case upon the death of the widow. But it does seem to be inconsistent with the retention by them, "of all future rights of succession which might accrue to them as members of an undivided family." The construction of the instrument for which Mr. Cowie argued at the bar does not substantially differ from that of the High Court. He contended, as their Lordships understood, that the only effect of the transaction was to transfer the ostensible headship of the family, as regarded Padamattur, to the second brother and his direct descendants, and so virtually to reduce the position of Muttu Vaduga and his heirs to that of a junior line. This, however, is not the construction which, after some doubt, their Lordships think must be put upon the document. The heading of it is in these words: "Agreement passed on" such a day "by me Oiya Tevar's son Muttu Vaduganadha Tevar of Padamattur in favor of my brother Gouri Vallabha Tevar." It proceeds thus:—"My junior paternal uncle Muttu Vijaya Raghunadha Gouri Vellabha Peria Udaya Tevar, zemindar of Shivagunga, having departed this life, leaving no male issue, I have become entitled to the said zemindary, and you, as my next younger brother, are appointed zemindar of the Palayapat of the said Padamattur." It then refers to the pregnancy of one of his uncle's wives, and says:—"I shall act as usual in the matter in the event of her giving birth to a son." Those words show that where the grantor meant to make a gift on a condition he knew very well how to express what the condition was to be; and this affords an additional argument against the construction put upon the document by the Subordinate Judge. Then follows this clause:—"But should she be delivered of a daughter"—an event which happened—"I and my offspring shall have no interest in the said Palayapat, but you alone shall be the zemindar, and rule and enjoy the same, allowing at the same time, as per former agreement to the younger brother, P. Bodhagarusami Tevar,"—who in the pedigree is called Chinna Sami,—"the village that has been assigned to him before. Now the plain meaning of those words seems to their Lordships to be that Muttu Vaduga renounces for himself and each of his descendants all interest in the Palayapat either as the head or as a junior member of the joint family, whilst at the same time he reserved expressly the rights of the youngest brother, Chinna Sami. The effect, therefore, of the transaction, in their Lordships' opinion, was to make this particular estate the property of the two instead of the three brothers with, of course, all its incidents of impartibility and peculiar course of descent, and to do so as effectually as if in the case of an ordinary partition between the brother, on the one hand, and the two younger brothers on the other, a particular property had fallen to the lot of the two."

This construction seems to their Lordships to be strengthened rather than weakened by the subsequent clause as to the debts. He says, "As regards any debt contracted by me during the time that I was zemindar of the said Palayapat you shall have no concern at all therewith, but I shall myself be responsible for the same." That clause reads as if he wished to transmit the Palayapat, in which he had abandoned all interest, to his brothers, cleared of the debts incurred by himself as Polygar, whatever might have been their nature, and whether they were a charge upon the estate or not. Their Lordships see no great improbability in such a transaction. Muttu Vaduga believed himself to be, by a title not then disputed, the proprietor of the large and valuable estate of Shivagunga. He might therefore well be content to abandon in favor of his brothers all his interest in the comparatively inconsiderable sub-tenure of which, as zemindar of Shivagunga, he had become the superior landlord. That he should have done so and have afterwards lost Shivagunga was, no doubt, a misfortune for his family, and would be the greater subject of regret if the Polygarship of Padamattur now carried with it anything more than the right of disputing transactions which

were very possibly entered into by the parties in the *bond fide* belief that Dhorai Pandian had become sole owner of the estate ; as, if their Lordships' construction of the document is right, would have become upon the death of Chinna Sami without issue. But this unfortunate consequence cannot, in their Lordships' view, affect the construction of the document, which must be considered by the light of the circumstances as they existed at the time of its-execution.

Again, their Lordships may observe, their construction of the instrument is somewhat corroborated by what seems to have been the understanding of the family. It appears at page 71 of the Record that in the suit in which Muttu Vaduga's eldest son, Muttu Sami, and Chinna Sami were sued together for debts alleged to be a charge upon the Palayapat, both the first and the second defendants invoked the transaction of 1829, the first contending that as his father had transferred the estate to his brothers, the second and third defendants, he was no longer responsible for the debt; Muttu Sami, on the other hand, relying on the clause in the deed of 1829 by which Muttu Vaduga had agreed to take such debts upon himself.

Then again, in the cases that are found at pages 195 and 197 of the Record, in which Chinna Sami first, and afterwards his widow, were so ill advised as to raise the question of the partibility of Padamattur, the suits seem to have been brought against the representatives only of Muttu Sami, and the representatives of Muttu Vaduga are treated as having no interest in the matter. And, lastly, their Lordships' construction is in some degree further confirmed by the acquiescence of the plaintiff himself for nearly twelve years in the conveyances and transactions which he now seeks to impeach.

Their Lordships then have come to the conclusion that, as between the descendants of Muttu Vaduga and Dhorai Pandian, the Palayapat was the separate property of the latter; that on the death of Dhorai Pandian, his right, if he had any left undisposed of in the property, passed to his widow, notwithstanding the undivided *status* of the family; and that therefore the case was one to which the rule of succession affirmed in the Shivagunga case applies.

It follows therefore that their Lordships dissent from the finding of the two Indian Courts on the 9th issue, and hold that the plaintiff had no title to sue in the life of the widow of Dhorai Pandian. This being so, it is unnecessary to consider the other objection taken to the plaintiff's title. That objection involves considerations of some difficulty which perhaps could hardly be satisfactorily determined without further evidence as to the customary rule of succession to Padamattur.

Their Lordships will humbly advise Her Majesty to reverse the decrees of both the High Court and the Subordinate Court, and to dismiss the three suits, with costs, in both Courts. The appellants must also have their costs of the appeals; but in taxing those costs the Registrar must set off against the amount of costs payable by the respondents the taxed costs of the application to bring in fresh evidence, which were in any case to be borne by the appellants.

• The 12th March 1878.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Mortgage (by Conditional Sale)—Instalments—Compromise—Execution Sale—Interest (not awarded by Decree)—Damages—Concealment—Misrepresentation—Act IX of 1872 ss. 18, 20, 23—Act VIII of 1859 s. 249.

On Appeal from the Judicial Commissioner, Central Provinces.

Seth Gokuldass Gopuldass

versus

Murli and Zalim (heirs of Tarapat).

A mortgage by way of conditional sale on failure to pay by instalments, executed by way of compromise to save a village from sale in execution of a decree, included future interest on the amount decreed when the decree was silent as to future interest. The first Court held the mortgage invalid on the ground of concealment of facts and misrepresentation. On appeal the Commissioner was of opinion that there was no evidence of concealment, but that there was misrepresentation with regard to defendant's liability to interest under Definition 1 s. 18 of the Indian Contracts Act IX of 1872, and he held the contract illegal and void under cl. 2 s. 23 of that Act. On special appeal the Judicial Commissioner held that the deed was voidable under s. 20.

Held that the mortgage was not invalid upon any of the above grounds; but that there was a mistake of law on the part of the defendants in supposing that execution could be issued for future interest although not awarded by the decree; and that (except as to an addition to the amount for which the village was ordered to be sold in execution, which addition was disallowed as contrary to s. 249 Act VIII of 1859) the plaintiff had not gained any unconscionable advantage by the transaction, as there was nothing to prevent him from recovering by action as damages interest upon a judgment which could not be levied in execution.

Mr. Leith, Q.C., and Mr. Norton for Appellant.

No one for Respondents.

Sir Barnes Peacock delivered judgment as follows :—

This is an appeal from a decree of the Judicial Commissioner of the Central Provinces of India, in a suit instituted by the appellant against the respondents in the Court of the Deputy Commissioner of Jubbulpore, for the foreclosure of a mortgage.

The following are the circumstances under which the mortgage was executed :—On the 27th June 1859, the appellant obtained a decree in the Court of the Sudder Ameen of Jubbulpore against Tarapat Patel, malgoozar of Khairi, the father of the defendants, for the sum of Rs. 9,413 15 annas and 3 pie, being the balance of principal and interest due upon a bond executed by Tarapat and the costs of suit. The decree was silent as to the payment of future interest on the amount decreed. By the bond upon which the decree was obtained, it was expressly stipulated that interest should be paid at the rate of 1 per cent. a month.

Between the date of the decree and the 27th June 1865, the plaintiff endeavored on several occasions to obtain payment of the amount decreed, and did in fact realize portions of the amount under two several executions. It is unnecessary to enter into any details of the proceedings adopted by the plaintiff, or of the litigation which ensued upon them. It is sufficient to state that in their Lordships' opinion no laches can be imputed to the plaintiff in endeavoring to enforce the decree.

In February 1865, the plaintiff applied to the Court of the Deputy Commissioner of Jubbulpore, against the defendants and their father, Tarapat, for an attachment and sale of their rights in the village of Khairi in execution for the sum of Rs. 13,498 : 9 : 9 claimed to be due under the decree.

That sum included interest on the amount of the decree calculated up to the 14th October 1863, after giving credit for payments made on account. Upon that application the defendants and their father were ordered to be summoned, and upon their non-appearance an order was made on the 25th July 1865 for the attachment of their proprietary rights in the village, and for the sale thereof by public auction, after due notice, according to ss. 248 and 249 of Act VIII of 1859.

On the 3rd August, in the same year, orders were issued that the requisite notifications, according to s. 249, be issued, and that the sale of the right and interest of defendants in the village of Khairi should take place on the fortieth day from that date.

On the 4th, the present defendants presented a petition to the Deputy-

Commissioner praying to be relieved from liability for the plaintiff's claim, and that the attachment might be removed from the village. Upon that petition an order was passed refusing to alter the order already made, and stating that as the defendants had failed to appear on the date appointed for hearing, the case had been disposed of in their absence, the reason why they had absented themselves not having been explained. From that order they appealed to the Commissioner, and their appeal was rejected.

On the 18th September the mortgage upon which the suit was brought was executed. It was by conditional sale, and is set out at p. 40 of the Record, and is in the following words :—

"Seth Khusalchand and Gokuldass, of Jubbulpore, plaintiffs ; v. (1) Tarapat, (2) Murlidbar, (3) Zalim Singh, Patel, residents and malgoozars of the village Khairi, Pergunnah Patan, defendants.

"Claim.

"Execution of decree for Rs. 13,498 : 9 : 9.

"We, Tarapat, Murlidbar, and Zalim Singh, patels and residents of Mouzah Khairi, defendants, are the writers of this agreement.

"The plaintiffs above-named having taken out execution of a decree for the sum above-mentioned and applied for attachment and sale of the village Khairi, the 13th September 1865 was first appointed as the date for the sale of the village in accordance with orders from the Judicial Commissioner. Subsequently the 18th of the said month had been fixed as the date for sale, in liquidation of a sum of Rs. 16,498 : 9 : 8.

"We have now brought the plaintiffs to terms, and having gone into the accounts, we agree to pay plaintiffs as principal, interest, costs, and future interest on the decree, in all 19,000 Government Sica Rupees.

"Of this we have caused Rs. 5,000 to be paid by Naraindas and Raghoonath. This leaves a balance of 14,000 Government Rupees, which we agree to liquidate, paying no interest, by yearly instalments as detailed below, and until the liquidation of the whole amount due we hereby mortgage or conditionally sell the village in question, the condition being that in the event of our failing to pay any one of the instalments agreed upon the sale of the village shall become absolute ; we and our heirs would then forfeit all proprietary rights in the village, and such rights would be transferred to plaintiffs, to be thenceforward enjoyed by them and their descendants. Should, however, the failure on our part to pay the instalments in arrears be attributable to unfavorable seasons, etc., the said instalments will be payable next year, and will bear interest at 1 per cent.

"Should the payment in arrears be not made in the next year, along with the one due for that year, the sale of the village will be considered absolute. The terms of this deed of sale would be binding on our heirs and representatives also, and so long as the money due to plaintiffs remains unpaid, the village shall not be transferred by us to anyone else ; any such transfer, if made, shall be held to be illegal.

"We relinquish all claims to any money which the plaintiffs may have recovered at the time of the sale becoming absolute."

The details of the instalments were for the payment on the 15 Aghan-Sambat, 1922, corresponding with the year 1865, of the sum of Rs. 2,000, and on Jeth 15 in each of the following twenty years, of the sum of Rs. 600, making a total of Rs. 14,000.

On the same 18th September 1865, Tarapat, the father, each of the defendants, and the plaintiff respectively, made the following statements, viz. :—

"Tarapat, defendant, son of Mahadeo, caste Koormee, aged fifty years, malgoozar, resident of Khairi, states on solemn affirmation :—

"We have effected a settlement of his claim with the plaintiff by hypothecating our village, and fixing instalments for the liquidation of the same, and beg that our village be released from attachment." 18th September, 1865.

"Murlidbar, defendant, son of Tarapat, caste Koormee, aged twenty-eight years, resident of Khairi, malgoozar, states on solemn affirmation :—

"Having effected a settlement of his claim with the plaintiff by fixing instalments for its liquidation, I beg that the village be released from attachment. We have hypothecated our village as a guarantee for the liquidation of plaintiff's claim." 18th September, 1865.

"Zalim, defendant, son of Tarapat, caste Koormee, aged twenty-one years, resident of Khairi, malgoozar, states on solemn affirmation :—

"We have fixed instalments for the payment of the plaintiff's claim, and beg that our village be released from attachment. We have mortgaged our village to plaintiff." 18th September, 1865.

"Seth Khusalchand, son of Sawaram, aged sixty-two years, caste Maheshree, resident of Jubbal, and a mahajun by profession, states on solemn affirmation :—

"I have taken out execution of a decree against Tarapat, Murli, and Zalim, and their village was about to be sold. The defendants have, however, made an amicable arrangement for the liquidation of my claim by agreeing to pay instalments, which I have approved. I have no objections whatever, and I beg that the arrangements be sanctioned by the Court, and the village released from attachment. The defendants have hypothecated the village, and I wish that it should remain so hypothecated, and the case be struck off the file." 18th September, 1865."

The mortgage was on the same day presented by the defendants to the Extra Assistant Commissioner, who forwarded the case to the Court of the Deputy-Commissioner, who thereupon, on the 19th September 1865, ordered that the kistbundi be sanctioned and the case struck off the file as completely disposed of.

The defendants continued to pay the instalments under the mortgage up to 15 Jeth 1929, but failed to pay the instalments which fell due in Sambat 1930 and 1931, whereupon the plaintiff, on the 24th October 1874, filed his plaint and prayed for a decree for Rs. 7,800, the amount of the instalments remaining unpaid, with a proviso that in the event of the same not being paid up within one year, the rights and interests of the defendants and their deceased father in the village in question be transferred to plaintiff, the transaction being then considered as one of an absolute sale.

The defendants in their written statement alleged, amongst other things, that in June 1849 a money decree for Rs. 9,413 : 15 : 3 was passed against Tarapat, their father, and that future interest on the decree was not allowed; that the plaintiff, however, fraudulently went on executing the decree with interest, and eventually, in September 1865, induced Tarapat and the defendants to execute the deed sued on by dishonestly concealing the fact that future interest had not been decreed.

They also stated that they were ignorant people, and that they executed the deed under a mistake of fact, i.e., under the impression that future interest had been decreed as represented by the plaintiff; that at the time when the deed was executed only Rs. 3,798 : 4 : 9 was due under the decree, and that the defendants were minors at the time of the execution of the deed.

The plea of minority was found against the defendants, but the Deputy-Commissioner dismissed the plaintiff's suit with costs, upon the ground that the claim was based on an illegal contract. He held that even if the plaintiff had a right to demand the sum of Rs. 13,498 : 9 : 9 for which execution had been awarded, there was not sufficient explanation as to how that amount was increased to Rs. 16,498; and further that even if, as the plaintiff's Counsel had suggested, the plaintiff in making up the accounts with defendants added interest for the period from October 1863 to the day fixed for the sale of the village in execution, that alone was sufficient to vitiate the contract, for, in the view of the Deputy-Commissioner, it was evident that the plaintiff was well aware that he had no real claim to interest. But he went further, and held that the plaintiff was not entitled to any interest on the decree; that Rs. 4,820 only were due; and that the plaintiff, by concealment of facts regarding the amount due, and by misrepresentation of facts, as shown by the proceedings in the original case, and the application for execution for Rs. 3,000 in addition to the Rs. 13,498, were sufficient grounds for considering the transactions out of which the contract grew were unlawful.

Upon appeal, the Commissioner was of opinion that there was no sufficient evidence of concealment, but that there was misrepresentation with regard to defendant's liability to interest within the meaning of Definition 1 s. 18 of the Indian Contract Act No. IX of 1872. He further held that the bond was nothing more than a kistbundi; that no new consideration for it was given; that if the parties had arranged that effect should be given to it by the executing Court, it would have been pronounced invalid, as it altered the terms of the decree by the addition of interest, which could not be done even with consent of the parties.

He therefore held that the contract was illegal and void under cl. 2 s. 23 of the Indian Contract Act, and dismissed the appeal with costs.

A special appeal was preferred to the Judicial Commissioner, who dismissed it with costs, on the ground that the deed was voidable under s. 20 of the Indian Contract Act, inasmuch as both parties were under a mistake of fact essential to the agreement expressed in it. Their Lordships are of opinion that there was no sufficient evidence to prove a fraudulent misrepresentation or concealment of facts on the part of the plaintiff. There was, no doubt, a mistake of law on the part of the defendants in supposing that execution could be issued for interest upon the amount decreed from the date of the decree to the date of realization, no such interest having been awarded by the decree. But that mistake appears to have been common not only to the plaintiff and the defendants, but also to the Assistant-Commissioner by whom the order of the 25th July 1865 was made for the attachment and sale of the village in execution for the sum of Rs. 13,498 : 9 : 9. Indeed, until the Full-Bench ruling of the High Court of Bengal in September 1866, in the case of *Madosoodun Lall v. Bhukaree Singh*, reported in "6 Weekly Reporter," Miscellaneous Decisions, page 109, the principle of which was upheld by the Judicial Committee in the case of *Pillai v. Pillai* (2 Law Reports, Indian Appeals 219),* there were conflicting rulings upon the point whether interest upon a decree could be levied in execution when the decree was silent as to subsequent interest on the amount decreed.

In that uncertain state of the law, the defendants not having appeared to show cause, an order was in fact made for the attachment and sale of the village in execution for the sum of Rs. 13,498 : 9 : 9, which included interest on the decree. No appeal was preferred against that order, nor were any other proceedings adopted to set it aside. It remained in force up to the time of the mortgage, and the village had been actually attached and was liable to be sold under it if the compromise had not been effected and the mortgage executed. Their Lordships are of opinion that the mortgage was not invalid either upon the grounds stated by the Commissioner or upon that stated by the Judicial Commissioner. It appears to have been executed by way of compromise, after an examination of the accounts at which the father Tarapat was present; and it does not appear to their Lordships that, subject to what will hereafter be said as to a sum of Rs. 3,000, part of the money secured, the plaintiff gained any unconscionable advantage by the transaction; for although he was not strictly entitled to an execution for interest calculated for a period subsequent to the date of the decree, there seems to be no reason why he should not have recovered interest as damages in an action upon the decree if he and the Court which issued the attachment had not mistaken his remedy. It is not necessary to refer to the English decisions bearing upon the subject of recovering by action interest upon a judgment which cannot be levied by execution. In the case of *Pillai v. Pillai*, 2 Law Reports, Indian Appeals, p. 228, to which reference has already been made, the Judicial Committee, in reference to the question of levying interest upon a decree where the decree was silent as to future interest, stated expressly that questions of that nature might be raised by separate suit.

It may be remarked that the rate at which interest was calculated for the period between the execution of the mortgage and the times fixed for the payment of the instalments was extremely low. It appears, however, to have been assumed that the sum for which the village was liable to be sold in execution was not Rs. 13,498 : 9 : 8, but Rs. 16,498 : 9 : 8.

The recital in the mortgage is: "Subsequently the 18th of the said month had been fixed as the date for sale in liquidation of a sum of Rs. 16,498 : 9 : 8." As to this the Judicial Commissioner says, "In the first Court's judgment the larger sum of Rs. 16,498 : 9 : 9 is referred to as entered in one of the processes

* 24 W. R. 193; ante p. 190.

of execution, viz., 'the Notice of Sale,' but the extant record of proceedings nowhere mentions such a sum. If such a sum was ever entered in such a process it must apparently have been only through a clerical error." Although there does not appear to have been any wilful misrepresentation in this respect by the plaintiff, their Lordships are of opinion that there was no authority under s. 249 of Act VIII of 1859 for increasing the amount for which the village was ordered to be sold in execution from Rs. 13,498 to Rs. 16,498; that the addition has not been satisfactorily explained; and that the deed ought to be reformed by disallowing the additional sum of Rs. 3,000. This will reduce the sum secured by the mortgage by Rs. 3,000, and a proportionate part of the sum allowed for future interest during the period stipulated for payment by instalments, which may be taken in round numbers as together amounting to Rs. 3,480. Deducting Rs. 3,480, and the eight instalments of the Rs. 14,000 which have been paid, amounting to Rs. 6,200, from the total amount of Rs. 14,000 secured, there remains the sum of Rs. 4,320 to be paid by the defendants to the plaintiff in order to redeem the above-mentioned village.

Their Lordships will therefore humbly advise Her Majesty that the decrees of the three Lower Courts be reversed; that in the event of the defendants paying to the plaintiff the sum of Rs. 4,320, together with the costs of the plaintiff in the three Lower Courts, within one year from the time of the service upon them of notice of such Order of Her Majesty in Council as shall be made in this appeal, or in the event of their paying into the Court of the Deputy Commissioner of Jubbulpore within that period the said sum of Rs. 4,320, together with such costs as aforesaid for the use of the plaintiff, the said village should be freed and discharged from the said mortgage; but that in the event of the said sum of Rs. 4,320, together with such costs as aforesaid, not being paid to the plaintiff by defendants, or paid by them into the said Court for the use of the plaintiff within the period aforesaid, the said mortgage and conditional sale shall become absolute, and all the right, title, and interest of the defendants in the said village shall be transferred to and vested in the plaintiff; and in order that due notice of such Order in Council shall be given to the defendants their Lordships will further advise Her Majesty that the plaintiff be ordered to lodge the said decree of Her Majesty in Council in the Court of the Deputy Commissioner of Jubbulpore, in order that notice thereof may be given to the defendants in due course, and that the plaintiff do also deposit in the said Court such an amount as may be required to defray the costs of serving upon the defendants notice of the said Order.

Considering the peculiar circumstances of this case, and also the fact that the plaintiff has not succeeded to the full extent of his claim, their Lordships are of opinion that the respondents ought not to be ordered to pay the costs of this appeal.

The 13th April 1878.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Sheriff's Sale—Writ of Fi. Fa.—Ultra vires—Eviction of Purchaser—Recovery
of Purchase Money—Trespasser—Warranty of Title—
Caveat Emptor.*

*On Appeal from the High Court at Calcutta.**

* From the judgment of Sir R. Garth, C.J., and Markby, J.,—24 W. R. 372.

Dorab Ally Khan

versus

Abdool and Ahmedoollah, the Executors of Khajah Moheecooddeen, deceased.

The purchaser at a sale by the sheriff under a writ of *fi. fa.*, upon being evicted by the execution-debtor, can recover from the execution-creditor the purchase money which he has paid, if it should turn out that the sheriff had no authority to execute the writ at the place where the property was situate.

A sheriff who seizes property out of his jurisdiction is a trespasser, and in the position of an ordinary person who has sold that which he had no title to sell.

The rule of English law which bars a purchaser by private contract from recovering the purchase money, if evicted by a title to which the covenants do not extend, does not govern a case in which the sale, as regards the owner of the thing sold, is *in invitum* and made under color of legal process.

Nor can the rule of English law, as to implied warranty of title in chattels sold, and regarding the application of the maxim *caveat emptor*, be applied to a sale of goods by the sheriff under *fi. fa.*

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Appellant.

Mr. Cowie, Q.C., Mr. Doyne, and Mr. Graham for Respondents.

Sir James Colville gave judgment as follows :—

This is an appeal against a decree of the High Court of Calcutta, sitting as a Court of Appeal, which, on the 23rd August 1875, affirmed the judgment of Mr. Justice Phear, who, in the exercise of the original civil jurisdiction of the same Court had, on the 22nd April 1875, dismissed the appellant's suit with costs.

The suit was instituted in December 1872, by the appellant suing as executor of one Dianut-ut-Dowlah against Khajah Moheecooddeen, who died after leave to appeal had been given in India, and is represented by the present respondents. The case was tried in India upon only the first and preliminary issue, *viz.*, whether or not a good cause of action was disclosed in the plaint. It is, however, conceded that the statements in the plaint may be taken to be supplemented by, and to include any fact stated, or to be inferred by necessary, implication from the written statement of the plaintiff, or the documents annexed to and filed with either that or the plaint itself. These are the sheriff's bill of sale of the 9th October 1866; a petition of Dianut-ut-Dowlah to the Judicial Commissioner of Oudh and the order thereon; the will of Dianut-ut-Dowlah and the certificate granted to the plaintiff as the executor named therein; the writ of *fi. fa.*, dated the 18th June 1866; and the warrant of attorney to confess judgment in the action in which that writ was issued. For the trial of the issue which is in the nature of a trial on demurrer, the facts stated or to be implied as above mentioned must be taken to be true.

What, then, are those facts? Taken in chronological order, they are as follows :—In 1856, under the before-mentioned warrant of attorney, judgment was entered up in the late Supreme Court of Judicature at Fort William, at the suit of Khajah Moheecooddeen (the defendant in this action), and one Robert O'Dowda, who was only joined with him as co-plaintiff in order to give the Court jurisdiction, against Wazeer Khan and Khajah Abdoos Samut, for the purpose of securing the repayment of Company's Rs. 70,000, with interest, on the 23rd July 1856. In order to enforce this judgment against Khajah Abdoos Samut, and the representatives of Wazeer Khan, who was then dead, a writ of *fi. fa.* was, on the 18th June 1866, directed to the Sheriff of Calcutta, commanding him to cause "to be levied and made of the houses, lands, debts, and other effects, moveable and immoveable, of the said defendants, within the provinces, districts, or countries of Bengal, Behar, and Orissa, or in the province or district of Benares, or in any other factories, districts, and places which then were annexed to and made subject to the Presidency of Fort William in Bengal, by seizure, and if necessary by sale thereof," a certain sum therein mentioned. The plaintiff alleged that this writ did not legally authorize the levy of the sum in the writ mentioned by the seizure and sale of immoveable properties in Oudh,

but that nevertheless the sheriff, "by the authority of Khajah Moheooddeen, the execution creditor, and on the express instructions of his attorney, and professing to act under and by virtue of the said writ," on the 2nd and 20th days of August 1866, seized the right, title, and interest of Abdoos Samut and of Wazeer Khan, then in the hands of his heirs and representatives in a talook and premises within the Province of Oudh, and put the property so seized up for sale on the 4th October in the same year; that Dianut-ut-Dowlah became the purchaser of it for the sum of Rs. 26,000; and that the sheriff afterwards executed to him the bill of sale of the 9th October 1866, which is annexed to the plaint. He further alleged that before the execution of the bill of sale, Dianut-ut-Dowlah paid the purchase money to the sheriff, who, about the 12th October 1866, paid Rs. 5,000, part thereof, to the attorney of the plaintiffs in the suit; and on the 25th October 1867, paid the balance of the purchase money, less his poundage and charges, to Moheooddeen himself; that the sheriff, by his officer, put Dianut-ut-Dowlah into possession of the property, but that such delivery of possession was not legal or operative by the law then in force in Oudh, and that by that law the sale was wholly inoperative, and did not pass the right, title, and interest of the judgment debtors or of any other person to Dianut-ut-Dowlah; that afterwards and under some proceedings which took place in the Courts in Oudh (the nature whereof, except that they began with a proceeding instituted by Dianut-ut-Dowlah himself for a partition, does not very clearly appear), the sale was pronounced null and void, and that thereupon and in the month of August 1868, Dianut-ut-Dowlah was removed from possession of the talook and premises. The plaintiff then admitted that Dianut-ut-Dowlah, whilst in possession, had made collections to the amount of Rs. 10,937, but alleged that after payment of the Government revenue, collection and law charges, and other necessary outgoings, a balance of only Rs. 446 : 6 : 9 remained in his hands, and that such balance was the only profit, benefit, or advantage which he obtained from the purchase, and then, after stating the death of Dianut-ut-Dowlah on the 23rd June 1868, the title of the plaintiff as his executor, a demand by the plaintiff and a refusal by the defendant, the plaint goes on to say—"The plaintiff sues the defendant for the sum of Rs. 26,000 for moneys had and received by the defendant for the use of the said Dianut-ut-Dowlah."

Mr. Justice Phear, in the course of his judgment, made some attempt to support the regularity of the seizure and sale of the property under the writ of *fi. fa.* In their Lordships' opinion, the decree under appeal cannot be supported upon any such ground. The illegality of these proceedings is sufficiently alleged, and the objection to them is patent on the face of the plaint. The jurisdiction of the late Supreme Court, and of the sheriff as its officer, was originally limited by the Charter of Justice of 1774, to the Provinces of Bengal, Behar, and Orissa, and though afterwards extended by the 39 and 40 Geo. III., cap. 79, s. 20, was so extended only to the province or district of Benares, and to and over all such provinces and districts as might at any time thereafter be annexed to and made subject to the Presidency of Fort William. The writ of *fi. fa.*, which was the sheriff's authority for the seizure, was carefully framed in accordance with this definition of his jurisdiction. If, therefore, he seized property in any place which did not form part of, and had not been annexed to, the Presidency of Fort William, he was as much a trespasser as an English sheriff who had seized property out of his bailiwick would be. That the Province of Oudh was not, when first annexed to British India, or at the date of the execution, annexed to the Presidency of Fort William, if not one of those historical facts of which the Courts in India are bound under "The Indian Evidence Act 1872," to take judicial notice, was at least an issue to be tried in the cause.

The question to be determined was, however, correctly stated in the judgment of the High Court on the appeal. After stating that they must assume it as

established that the sheriff had no right to execute the writ upon property in Oudh, and also, though that was not so clearly stated in the plaint as it might be, that the result of the proceedings before the Commissioner of Oudh was that the sale was declared null and void, and that the plaintiff's testator was thereupon evicted from the property; the learned Judges said: "The question then arises, can the purchaser, at a sale by the sheriff under a writ of *fi. fa.*, upon being evicted by the execution debtor, recover the purchase money which he has paid from the execution creditor, if it should turn out that the sheriff had no authority to execute the writ at the place where the property was situate?" If that sentence had stood alone, their Lordships think it would have required to be modified by the addition of some such words as "and that he did so execute it under the authority, and by the express direction of the judgment creditor." They understand, however, that modification to be implied in the next sentence of the judgment, which is in these words:—"We are asked by the appellant to consider and decide the case upon the assumption that the sheriff in seizing, selling, and conveying the property, was the agent of the execution creditor; that the execution creditor was in fact the vendor, and as he had no right whatever to deal with or sell the property, there was a total failure of consideration, and that consequently the money paid to him for the purchase became money had and received to the use of the plaintiff's testator." This assumption seems to be amply justified by the eighth paragraph of the plaintiff's written statement at page 16 of the record, and the letter therein set forth. The question thus stated is novel, and not without difficulty.

Their Lordships propose to consider, first, whether in the circumstances stated the evicted purchaser can have any remedy against the execution creditor.

There is no doubt that the authorities cited in the judgment of the High Court, and relied upon at the Bar, establish the proposition which is thus stated by Lord St. Leonards at page 549 of the 14th edition of his work on Vendors and Purchasers: "If the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity." This general rule seems by the law of England to govern all sales by private contract between the parties either of a freehold or of a leasehold interest in land.

Does it, however, govern a case like the present, in which the sale, as regards the owner of the thing sold, is *in invitum*, and made under color of legal process? The chief reasons for the rule are that the purchaser by private contract has full means of investigating the title of the vendor, and of either satisfying himself that it is good, or of protecting himself against any apparent or latent defect in it by proper and apt covenants. If he fails to do either, his subsequent eviction is the result of his own negligence. But the purchaser at a sheriff's sale has at best very inadequate means of investigating the title of the judgment debtor; all that is sold and bought is the right, title, and interest of the judgment debtor with all its defects: and the sheriff who sells, and executes the bill of sale, is never called upon, and, if called upon, would refuse, to execute any covenant of title. Therefore, the reasons for the rule failing, the rule itself cannot properly be held applicable to sales by the sheriff, which are governed by rules peculiar to such sales.

Now it is, of course, perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment debtor, he has no remedy against either the sheriff or the judgment creditor. This, however, is because the sheriff is authorized by the writ to seize the property of the execution debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

The sheriff, however, if he acts *ultra vires* cannot invoke the protection which the law gives to him when acting within his jurisdiction. He is in the position of an ordinary person who has sold that which he had no title to sell. And it appears to their Lordships that his responsibility in respect of the sale must be governed by the law relating to the sale of chattels, rather than by that relating to the sale of real estate. There is not in India the difference between real and personal estate which obtains in England; and moveable and immoveable property are alike capable of being seized and sold under a writ of *fi. fa.*

The law of England as to implied warranty of title in chattels sold was until lately, if it is not still, in some uncertainty. The more modern cases are collected by Mr. Benjamin in his work on Sales, 2nd edition, page 511 *et seq.* In *Sims v. Marryat*, 17 Q. B. 281, Lord Campbell, when commenting on Mr. Baron Parke's judgment in *Morley v. Attenborough*, after saying that the law was not in a satisfactory state, observed: "It may be that the learned Baron is correct in saying that on a sale of personal property the maxim of *caveat emptor* does by the law of England apply, but if so, there are many exceptions stated in the judgment which well nigh eat up the rule."

One of the latest expositions of the law on this point is to be found in the case of *Eichholz v. Banister*, 34 "Law Journal," C. B. 105, and 17 C. B. N. S. 708, which was decided in 1864. In that case Chief Justice Erle is reported to have said: "I decide, in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirms that he is the owner, or by his conduct gives the purchaser to understand that he is such owner, then it forms part of the contract, and if it turns out in fact that he is not the owner the consideration fails, and the money so paid by the purchaser can be recovered back." This passage, it is to be observed, although contained in the report in the "Law Journal," is not to be found, *totidem verbis*, in the regular report. The actual decision, however, in which all the Judges concurred, was that on the sale of goods in an open shop or warehouse there is an implied warranty on the part of the seller that he is the owner of the goods, and if it turns out otherwise the buyer may recover back the price as money paid as on a consideration that has failed.

A rule of this kind cannot, of course, be applied to a sale of goods by the Sheriff under a *fi. fa.*, because what the sheriff professes to sell is only the right, title, and interest, whatever that may be, of the judgment debtor, and this was the express ground of the decision in *Chapman v. Spiller*, 14 Q. B. 621, where the case is treated as an exception to the general rule. It would seem, however, that, even according to the principles laid down in *Morley v. Attenborough*, 3 Exch. 500, which, of the modern cases, is the most favorable to the application of the maxim *caveat emptor*, the sheriff may reasonably be held to undertake by his conduct that he is acting within his jurisdiction. In that case, though it was decided that on the sale by a pawnbroker of an article pawned with him as an unredeemed pledge there is no implied warranty of the pawner's title, the judgment of Mr. Baron Parke seems to assume that the pawnbroker does warrant that the article has been pledged with him, and has become irredeemable. The learned Judge says: "In our judgment it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it." So too it may be inferred from *Hall v. Conder*, 2 C. B. N. S., page 22, that although upon the sale of a patent there is no implied warranty that the patent is valid and indefeasible, it would be reasonable to hold that there is an implied warranty that Letters Patent for the alleged invention have been regularly issued under the Great Seal. Their Lordships think that upon a similar principle the sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdic-

tion; although when he has jurisdiction he does not in any way warrant that the judgment debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment debtor.

In the present case the subject matter of the sale was the estate of the execution debtor, so that if the sheriff had had jurisdiction his conveyance would have passed the title. It was solely because he was acting beyond his territorial jurisdiction that the sale became inoperative, and wholly ineffectual. The High Court have assumed that if the defendant is to be treated as a principal in the transaction (and their Lordships think he ought to be so treated), the case must be governed by the ordinary rules relating to vendors and purchasers upon voluntary sales of immoveable property. This view does not appear to their Lordships to be correct. The defendant directed the sheriff to sell in his character of sheriff. He did not profess to sell, nor could he have sold, as for himself. He intended the sale should be, as in fact it was, a sale by the sheriff, as sheriff, and with the incidents attaching to such a sale. For the above reasons their Lordships are of opinion that the action cannot be properly determined without further investigation into the facts, as they cannot say that the plaint and the other documents on the Record do not disclose a *prima facie* case for some relief against the defendant.

There is, no doubt, a further question whether the plaintiff has shown a case which, if proved, would entitle him to recover back the purchase-money as money had and received to his use as upon a total failure of consideration. To that their Lordships think the admitted fact of the possession by his testator for nearly two years of the property in question, and his perception, partial at least, of the rents and profits, might be a fatal objection. It could not, in such case, be said that the consideration wholly failed. But it is not quite clear on the record that this objection arises, since if the sale has been treated as a nullity, the purchaser has been accountable, and may have accounted, for what he received; and in any case the Court in India will be competent to mould the relief according to the facts finally established at the hearing. Their Lordships, of course, offer no opinion whether the plaintiff will ultimately succeed in establishing his right to any relief. It may turn out that his testator, who never made any claim for a return of the purchase-money in his lifetime, bought with knowledge of the defect in the sheriff's jurisdiction, or has, by acquiescence or in some other way, forfeited any right which he might otherwise have had to relief. They only decide that the plaintiff has not wholly failed to disclose a good cause of action on the face of the record; and that the cause ought to be tried upon the other issues that have been, or may be, raised in it. And they will accordingly advise Her Majesty to reverse the two decrees of the High Court, and to remand the cause for trial upon any other issues settled or to be settled in the suit. They think that the costs of both parties to this appeal should be taxed, and a certificate of their amount sent to the High Court, in order that they may hereafter be dealt with by that Court as costs in the cause.

The 13th April 1878.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Conversion of Timber—Damages (Principle of Estimating)—Obstruction by
Agent—Liability of Principal—Authority of Agent.*

On Appeal from the Court of the Recorder of Rangoon.

Nos. 96 of 1872 and 44 of 1873.

Bombay Burmah Trading Corporation, Limited

versus

Mirza Mahomed Ally Sherazee and the Burmah Company, Limited,
and

Cross Appeals in the same suits.

In a suit for damages for conversion by the defendants of certain logs of timber belonging to the plaintiff, the principle of estimating the damages adopted was not only to take the value of the logs at the place where the principal, if not the only, market for them existed, as the basis of the calculation ; but to deduct from the price at which the plaintiff could have there sold them, what it would have cost him to bring them to the market.

In a suit for damages for the obstruction by the defendants' agent of the plaintiff in the exercise of his alleged right to remove timber from certain forests in Burmah, it was held that the acts complained of could not be treated as the wrongful acts of a servant or agent committed in the course of his service, for the plain reason that it was not shown at the time in question the alleged agent was a servant or agent for the purpose of working in the forest on behalf of the defendants, or of doing any class of acts analogous to those complained of, nor was there any proof of the defendants having ever knowingly adopted or ratified those acts, or indeed of the acts having been committed for their benefit.

Mr. Butt, Q.C., Mr. W. G. Harrison, Q.C., and Mr. Doyne for Appellants.

Mr. Benjamin, Q.C., Mr. Cowie, Q.C., and Mr. John Elms for Respondents.

Sir Robert Collier gave judgment as follows:—

These are appeals and cross appeals from judgments of the Recorder of Rangoon in two suits, in which Mirza Mahomed Ally, together with a company called the Burmah Company, Limited, were plaintiffs. The Burmah Company, being merely put upon the record as assignees of the plaintiff's right of action, need not be further referred to. The defendants in both cases were the Bombay and Burmah Trading Corporation. The first action was brought to recover damages for the conversion by the defendants of a large quantity of logs of timber belonging to the plaintiff, the second to recover damages for the obstruction by the defendants of the plaintiff in the exercise of his alleged right to remove timber from certain forests in Burmah. The Recorder gave judgment for the plaintiff in both suits.

The case of the plaintiff may be stated in outline thus. He was what may be called a middle-man between the foresters in the woods of Burmah and the merchants of Rangoon who bought the timber felled. In the year 1867 he had a right, obtained from the Burmese Government, to fell or otherwise possess himself of timber in a certain forest known as the Ningyan forest belonging to the King of Burmah, and to take the timber by water to Rangoon. In that year two other persons, who may be also called middle-men, named Darwood and Goldenberg, had a concurrent right to obtain and export timber. In the summer of that year Darwood and Goldenberg succeeded in obtaining from the Burmese Government a monopoly of the right to export timber from the Ningyam forest, lasting for four years. The grant was dated on the 15th July 1867, but was not to come into operation until November of that year. In obtaining that grant Darwood and Goldenberg acted as agents of the defendants. The plaintiff's case is that between the date of the grant and the time when it came into operation, he was possessed

of a large quantity of logs of timber, in all about five thousand, part of which he had felled, part of which he had bought, and that he would have been able to take these logs by water to Rangoon during that interval, in which it was permitted to him and other foresters to take away their timber, but that he was forcibly prevented from doing this by Darwood, who acted as an agent of the defendants. He further goes on to show that in the next year 1868 he actually found in the possession of the defendants, at a place called Tounghoo, an intermediate station between the Ningyan Forest and Rangoon, a large quantity of logs, 1,241 in number, which belonged to him. They are alleged to have been discovered in the year 1868 in the possession, at Tounghoo, of a Mr. Petley, an agent of the defendants. The plaintiff brings his first action to recover damages for the conversion by the company of the logs found at Tounghoo in Petley's possession. He brings his second action to recover damages in respect of the injury he has sustained by being prevented by Darwood in August or September 1865, from removing the remainder of the logs to which he was entitled. These logs, after deducting such as had by some means come into his possession, he alleges to be in number 1,873.

Such is a short outline of the plaintiff's case. Their Lordships do not propose to review the evidence in detail, a task which was very carefully and laboriously performed by the learned Recorder. They cannot help observing, however, with respect to the evidence in general, that it appears to them of a loose, confused, and enbrangled character, and that the plaintiff cannot be regarded as a satisfactory witness, inasmuch as he has been convicted of perjury.

It now becomes necessary to deal with the two actions separately.

In the first action the plaintiff, as before observed, claimed damages for the conversion of 1,241 logs. The learned Judge has found that 1,041 of his logs were converted by the defendants, and has given as damages the full value of each of those logs at Rangoon, which he estimates at Rs. 50. Undoubtedly, in this case there is evidence, which if believed would justify the learned Judge in his finding for the plaintiff, that a large quantity of his logs were in the possession of the defendants. The plaintiff produces a list which is sworn by a person whom he employed to have been made out from memoranda taken from personal observation of logs which he found in Petley's possession in 1868, bearing the plaintiff's property marks, though not his delivery marks. The number of the logs in that list is 1,187. There is some further evidence of the same kind respecting a lot of 11 logs. It is contended for the respondents that this list is to a certain degree confirmed by another list which was put in and sworn to by another witness, of 981 logs, which are alleged to have been found in the same summer and autumn in the possession of Darwood in the creeks at Ningyan. There is also some evidence of Darwood having taken possession of about 1,000 logs of timber in the forest. Their Lordships are not insensible to the weight of several observations which have been addressed to them by the Counsel for the appellants impugning the genuineness of these documents, and the general truthfulness of the plaintiff's case, not the least weighty of which was that the plaintiff brought actions in 1869 for some far smaller lots of timber which, according to his own showing, came down the river to Tounghoo after the large lot for which he brought his present action in 1872, and that he appears to have demanded this lot for the first time shortly before he brought his action. But after giving due weight to this and other objections which have been made to the whole of the plaintiff's case, their Lordships have come to the conclusion that whatever view they might have taken of the case had it come before them as a Court of First Instance, it has not been sufficiently established that the learned Recorder, who considered the evidence with great care, was wrong in coming to the conclusion of fact that the defendants had in their possession a large quantity of logs belonging to the plaintiff.

Their Lordships, therefore, are not prepared to reverse his finding, that the

defendants had in 1868 a large quantity of logs of the plaintiffs in their possession, nor are they satisfied that his computation of the number of those logs was wrong. But they are of opinion that he has somewhat erred in his estimation of the damages. He appears to have treated the case as what, in language familiar in Westminster Hall a few years ago, was called an action of detinue, in which the plaintiff sought to recover a specific chattel which the defendant detained from him, and in which the judgment was that the defendant do deliver the chattel or pay the value of it. But this is neither in form nor in substance such an action, but more resembles what used to be called an action of trover. The subject-matter of the action is timber, an ordinary article of commerce, which, according to the evidence of the usage of trade is disposed of in the same year in which it arrives at Rangoon, either by sale or by being cut up, or in various ways. This the plaintiff must have perfectly well known, and he could not, and indeed he does not profess to, claim four years afterwards the restitution of the particular logs which were found in 1868 at Tounghoo. His claim is to the damages which he has sustained by the conversion of the logs by the defendants at Tounghoo at that date. It may be right indeed to take the value of the logs at Rangoon, where the principal if not the only market for them existed, as the basis of the calculation; but from the price at which the plaintiff could have there sold them must be deducted what it would have cost him to bring them to the market. This principle of estimating the damages is in accordance with the case of *Morgan v. Powell* (3 Queen's Bench Reports), and with other cases with which English lawyers are familiar. It has been found by the learned Judge upon the evidence that Rs. 4 a log would be the cost of conveying logs from Tounghoo to Rangoon. There is no direct evidence of what the cost of conveying logs from Ningyan to Tounghoo would be; but the distance is said to be about three days' journey, and the price of logs at Tounghoo is more than double the price of logs in the forest, a difference which must in some degree be composed of the cost of conveyance.

On the whole their Lordships are of opinion that they will be doing no injustice to the plaintiff if they assume the cost of conveying timber from Ningyan to Tounghoo to be as much as that of conveying it from Tounghoo to Rangoon. They think, therefore, that the sum of Rs. 8 per log should be deducted from the selling price at Rangoon. As some evidence was given of the price which the Recorder adopts, viz., Rs. 50 per log, they adopt his finding on this point. They are therefore of opinion that from the Rs. 52,050 which have been given to the plaintiff, Rs. 8,328 should be deducted, leaving a balance of Rs. 43,722.

The next action gives rise to different considerations. It was originally an action for conversion of logs, but the amended plaint alleges in substance that the defendants obstructed the plaintiff's right of ingress and egress to the forest, and his right of obtaining and removing timber therefrom, whereby he suffered the damage complained of. It is not necessary further to advert to a question of limitation which was disposed of during the argument; but a more formidable objection to the maintenance of the action has to be dealt with, viz., that the defendants are not responsible for the wrongful acts of Darwood in August or September 1867, assuming them to be proved; whether or not the Recorder was right in finding that they were proved it becomes immaterial to decide, in the view which their Lordships take of the case.

It was contended on behalf of the respondents, that Darwood was the agent of the defendants, and that the defendants are responsible for those acts. That view was endeavored to be supported by reference to the case of *Mackay v. The Commercial Bank of New Brunswick* (5 Law Reports, Privy Council), in which the rule was laid down as to the principles which regulate the liability of a master for the acts of an agent done without his express authority, but still within the scope of the authority of the agent. Some expressions of Mr. Justice Willes, in the

case of *Barwick v. The English Joint Stock Bank*, referred to in the judgment of this board, were especially relied upon, and appear to contain as clear an exposition of the law upon this subject as is anywhere to be found. They are as follows :—"With respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit ;" and the learned Judge goes on further, with reference to what may be deemed the course of the service, to observe, "In all these cases, it may be said, as it was said here, that the master had not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." It has been contended on the part of the respondents, that although there is no evidence of the defendants authorising the particular acts of violent obstruction of Darwood complained of, still that inasmuch as the defendants put Darwood in a position to do that class of acts, and they were done for the defendants' benefit, they are responsible for them, upon the principle laid down in the cases just referred to.

It now becomes necessary to refer to what evidence there is of Darwood's authority. On the 28th March 1867 we have an agreement put in between Darwood and Goldenberg and the Company, defendants, whereby Darwood and Goldenberg agree to sell to the Company, and the Company to purchase, the logs which Darwood and Goldenberg cut. That document establishes the relation of vendor and purchaser only, and not that of master and servant or principal and agent. The next material fact is that on the 15th July 1867 Darwood obtained a grant of the monopoly for four years, in obtaining which he must be taken to have been the agent of the defendants, but that monopoly was not to take effect until the November following. Then follows an agreement in February 1868, wherein Darwood and Goldenberg agree to assign over the lease or grant which they had obtained in their own names to the Company, and to work for them from that time at certain rates. Undoubtedly this document creates as between Darwood and the Company the relation of employer and employed. It may be that this relation existed before, and that the document only embodied the terms under which Darwood and Goldenberg acted for the Company in November 1867, when the monopoly which was obtained in Darwood's and Goldenberg's names was really exercised on behalf of the Company. But their Lordships are unable to find any proof that before November Darwood (Goldenberg may be thrown aside as he was not in the forest) can be considered as having acted as the servant or agent of the Company. Until the lease of July 15th, giving the monopoly, took effect on the 1st November, it would appear that the relation created by the agreement of March 1867 of vendor and purchaser continued ; it is certainly not shown that any relation other than that of vendor and purchaser existed between the defendants and Darwood up to November 1867, except that of agent to procure the lease in the previous July, but an agency to procure this lease is a totally different thing from an agency to work the forest on behalf of the Company.

In this view, taking the exposition of the law of Mr. Justice Willes, which has been quoted, their Lordships are of opinion that the acts of Darwood cannot be treated as the wrongful acts of a servant or agent committed in the course of his service, for the plain reason that at that time it is not shown that Darwood was a servant or an agent for the purpose of working in the forest on the behalf of the Company, or of doing any class of acts analogous to those complained of. It may be added that there is no proof of the defendants having ever knowingly

adopted or ratified those acts, or indeed of the acts having been committed for their benefit.

This being so, their Lordships are of opinion that the second action fails altogether.

They will therefore humbly advise Her Majesty that in the first action the judgment be varied by reducing it from the sum of Rs. 52,050 to Rs. 43,722; that the costs of the appeal be borne respectively by each party; but that the cross appeal be dismissed with costs. In the second action they will humbly advise Her Majesty that the judgment appealed against be reversed and the suit dismissed, and that the appellants have their costs in the Court below and of this appeal, and that the cross appeal be dismissed with costs.

The 13th April 1878.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Hindoo Law—Jains—Customs and Usages—Adoption (by Widow)—Act VIII of 1859 s. 15—Declaratory Decree—Consequential Relief—Cancellation—Injunction—Intervention in Settlement Proceeding—Setting up Fictitious Nuncupative Will—Practice (Parties)—Co-Plaintiff—Remodelling of Suit.

On Appeal from the High Court at Allahabad.

Sheo Singh Rai

versus

Mussuniat Dakho and Moorari Lall.

The right of Jains to be governed by their own peculiar customs and usages, when they are, by sufficient evidence, capable of being ascertained and defined, and are not open to objection, on the ground of public policy or otherwise, was admitted in the case of an adoption made by a widow of her grandson without any authority expressly derived from her deceased husband and without the consent of his kindred, which adoption would be invalid by ordinary Hindoo law.

The question whether a right to some consequential relief exists must arise in all suits in which a declaration of title is sought under s. 15 Act VIII of 1859.

A right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstruction, would be sufficient to sustain a declaratory decree.

The intervention of defendant in the proceedings of the Settlement Officer, and the former's objection to the entry on the wajibulur (or village administration paper) of the widow's adopted son as her successor to the mouzah in question on the ground that the adoption was illegal, is an act of obstruction against which relief may be granted if it is shown (which was not in this case) that the entry thus objected to was necessary to the settlement of the mouzah, or the completion of the title, or the right to present possession.

The setting up by the defendant of a fictitious will (whether oral or written) may be a ground for claiming a cancellation of the document.

Quere.—Whether, where relief against this will was not one of the objects of the original suit by the widow, and the adopted son was afterwards made a co-plaintiff, the suit ought not, for the purpose of such claim, to be considered as a new suit; and whether, the defendant having before that time put forward the claim and persisted in it to the end, relief might not, if asked for, have been granted against it.

Mr. Doyne and Mr. Raikes for Appellant.

Mr. Cowie, Q.C., and Mr. Cowell for Respondent.

Sir Montague Smith gave judgment as follows :—

This is an appeal from a judgment of the High Court of the North-West

Provinces, which substantially affirmed a decree of the Subordinate Judge of Meerut.

The suit was originally brought by the respondent, Mussumat Dakho, the sonless widow of Ishq Lall, in her own name; Moorari Lall, her daughter's son, whom she had adopted, being afterwards added as co-plaintiff. The defendant (the appellant) was a younger brother of Ishq Lall.

The family were Saraogi Agarwalas, one of the divisions of the sect of Jains, whose laws and customs with regard to a widow's estate and her power of adoption differ, as the respondents allege, from the ordinary law by which Hindoos are governed. This difference gives rise to the principal questions to be decided in the present suit.

Ishq Lall died in 1867. He left considerable property, including Government notes to the value of upwards of five lakhs of rupees. The widow took out the certificate of administration of his estate, and obtained possession of it.

It is admitted that the adoption by the Mussumat of her grandson was made without any authority expressly derived from her deceased husband, and without the consent of his kindred—an adoption, therefore, which on that ground, as well as by reason of the relationship of the parties, would be invalid by ordinary Hindoo law.

The immediate occasion of the suit arose in the following manner:—Ishq Lall, who had been an army contractor, received from the Government as a reward for services rendered during the mutiny a grant for his life of the zemindary of Mouzah Nabali, in Pergunnah Baghpat, an estate to which Government had acquired title by forfeiture. After his death the Government offered to sell the mouzah to his widow, and she purchased it at the price of Rs. 6,206. It has been assumed that the purchase-money was paid out of the proceeds of her deceased husband's estate. It appears that whilst making up the wajibulurz (a document called by the Subordinate Judge "the village administration paper"), the Settlement Officer called upon the widow to name her successor to the mouzah, with a view to enter the name in this paper; and that in answer to this requisition, she requested that the name of Moorari Lall should be recorded as her adopted son and successor. The appellant objected to this being done, and the Settlement Officer thereupon ordered the following special entry to be made in the wajibulurz:—

"Para. IX. Regarding special tribes and customs of adoption, second marriage, or succession.

"Mussumat Dakho desired that Moorari Lall, her daughter's son, whom she adopted, should succeed her after her death. But Sheo Singh Rai, the younger brother of her husband, on hearing this, objected that it is illegal that an adoption should take place without the permission of the husband's near relations. The Settlement Officer therefore passed the following Order on the 15th July 1871:— 'The parties may get this point decided by the Civil Court, and all points of this paragraph shall be decided by order of the Civil Court.'"

Both the Courts in India have stated that the Settlement Officer, in calling upon the Mussumat to name her successor, acted in excess of his powers. It has not been shown what is the precise object of the wajibulurz, nor what are the regulations or orders under which it is made. The reference to "Paragraph IX. Regarding special tribes and customs of adoption, second marriage, or succession," seems to indicate that when these special customs are found to exist, it is desired that they should be recorded for the information of the Settlement authorities. The Settlement Officer directed that the order he had made for the above entry should be communicated to the Mussumat by the tehseeldar, and that she should be advised to have the question of adoption settled by the Civil Court.

The present suit was thereupon brought; and, in consequence of an objection which has been taken to its maintenance, as being a declaratory suit only, it will be necessary to advert to the proceedings in it.

The plaint (the widow being sole plaintiff) asserts in a general and somewhat informal manner her claim to be maintained in possession "by establishment of plaintiff's exclusive right of inheritance to the estate of her husband, composed of the mouzah above described, and to uphold the adoption of Moorari Lall, plaintiff's daughter's son, as well as his right permanently to succeed her after her death, by voiding the defendant's pretensions, under the usages and customs of the Saraogi religion." It then alleges that the defendant, during the progress of the late settlement, raised the objection that the widow cannot, unless with the consent of the relations of the family, make an adoption, and that the plaintiff was referred to the Court by the Settlement Department.

The defendant, in his written statement, after objecting to the suit on the grounds that the adopted son was not made a party to it, that the entry in the *wajibulurz* did not give a cause of action, and that the suit was unnecessary and premature, stated his defence on the merits as follows :—

"3rd. The law of inheritance applicable to the Jains is nothing different from the *Shastras*. They are all subject to the common Hindoo law. Therefore, both according to law and custom, the adoption of a daughter's son is invalid; moreover, the custom of adoption is not universally recognised among the people of this sect.

"4th. Among the Jains, a widow is not competent of herself to adopt a son, unless with the permission of her husband or the consent of the near heirs.

"5th. The plaintiff, as heiress of her husband, possesses only a limited interest. Her right is not permanent, and she has no power to alienate the property. The defendant, the brother of the deceased, is, under the *Shastras* as well as a verbal declaration of Ishq Lal, the owner and possessor of the whole of his estate. The plaintiff only possesses a portion of the property by way of maintenance for her life. She will hold it as long as she lives, and then the defendant will be entitled to it as reversioner."

Evidence having been taken respecting the customs and tenets of the Saraogi Agarwala Jains, the Subordinate Judge, without specifically deciding upon these customs, dismissed the suit on the ground that the plaintiff, by adopting a son who, upon adoption, would become, if his adoption were valid, heir to his father, "had raised a barrier" to her own claim of absolute right. Upon appeal to the High Court, the Judges were of opinion that the Subordinate Judge had not sufficiently inquired into and ascertained the special customs of the Jains, and that he was wrong in dismissing the suit. The Court, therefore, remanded the suit under s. 351, Civil Procedure Code, and directed that an opportunity should be given for making the adopted son a party to the suit.

The following passage of the judgment contains the view of the Court with regard to the nature and scope of the enquiry to be made by the Subordinate Judge :—

"We are invited by the pleaders of the parties in this Court to give directions to the Court below on the questions of Jain law which are raised in this suit.

"The Jains have no written law of inheritance. Their law on the subject can be ascertained only by investigating the customs which prevail among them; and for the ascertainment of those customs we think the Court below would exercise a wise discretion if it issued commissions for the examination of the leading members of the Jain community in the places in which they are said to be numerous and respectable, *viz.*, Delhi, Muttra, and Benares. The questions to be addressed to these gentlemen would be the following :—

"What interest does the widow take under Jain law in the moveable and immoveable property of her deceased husband? and does her interest differ in respect of the self-acquired property and the ancestral property of her husband? Is a widow under Jain law entitled to adopt a son without having received authority from her husband, and without the consent of her husband's brother?

May a widow adopt the son of her daughter? By the adoption of a son, does the adopted son succeed as the heir of the widow or as the heir of her deceased husband?

"Has the adoption of a son by a widow any effect, and (if any) what effect in limiting the interest which she takes in her husband's estate? And if the Subordinate Judge considers that the verbal gift which the respondent alleges is established by proof, he might further enquire whether such a gift is valid as against the widow?"

Upon the suit being thus remanded, Moorari Lall, the adopted son, was made a co-plaintiff, the Mussumat being appointed his guardian.

Commissions to take evidence as to the customs of the Saraogi Agarwala Jains, were then issued to Delhi, Jeypore, Muthra, and Benares, and several leading members of that division of the Jain community were examined under them at each of these places. The Subordinate Judge has thus summarised their evidence:—

"With the exception of one from Delhi, the others unanimously declare that, in the absence of any son, a Jain widow succeeds to the estate of her husband, moveable and immoveable, in absolute right. 2nd. That she can deal with it at pleasure and without restriction. 3rd. That she can adopt her daughter's son, without requiring any consent or authority from her deceased husband, or relatives of such deceased husband; and that such adopted son would succeed to her deceased husband's estate in the same manner as her own begotten son would have done, with a slight restriction. 4th. That a nuncupative will by her husband would not be valid as against her; but this last point does not at all bear on the case, seeing that there is no evidence as to any such will having been pronounced."

The Subordinate Judge then made a decree in favor of the plaintiff in the following terms:—

"That the plaintiff is entitled to a decree to be maintained in possession of the zemindary property in question, on the ground of her exclusive and absolute right thereto as heir of her husband, and for a declaration of the validity of the adoption made by her, and of the right of her adopted grandson by her daughter, there being nothing to prevent his succession to the estate."

The defendant again appealed to the High Court, one of his grounds of appeal being that the witnesses, except at Jeypore, had not been examined on oath. Another ground was, "That the finding of the Subordinate Judge as to there being no evidence regarding the nuncupative will by the deceased husband of the plaintiff in favor of the appellant was incorrect."

On this appeal coming on to be heard, the Judges of the High Court held that the evidence objected to had been irregularly taken, and being of opinion that it would not be proper to decide the important questions of Jain law involved in the case upon the evidence of the Jeypore witnesses alone, they determined, before finally disposing of the appeal, to issue fresh commissions from their own Court to Delhi, Muthra, and Benares. These commissions were accordingly issued, and under them the original and new witnesses were examined, whose testimony was given at greater length than on the first occasion.

Upon the return of these commissions, the cause was finally heard by the High Court, and the judgment now under appeal pronounced. It contains the following general account of the history and religious tenets of the Jains:—

"The parties are Saraogi Agarwalas, one of the numerous subdivisions of the sect of the Jains. What little is known of the history of that sect is to be found collected in the learned judgment of the Chief Justice of Bombay in *Bhugwan Dass Tejmal v. Ragial* (10 Bombay, H. C. R., 241). For upwards of eleven and twelve centuries they have seceded from the creed of the Vedas, and their religious tenets have more affinity with the precepts of the Buddhists than with those of the Brahmins. They recognise the caste system of the Brahminical Hindoos, and in such ceremonies as they retain, generally avail themselves of the assistance of a Brahmin.

"They differ particularly from the Brahminical Hindoos in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of his progenitor, and, consequently, adoption is a merely temporal arrangement and has no spiritual object."

The Judges then proceed to an elaborate review of the decisions in India in which the laws and customs of the Jains have been considered. It appears to have been contended before them, to use the words of the Court, "that the applicability to Jains of the laws of the Brahminical Hindoos, or what is generally termed Hindoo law, had been established by so many rulings that the Court was bound to apply it to this case;" and further, that no uniform and consistent body of customs and usages existed among the Jains which would enable the Court to affirm that the general law was modified by them. It certainly appears that in most of the decisions referred to by the Judges, the Courts had held that there was no sufficient proof of the existence of special customs among the Jains to displace or modify the general law, though in others, where sufficient proof of special customs appeared, effect had been given to them. Their review of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the Jains might be governed, as to some matters, by special laws and usages, and that where these were satisfactorily proved, effect ought to be given to them. The learned Counsel for the appellant, who argued the case at their Lordships' bar, felt himself unable to dispute the correctness of this conclusion.

It would certainly have been remarkable if it had appeared that in India, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed to usages and customs differing from the ordinary law, whether Hindoo or Mahomedan, the Courts had denied to the large and wealthy communities existing among the Jains, the privilege of being governed by their own peculiar laws and customs, when those laws and customs were, by sufficient evidence, capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise.

It no doubt appears from the judgment of the High Court of Bombay delivered by Westropp, Chief Justice, in *Bhagvandas Tejmal v. Raginal* (10 Bombay H. C. R. 241) that the Judges of that Court were not satisfied that in the Presidency of Bombay usages had been established to exist among the Jains at variance with ordinary Hindoo law. "Hitherto," they say, "so far as we can discover, none but ordinary Hindoo law has been ever administered either in this Island, or in this Presidency, to persons of the Jaina sect." This view was expressed by the Judges after considering and commenting upon several extracts from historical and text writers. They also remark upon the impolicy of introducing departures from the general law. Their Lordships, however, do not understand the Judges to say that customs having such an effect may not lawfully be given effect to, if established by sufficient evidence. On the contrary, their judgment contains this passage:—

"But when amongst Hindoos (and Jains are Hindoo dissenters) some custom different from the normal Hindoo law of the country in which the property is located and the parties resident is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence."

Reference was also made to the observations of this Board respecting the proof required to establish customs in the case of *Ramalakshmi Ammal v. Sivanatha Perumal* (14 Moore, I. A. 585).*

The facts in the case before the High Court of Bombay were, that after the death of both husband and wife, the brothers of the deceased husband, with the

consent of the Pūneh, chose a nephew of the husband, to be his son by adoption. The evidence given in support of such a custom of adoption was slight, and the Court held that it was not sufficiently proved. It is said in the judgment, "Not a single yati, or pundit, or priest, or other expert, either in the lore of the Jainas or of the Brahmins, has been called to prove the alleged custom." Undoubtedly such a custom being, as the Judges point out, opposed to the spirit of the Hindoo law of adoption, would require strong evidence for its support, and such evidence appears to have been wholly wanting in that case.

In the present case their Lordships consider that the Judges of the High Court were right in thinking that their decision should be governed by the evidence taken in this suit.

This evidence, particularly that taken at Delhi, is entitled to great weight, having regard both to the *status* of the witnesses, and to the consistent manner in which they describe the custom. It is stated in the judgment below that "Delhi is the chief seat of the Jains in the North-West of India, and is the adjoining district to that in which the property is situate."

The manner in which the witnesses were called together to be examined, and their position in the Jain community, are thus described in the judgment:—

"The Commissioner reports that on receipt of the Court's commission, he called upon the Deputy Commissioner to furnish him with a list of the names of the principal members of the Jain community residing in Delhi; that out of 125 persons whose names were so furnished, he selected twenty-six persons, whom he summoned to attend his Court, and that of the twenty-six he examined six, of whom two, Zora Mul and Ghyan Chund, were elders of the Council of the sect at Delhi, appointed to determine all questions of religious and social importance arising in the sect, while the other four persons selected were all of a rank that entitled them to admission to the Lieutenant-Governor's durbar. Of these also, one Buldeo Singh, deposed he was a member of the Council before-mentioned. Furthermore, the Commissioner, at the instance of the appellant, took the evidence of two others out of the 26 persons summoned. As all the witnesses so selected by the Commissioner must be presumed to have been impartial, and as either party was at liberty by the terms of the Commission to produce any witnesses he desired should be examined, and the appellant availed himself of this privilege only so far as to examine two of the witnesses summoned by the Commissioner, it is hardly going too far to say that no better parol evidence could be obtained than was taken under the Delhi Commission."

Their Lordships are relieved from an examination of this evidence in detail, since the learned Counsel for the appellant felt constrained to admit that the conclusions drawn from it by the Court were in the main correct.

These findings are thus stated in the judgment, and their Lordships entirely concur in them:—

"Contrasting this evidence with that given by the independent witnesses examined under the several Commissions, and having regard to the position which several of the Delhi witnesses hold as expounders of the law of the sect, it cannot be doubted that the weight of evidence greatly preponderates in favor of the respondents. It appears to us, that so far as usage in this country ordinarily admits of proof, it has been established that a sonless widow of a Saraogi Agarwala takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindoo law to the widows of orthodox Hindoos; that she takes an absolute interest, at least in the self-acquired property of her husband (and as we have said, it is not necessary for us to go further in this suit, for the property in suit was purchased by the widow out of self-acquired property of her husband); that she enjoys the right of adoption without the permission of her husband or the consent of his heirs; that a daughter's son may be adopted, and on adoption takes the place of a begotten son. It also appears proved by the

more reliable evidence, that on adoption the estate taken by the widow passes to the son as proprietor, she retaining a right to the guardianship of the adopted son and the management of the property during his minority, and also a right to receive during her life maintenance proportionate to the extent of the property and the social position of the family."

The Court adds :—

"We do not, however, desire to be understood as ruling this point in this suit for the widow, and the adopted son has not been separately represented at the Bar, and we have not had the benefit of such assistance from the Bar on this point as on the other issues, there being at present no contest between the widow and the adopted son as to their respective rights. We shall affirm the decree of the Subordinate Judge, declaring the validity of adoption and the right of the adopted son to succeed to the estate in suit as a begotten son, but we shall vary the decree of the Subordinate Judge, so far as it declares the widow entitled to be maintained in possession as proprietor, by inserting the alternative, or as manager on behalf of her adopted son."

Their Lordships will advert hereafter to the form of the decree.

They will now proceed to consider the objections raised to the suit on the ground that it is merely declaratory, and can lead to no relief.

It is scarcely necessary to say that their Lordships desire to adhere to the opinion declared in several decisions of this Board, that s. 15 of the Indian Act VIII of 1859 relating to declaratory decrees ought to receive the same construction as s. 50 of the English Act, 15 and 16 Vic., c. 86, which is similarly worded, has received from the English Courts. In the last of these decisions the English and Indian cases on the subject were reviewed, and it was laid down that a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court, or unless in certain cases a declaration of right is required as a step to relief in some other Court. (*Strimathoo Moothoo Natchiar and others v. Dorasinga Tever*. L. R., 2 I. A., 169.)*

The question whether a right to some consequential relief exists must therefore arise in all suits in which a declaration of title is sought. It is enough for the present purpose to observe that a right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstructions, would be sufficient to sustain a declaratory decree.

It was contended on behalf of the respondents that the intervention of the appellant in the proceedings of the Settlement Officer, and his objection to the entry on the *wajibulurz* of the name of Moorari Lall as the adopted son of the Mussumat on the ground that the adoption was illegal, was an act of obstruction against which they were entitled to relief; and if it had been shown that the entry thus objected to had been necessary to the settlement of the *mouzah*, or the completion of the title, or the right to present possession, the contention might have been well founded. But this has not been shown. It would seem that the *mouzah* had been already granted by the Government to the Mussumat, and she had been recorded as proprietor. The object of the paper appears to be, as already stated, to record peculiar customs and rights for the information of the Settlement Officers; and although the Deputy Collector asked for information as to the Mussumat's successor, and upon the appellants' objection to the entry of the adoption, placed his objection upon the *wajibulurz*, and referred the parties to a Civil Court, their Lordships would have felt great difficulty, to say the least, if it had been necessary to give a decision upon this point, in coming to the conclusion that these proceedings were such an obstruction to the title or right of possession as would sustain the decree.

* 23 W. R. 314; ante p. 106.

Another ground on which it was alleged the plaintiffs were entitled to relief was that the appellant had put forward a nuncupative will of his deceased brother, by which he was made the proprietor of the estate, and that the plaintiffs were entitled, if they had asked for it, to a decree annulling that will.

It would not probably be disputed that if a fictitious will in writing be set up, the heir, upon a proper case being made, might claim to have the document cancelled, and their Lordships are not prepared to say that in cases where property may legally pass by an oral will an analogous right to have it declared null may not exist. A claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred. The reasons, too, for giving such relief in the case of written wills would seem to apply to nuncupative wills, and one of them, the probable deaths of witnesses, with even greater force to the latter than the former.

It was, however, contended, on behalf of the appellant, that relief against this will was not one of the objects of the original suit, which was confined to the intervention of the appellant in the settlement proceedings. Undoubtedly the plaint refers only to this intervention, and the assertion of this will appears for the first time in the defendant's answer. But it will be found, on reference to the proceedings, that the claim was persisted in after Moorari Lall had been added as a co-plaintiff, and indeed to the end of the suit. One issue framed at the first hearing of the cause was whether the verbal will had been in fact made, and one of the questions put to the witnesses examined upon the customs of the Jains was, whether a verbal gift is valid against the widow. The Commissions in which this question appeared were issued after the first remand to the Subordinate Judge, and after Moorari Lall had been made a co-plaintiff. In his judgment, given after the return of these commissions, the Subordinate Judge expressly finds on this issue that a nuncupative will by the deceased husband would not be valid as against the widow; and although he adds that there was no evidence that such will had been "pronounced," the defendant, in one of his grounds of appeal to the High Court, complains that this finding is not correct, and the High Court deals with the question of this will in its final judgment.

The contention, then, on the part of the appellant that his putting forward of this will ought not to be regarded, is reduced to the objection that it was not introduced into the original plaint. It is, however, questionable whether, when Moorari Lall was made a plaintiff, the suit ought not to be considered for this purpose as a new suit, and whether the appellant, having before that time put forward the claim in question and persisted in it to the end, relief might not, if asked for, have been granted against it. It would not be necessary that the suit should have been in fact remodelled when Moorari Lall became plaintiff, so as to ask for this relief, it is sufficient if it might have been so remodelled, and relief obtained.

Their Lordships, however, do not think it necessary to give a definitive judgment on this question, because they are of opinion that under the circumstances in which this appeal to Her Majesty comes on to be heard, the appellant ought to be precluded from insisting on his objection to the decree on the ground of its being declaratory only.

In his petition to the High Court for leave to appeal to Her Majesty, the appellant made no reference in the grounds of appeal to this objection to the decree. The leave granted by the High Court having become abortive, in consequence of the deposit for costs not having been made in due time, application to this Board for special leave to appeal was made. In the petition for this leave, again no reference was made to this objection, but the application was based on the ground that important questions affecting a large community were involved in the decision sought to be appealed from.

This petition, after fully stating the conclusions of the High Court upon the

evidence relating to Jain customs, contains the following passage :—"The petitioner now humbly submits that the suit is one concerning properties of large value, and involving questions of great importance to the sect of the Jain community, to which the petitioner belongs." Their Lordships having, on this ground, advised Her Majesty to grant special leave to appeal, they are invited, when the appeal comes on to be heard, not to examine or consider the important questions thus indicated, but to reverse the judgment on a ground which altogether excludes their discussion. Their Lordships do not by any means intend to lay down, as a rule, that no questions can be raised at the hearing which are not indicated in the petition for special leave to appeal; but, in the present case, considering the whole course of the proceedings in the Court below, to which they have fully adverted, the importance of the questions upon which the appellant obtained special leave to appeal, and the somewhat technical character of the objections raised to the maintenance of the suit, they think the appellant ought not, at this stage, to be allowed to insist that by reason of these objections the decree appealed from should be reversed.

Exception has been taken to that part of the decree of the High Court which varied the decree of the Subordinate Judge, declaring that the widow was entitled to be maintained in possession as proprietor, by substituting the declaration that the widow is entitled to retain possession of the estate, either as proprietor, or as manager thereof on behalf of her adopted son, Moorari Lall. The substituted declaration, being in the alternative, is no doubt in one sense uncertain; but it is independent of the other declarations which decide the rights of the parties as between the plaintiffs on the one side, and the defendant on the other, and repel the defendant's pretensions. The Court, indeed, could not properly make a binding declaration as between the adoptive mother and the adopted son, both being plaintiffs. It is, no doubt, on this account that the decree, whilst it declares the right of the widow to present possession as against the defendant, is framed in a form which avoids prejudice to the rights of the plaintiffs *inter se*.

In the result their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court with costs.

The 13th April 1878,

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Hindoo Law of Inheritance—Construction—Gift—Santān Sreni Kramē—
Absolute Estate—Estate-tail—Disposition by Will.*

On Appeal from the High Court at Calcutta,

Bhoobun Mohini Debia and another
versus

Hurriah Chunder Chowdhry.

If the words in a sunnud "You are my sister; I accordingly grant to you a talook for your support" had stood alone, it might have been open to question whether an absolute grant or a grant for life only was intended; but coupled with the words that follow, "being in possession of the lands and paying rent according to the tahoot jumma, do you and the generations born of your womb successively (*santān sreni kramē*) enjoy the same," they appear to import an absolute estate, such as would have been given had the words been "your children and grandchildren," and no inference so far arises that the donor had an English estate-tail in his contemplation. As to the negative words which follow, "no other

heir of yours shall have right or interest," it appeared to their Lordships that they may be read as referring to the time of the grantee's death, and that their effect was to make the absolute estate before given defeasible in the event of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs; and as that event did not occur, it was held that the grantee had an absolute estate which he could dispose of by will.

Mr. Leith, Q.C., and Mr. Doyne for Appellant.
Mr. Joshua Williams, Q.C., Mr. Mayne, and Mr. Woodroffe for Respondent.

Sir Robert Collier gave the following judgment:—

The facts which give rise to the questions of law into which this case resolves itself, are as follows:—

Shumbhu Chunder Surmana, in 1819, granted a talook to his sister, Kasiswari Debia, by a sunnud in the following words:—

"Shumbhu Chunder Surmana.

"Sunnud executed to the worthy to be remembered Kasiswari Debia, of good conduct, in the year 1226 B. S.:—

"You are my sister: I accordingly grant you as a talook for your support the three debas (villages), Hurripur, Futehpur, and Kudumtoli, in chukla, Jonardunpore in my zemindary, pergunnah Mymensing, at a tahoot jumma of Rs. 36½, three hundred and sixty-one rupees, with the land and water, and trees, etc., comprised within the four boundaries, [and] all [rights] appertaining to the said mouzahs. Being in possession of the lands and paying rent according to the tahoot jumma, do you and the generations (*santán sreni*) born of your womb successively (*kramé*) enjoy the same. No other heir of yours shall have right or interest. To this effect I have written and given a sunnud.

"The 8th Bysack, 1266."

Another translation of the document is given by the High Court substantially to the same effect.

At the date of the sunnud Kasiswari had one child only, a daughter, Chundermoni, one of the original plaintiffs in this suit. Kasiswari afterwards had a son who died in her life-time, leaving a widow, who was a co-plaintiff, suing as guardian of a son whom he had adopted.

Kasiswari held undisputed possession of the talook until her death in 1871, and by her will devised it (together with other property) to the two plaintiffs in equal moieties.

On the death of Kasiswari, the defendant, as heir of his father Shumbhu Chunder Surmana, took possession of the talook, whereupon the plaintiffs instituted the present suit to obtain possession of it, together with mesne profits from the date of their dispossession on the death of Kasiswari. Pending the suit the daughters of Chundermoni have been substituted for her as plaintiffs.

The plaintiffs claimed under the will of Kasiswari. A question, indeed, arose whether their claim could be construed as containing an alternative claim on behalf of Chundermoni under the sunnud independently of the will, but in the view which their Lordships take of the case, this question becomes immaterial.

The defendant denied the right of Kasiswari to dispose of the talook by will, contending that she took only a life estate under the sunnud. The principal ground on which he based this contention in the Court below was that, the terms *santán sreni kramé* imported only sons of Kasiswari living at the time of her death, and that these could only take, if at all, as donees under the sunnud.

No dispute was raised as to the genuineness of the will of Kasiswari, or its validity to pass whatever interest she was capable of devising. The Subordinate Judge gave judgment in favor of the plaintiffs. The grounds of his judgment, which are not very clearly stated, would appear to be that in his opinion Chundermoni took an absolute estate under the sunnud on the death of her mother, but that having elected to take under her mother's will, and to admit the co-plaintiff to a half share of the estate, both the plaintiffs were entitled to maintain

the action against the defendant. He gave the plaintiffs a decree for possession together with wasilat, the amount of which is not disputed.

On appeal to the High Court, in addition to the contention that *santān* signified sons only, it was urged that the sunnud was an attempt to create an estate tail in contravention of Hindoo law, and was, therefore, void except in as far as it gave a life interest to Kasiswari,

The High Court do not adopt this view, nor do they agree with the appellant that the Hindoo words which have been quoted import issue male only, but they regard them as bearing "the wider and more general meaning of issue." They hold that Chundermoni having been born before the date of the sunnud took under it a life interest in the talook, in succession to the life interest of her mother. But that the plaintiffs not having sued in respect of the life interest, but having claimed under the will of Kasiswari, which she was incompetent to make, their suit must be dismissed. From this judgment the present appeal is preferred.

At their Lordships' bar the main grounds on which the judgment of the High Court has been supported are—

1. That the sunnud is an attempt to create such an estate as is known in England by the name of an "estate tail," in contravention of Hindoo law, which does not recognise such an estate.

2. That even if this be not so, the gift to the children of Kasiswari to be born after its date as well as to those then born, is in contravention of the rule of Hindoo law that no gift can be made to any person who is not a "sentient being" at the time of the gift. In support of these propositions the case commonly called the *Tagore Case*, reported in the 9th vol. of the Bengal Law Reports, p. 337,* was quoted.

It was further argued that if the gift were void because made in favor of a class who could not legally take—that is to say unborn children—it could not be validated quoad Chundermoni (who happened to be born at the time), by changing it from a gift to a class into a gift to a designated individual. And in support of this proposition the cases of *Gee v. Audley* (1 Cox p. 324), and *Leake v. Robinson* (2 Merivale, p. 364), were cited.

It appears from the sunnud that the donor intended to convey more than a life estate. If the estate which he intended to convey was one which the law prohibits, effect cannot be given to his intention; but before coming to this conclusion their Lordships must be satisfied that the instrument does not fairly admit of being construed in a sense to which the law will give effect.

In the judgment of the *Tagore Case* the following passage will be found :—

"If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindoo law (as under the present state of law it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, although he adds a qualification which the law does not recognise."

The doctrine herein expressed had been frequently acted upon by the Courts in India, who have decided that words giving lands to the donee, "his children and grandchildren," conferred upon him an absolute estate. (See judgment of Sir Barnes Peacock in the *Tagore Case*. 4 Bengal Law Reports, p. 182.)

If the words of the sunnud, "You are my sister. I accordingly grant to you

a talook for your support," had stood alone, it might have been open to question whether an absolute grant, or a grant for life only was intended: coupled with the words that follow, "being in possession of the lands and paying rent according to the tahoot jumma, do you and the generations born of your womb successively enjoy the same," they appear to import an absolute estate, such as would have been given had the words been "your children and grandchildren . . ." And no inference so far arises that the donor had an English estate tail in his contemplation, as the testator in the *Tagore Case* undoubtedly had.

The only difficulty is caused by the words which follow, "no other heir of yours shall have right or interest."

Upon the best consideration which their Lordships have been able to give to the meaning of these negative words, it appears to them that they may be read as referring to the time of the death of Kasiswari, that their effect is to make the absolute estate before given defeasible in the event of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs. That there is nothing in such a condition repugnant to Hindoo law appears from the decision of this Tribunal as to an executory devise in the case of *Soorjeemoney Dosses v. Denobundo Mullick* (9 Moore I. A., p. 134),* as explained in the *Tagore Case*.†

Their Lordships are, therefore, of opinion that Kasiswari took the whole estate defeasible on the happening of an event which did not occur, and that she had, therefore, an estate which she could dispose of by will.

It follows that the plaintiffs are entitled to succeed in this suit. It is unnecessary to decide what their rights may be *inter se*.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court be reversed, and that the decree of the Subordinate Court be affirmed. The appellants will have their costs in the Courts of India, and of this appeal.

The 17th May 1878.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Res Judicata—Hindoo Law (Mitacshara)—Family Custom—Exclusion from Inheritance (of Females)—Impartible Property—Sale of Part—Necessity—Reversionary Heir—Declaratory Decree—Remand.

On Appeal from the High Court at Calcutta.

Tekait Doorga Persad Singh

versus

Tekaitni Doorga Konwari and another.

HELD that the decision in a former suit that the plaintiff as mother was the heiress of her son, and that she as such heiress was entitled to possession, was conclusive against the present plaintiff who was a party to (defendant in) that suit, that she was entitled, and that she having taken possession under that decree, the plaintiff was barred by the adjudication from recovering the possession from her upon the ground that (according to the Mitacshara law, and a family custom or koolachar, excluding females from inheritance) she was not the heiress, and that he, as the eldest branch of the family, was entitled to succeed to the property upon the death of her son.

Even if the family usage set up by the plaintiff in the present suit had not been set up by him, as

* 4 W. R. P. C. 114 ; 1 Suth. P. C. R. 291.

† 18 W. R. 366 ; 2 Suth. P. C. R. 701.

defendant, in the former suit, the adjudication in the first suit would still be a bar to the proceedings in the second, on the ground that the claim was the same in both suits although the allegations were different, and that the plaintiff, as defendant in possession, ought to have resisted the claim in the former suit by setting up the family usage.

But although the plaintiff is barred by the former adjudication from setting up the family usage for the purpose of showing that he is entitled to possession during the defendant's life, he is not thereby barred from showing that upon her death he, if he survives, will be entitled to succeed her.

The impartibility of the property does not destroy its nature as joint family property, or render it the separate estate of the last holder so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate.

Unless the plaintiff could establish the family custom which he had set up, he was held not entitled to ask for a declaration that a deed of sale executed by the defendant in favor of another party was illegal and inoperative after her death.

Where legal necessity can be proved for raising a portion of the money which formed the consideration for a deed of sale by a widow, but not the whole of it, the deed would not be wholly void as regards a reversionary heir, but would be valid as against him to charge the estate for the amount necessary to be raised.

Where the evidence was not such as to enable their Lordships to determine what, if any, portion of the advances made to the widow, was made for purposes for which according to Hindoo law she could alienate the estate, and it did not appear advisable to remand the case for a further enquiry which, after causing considerable expense and delay, would not be binding upon the whole family, their Lordships declined to make a declaratory decree with respect to the deed.

Mr. Woodroffe and Mr. Cutler for Appellant.
Mr. Doyne for Respondent.

Sir Barnes Peacock delivered the following judgment:—

This is a suit brought by Doorga Persad Singh, son of Gopi Nath Singh, alleging himself to be the proprietor of Talook Guddi Chakai and other property in Zillah Monghyr. The suit is against Tekaitni Doorga Konwari, widow of Futteh Narain Singh, deceased, and mother of Gurbh Narain Singh, deceased, and also against Maharajah Joy Mungul Singh. It was brought first to obtain possession from the widow by adjudication of the right of inheritance of the plaintiff in accordance with koolachar or family usage in reference to the property in suit left by Tekait Gurbh Narain Singh, son of the late Tekait Futteh Narain Singh. Secondly, for an adjudication and order with respect to the right of reversion to the said estate, that a deed which had been executed by the widow in favor of the defendant Joy Mungul Singh should be declared illegal and inoperative after the decease of the widow, the defendant No. 1.

The property was formerly the property of Dhurm Narain Singh, and their Lordships think it must be taken to be joint ancestral family property although impartible. Upon the death of Dhurm Narain Singh, who left several sons and other lineal descendants, the property descended to his grandson, Loke Narain Singh, the father of that grandson, Juggernauth Singh, having died in the lifetime of Dhurm Narain. Upon Loke Narain Singh's death the estate descended to Futteh Narain Singh, the husband of the present defendant No. 1. Futteh Narain Singh left three widows, who upon his death claimed to have the estate registered in their names. The present plaintiff intervened before the Collector and objected to the registration of the property in the names of the three widows, but the Collector decided in favor of the widows, and their names were registered as the proprietors of the estate upon the death of Futteh Narain. After that registration the present defendant gave birth to a son, Gurbh Narain Singh, who lived for a short time and died in his infancy. The plaintiff claims that upon the death of Gurbh Narain he was entitled to succeed to the estate, and that the widow was not entitled, according to the Mitacshara law and the custom of the family, to succeed as the mother and heiress of her son.

With regard to the claim to recover possession from the widow, the answer set up is that a former suit was brought by the widow after the death of her son for the purpose of recovering possession of two-thirds of the property from the other two widows with whom the present plaintiff, who was a defendant in the

former suit, was said to be in collusion, and also to have her possession confirmed as to her own one-third. A decree was given in that suit in favor of the present defendant, the widow, who was the plaintiff in that suit. The plaint in that case is not in evidence, but it is to be collected from the judgment of the Court of First Instance in that suit that it was brought by the present defendant as mother and heiress of Gurbh Narain Singh, deceased. The present plaintiff as defendant in that suit in his written statement, which is set out in the record, page 145, set up the following defence. He said: "The plaintiff is not entitled to succeed to the properties left by Tekait Futteh Narain Singh. The aforesaid Tekait during his lifetime, and, after his death, his widows and the minor son which was born to him, lived in commensality with me the defendant. The whole of the property in suit is ancestral, hence, according to the Mitacshara Shastra, after the death of the said Tekait and his minor son, I the defendant, the paternal cousin of Tekait Futteh Narain Singh, am entitled to the ancestral estates." He goes on in the fourth paragraph, "On the 13th Jeyt 1274 Fusli, I the defendant on account of my being the rightful party was by the consent of all the three widows of Tekait Futteh Narain Singh, the amlahs, ryots, and lessees and others installed, as the Gadinashin of Talook Chakai according to the usage which has prevailed of old. Since that date I have been enjoying possession of all the mouzahs in suit." He there says that he was installed according to the usage, and therefore it may be taken that, notwithstanding the estate was joint family property, he claimed to be installed because according to family usage it was an impartible estate to which he as the eldest branch of the family was entitled to succeed. The Court of First Instance in that suit decided that the claim of the plaintiff be decreed with this specification, "That the plaintiff aforesaid do recover possession of two-thirds of the estate claimed," that is, the two-thirds which were held by the other widows with whom the defendant was alleged to be colluding, "and that her possession of one-third be confirmed." There was therefore a decision in that suit between the plaintiff, who is the present defendant, and the present plaintiff, who was the defendant, that the widow was entitled to succeed as the mother and heiress of Gurbh Narain Singh her son. An appeal was preferred to the High Court, and the High Court affirmed that decision.

The question now is, whether in the face of that adjudication the plaintiff is entitled in this suit to recover the possession of the property upon the ground that he and not the defendant as mother of Gurbh Narain was entitled to succeed upon his death. It is contended on behalf of the plaintiff that he did not in that suit set up the family usage which has been set up in the present suit, and that consequently the adjudication in the former suit is no bar to his recovering possession. The case of *Hunter v. Stewart*, 31st Law Journal, Chancery, 346, was cited, in which Lord Westbury held that as the allegations and equity in the first suit were different from the allegations and equity in the second suit, the decision in the first suit was no bar to the proceeding in the second. But there it was expressly stated that the equity in the second suit was different from that which had been set up in the first suit, and that the allegations were also different. In this case, although the allegations are different, the claim is the same. The claim on the part of the widow in that suit was based upon her title to succeed as the mother and heiress of her son. The present plaintiff who was the defendant in that suit relied upon his own title, and denied that of the mother, the present defendant No. 1, but it was adjudged against him that the mother was entitled to succeed as the heiress of her son.

In a case which is referred to in the judgment of the High Court, reported, 11 Moore's Indian Appeals, 73,* it is said, in the judgment pronounced by Lord Westbury, "When a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is

* 10 W. R. P. C. 1; 2 Suth. P. C. R. 46.

possible for him according to his knowledge then to bring forward." If the defendant did not resist the claim in the former suit upon the ground of the family custom, he is not entitled in the present suit to upset the former decision, because he failed to set up a custom which he ought to have relied upon at the time. The decision in the former suit would be utterly useless if the present suit could be maintained. The plaintiff in his present suit, in the 8th paragraph of his plaint, says, "On the strength of the aforesaid decree, the defendant No. 1," that is the widow, "put your petitioner out of possession." If that decision was correct she was entitled to put him out of possession. But in the next paragraph he says, "The cause of action arose from the said date when your petitioner's dis-possession took place." In effect, he says, that although the mother took possession under the decree in the former suit, the taking of possession under that decree gave him a right to sue her to recover the possession back again from her. If such a suit could be maintained there would be no end to litigation.

A case was referred to from the 3rd Madras High Court Reports, page 320, in which Chief Justice Scotland seems to have been of opinion that if the same facts were not set up in the former suit a decision in that suit would not be a bar in the second suit. The ground, however, upon which Chief Justice Scotland thought that the former judgment could be impeached was that the Court had refused in the first suit to allow the party who wished to impeach the judgment to go into the case which he set up in the second suit.

In the 2nd Law Reports, Indian Appeals, 283,* a similar question was brought before the Judicial Committee. It is said, in the judgment delivered by Sir Montague Smith, "It was suggested by Mr. Cave that the former judgment ought not to be binding, because certain witnesses having been examined before the present appellant intervened in the suit he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any mis-carriage of that kind the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals that were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that that cannot affect the operation of the final judgment, which must be taken to have been rightly given."

But it appears at page 166 of the Record in the present case that the family custom was brought before the Court in the former suit. They say: "As to the third ground, Doorga Persad Singh attempted to give evidence that there is a family custom or koolachar, by which, in this family, females were excluded from inheritance. He did not make any averment to that effect in his written statement, and, therefore, did not, perhaps would not, pledge himself to it on oath or solemn affirmation. He did not give the plaintiff any warning that she would have to meet any such case. No issue was raised on it, and down to the time when he examined his witnesses, and even in his written grounds of appeal before us, there is no statement of the particulars of this custom or koolachar, the existence of which he now suggests. He does not even aver in his written grounds of appeal that such a custom is proved."

It was contended that the cause of action in the suit in which the present defendant was plaintiff was not the same cause of action as that which is set up by the plaintiff against her in the present suit. A similar point was considered in the case reported in 2 Bengal Law Reports, Indian Appeals,* to which reference has already been made. It was there said: "Both the Courts below have held that the present suit is barred by reason of the judgment in the former one. The ground of the present appeal is that they are wrong, inasmuch as it is said that the case does not come within s. 2 of Act VIII of 1859. Now the Section is this: 'The Civil Courts shall not take cognizance of any suit brought on a cause

* 25 W. R. 1; ante p. 213.

of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.' Their Lordships are of opinion that the expression 'cause of action' cannot be taken in its literal and most restricted sense. But however that may be, by the general law, when a material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the *status* of one of them in relation to the other, it cannot in their opinion be again tried in another suit between them. It is not necessary for their Lordships to go at length into the reasons for their decision because those reasons appear in a recent judgment of this Board in the case of *Soorjomonee Dabee v. Suddanund Mohapatter*.* In that judgment it is said, after reference to the second clause of Act VIII, 'Their Lordships are of opinion that the term cause of action is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause of action was in substance to declare the will invalid on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata* founded on the principle *nemo debet bis vexari pro eadem causa*. This law has been laid down by a series of cases in this country with which the profession is familiar. It probably has never been better laid down than in a case which was referred to in volume 3 of Atkyns, *Gregory v. Molesworth*, in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the Duchess of Kingston.' A decision of the High Court of Bengal has been referred to, the case of *Sheikh Rahmatulla v. Sheikh Sariutulla Kagchi*† as having a contrary tendency. All their Lordships desire to say of it is that, as reported, it does not appear to be consistent with their judgment in the former appeal to which they have referred, nor with their opinion in the present case. The decision is of so recent a date that they desire to say no more upon it."

Their Lordships think it clear that the decision in the former suit, that the plaintiff as mother was the heiress of her son, and that she as such heiress was entitled to possession, is conclusive against the present plaintiff, who was a party to that suit, that she was so entitled, and that she having taken possession under that decree the plaintiff is barred by the adjudication from recovering the possession from her upon the ground that she is not the heiress, and that he was entitled to succeed to the property upon the death of her son.

As to the second portion of the claim, namely; whether the plaintiff is entitled to have it declared that the deed which the widow executed in favor of Joymungul is void and invalid as against the reversionary heirs, the plaintiff must prove that he is the person presumptively entitled to succeed upon the death of the defendant No. 1. No doubt the family custom might be set up in this suit for that purpose, for although the plaintiff is barred by the former adjudication from setting it up for the purpose of showing that he is entitled to possession during the life of the Defendant No 1, he is not thereby barred from showing that upon her death, he, if he survives, will be entitled to succeed her. See the case of *Barrs v. Jackson*, 1 Young and Collier, 582.

The plaintiff in his plaint says: "The aforesaid estate was originally the ancestral property of the ancestors of Tekait Dhurm Narain Singh, the ancestor of plaintiff. The aforesaid property as a raj is not divisible, and according to the ancient family usage the succession has always run in this manner, that the

* 20 W. R. 377; 2 Sutb P. C. R. 899.

† 10 W. R. F. B. 51; 1 B. L. R. 68.

eldest heir male of the superior branch succeeds to the entire estate to the exclusion of other male heirs of the inferior branch, who only receive suitable maintenance; no widow or any female heir after the decease of the proprietor acquires a right to succeed. In the event of the decease of the proprietor the mehal in dispute leaving a female heir or female heirs who have descended from females, the eldest heir male of the eldest branch of the second degree, which said branch may have descended from males, becomes the heir and successor, to the exclusion of females and the aforesaid heirs. In fact, this practice obtains in other zemindaries, known as Gadis in Pergunnah Chakai and Khurugdiha in the neighbourhood of Talooka Chakai, the proprietors and occupants whereof are of the same caste as the plaintiff and his ancestors. Conformably to this ancient usage, the property in suit passed to the late Tekait Futteh Narain Singh, and after him to the late Gurbh Narain Singh, son of the aforesaid Futteh Narain Singh. Tekait Gurbh Narain Singh died a minor unmarried in the month of Cheyt 1272 F.S., leaving plaintiff the eldest male heir in the eldest branch of the second degree of the said family, and, according to the family usage, your petitioner is entitled to succeed to the disputed property." Then he mentions the former suit, and says: "Should your petitioner not be held entitled to immediate possession of the property in suit, he, as the next heir, is entitled (consistently with the practice of succession referred to above) to the reversionary right in the property after the decease of the Defendant No. 1. The alienation of the said six annas, which is alleged to have been made for the payment of bond debts, was not made for such a purpose by which, in the event of the Defendant No. 1 being a female heir, such alienations would be binding upon the reversioner, nor was it made under legal necessity, which entitles the purchaser to hold possession for a longer period than the lifetime of the vendor. Your petitioner therefore prays that he may be put in possession of the property in suit; but should the Court not deem him deserving of this relief, that an order be passed in reference to the aforesaid alienation, declaring the said alienation ineffectual after the demise of the Defendant No. 1, and that the reversioner is not bound by it."

In the present case there are other members of the joint family nearer in degree to the deceased Gurbh Narain than the present plaintiff, and who, in the absence of family custom, might be entitled (under the ordinary Mitacshara law) to succeed to the estate, assuming it to be joint family property; indeed that fact was not disputed. The impartibility of the property does not destroy its nature as joint family property, or render it the separate estate of the last holder so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate. The rule upon this subject was stated in the Shivagunga case, 9 Moore's Indian Appeals, 588.* It is there said: "The zemindary is admitted to be in the nature of a principality—impartible and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindoo law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject. Hence if the zemindar at the time of his death and his nephews were members of an undivided Hindoo family, and the zemindary though impartible was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the zemindar at the time of his death was separate in estate from his brother's family, the zemindary ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestible;

* 2 W. R. P. C. 32; 1 Suth. P. C. R. 521.

but Gowery Vallabha Taver's widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that even if the late zemindar continued to be generally undivided in estate with his brother's family, this zemindary was his self-acquired and separate property."

The same rule was laid down by their Lordships in a recent case which was decided on the 12th February in the present year, the case of *Periasami v. The Representatives of Salugai*,* at page 5 of the printed report: "It may be desirable before their Lordships approach the direct question to be decided briefly to recapitulate some of the facts relating to this estate. Oiya Tevar, the then zemindar of Padamattur, died in 1815. He was succeeded by his eldest son, Muttu Vaduga. That person had two brothers, and, therefore, whether Oiya Tevar were previously joint with his brother Gouri Vallabha, the istemirar zemindar of Shivagunga, in respect of Padamattur or not, the latter estate must be taken to have descended to Muttu Vaduga, as ancestral estate. He would therefore necessarily be joint in that estate so far as was consistent with its impartible character with his two younger brothers, the latter taking such rights and interest in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindoo family in the case of a raj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate though impartible was up to the year 1829 in a sense the joint property of the joint family of the three brothers."

Unless then the plaintiff can establish the family custom or koolachar which he has set up, he is not entitled to sue for a declaration in respect of the deed. Two issues were raised as to the alleged custom. First, "Is there a koolachar in the family by which females are excluded from succession or not?" And secondly, "Does the law of primogeniture regulate the succession to property in the family or not?" The Judge of the first Court did not decide them. He merely ordered that a decree be passed in favor of the plaintiff in this way; that the plaintiff should be taken to be the next heir after the death of Mussumat Doorga Konwari the defendant and that at that time he would be competent to bring a suit for the cancelment of the deed of sale executed in favor of Maharajah Joymungul Singh. He came to that decision upon the ground that other nearer heirs had not come in to dispute the plaintiff's right, but he did not express any opinion as to the evidence which was given in support of the custom.

Upon appeal from that decision to the High Court, that Court found that the custom had not been proved. They say at page 237, "We are of opinion that no family usage or koolachar, either excluding females or giving the preferential right of succession to direct descendants in the eldest male line, has been proved. Nearly the whole of the instances adduced by the witnesses as proof of koolachar must be referred to succession to undivided estate under Mitacshara law." In a subsequent part of their judgment they say, "In fact all the witnesses rely principally on local custom as applying to Soorujbunsi Rajpoots. But the evidence shows that in Pergunnah Purra, a Ghatwali zemindari in Beerbhoon held by Soorujbunsi Rajpoots, a woman had succeeded. We are of opinion that the evidence fails to prove any family or local custom excluding the succession of females, and also fails to prove a koolachar or local custom whereby the succession goes otherwise than under the ordinary Mitacshara law, as applied to impartible estates, under which it is admitted that the plaintiff would not, under existing circumstances, be the next reversioner, inasmuch as there are at least two persons who would be preferential heirs to him. With respect to local custom even if the plaintiff were entitled to raise that question in this case, which we think he is not, we are of opinion that there is no defined district pointed out over which the alleged custom extends."

This is not a case in which the Court was called upon to set aside the deed. It was merely asked to declare that the deed to Joymungul was not binding

* See *ante*, p. 508.

against the reversioner. It is entirely a matter of discretion whether to make any declaration of that kind or to leave the question open until the widow's death.

There is very conflicting evidence with regard to the deed, and as to the existence of such a necessity for the first defendant's alienating a portion of the estate as would render the deed in favor of Joymungul valid against a reversionary heir. If it could be proved that there was a legal necessity for raising a portion of the money which formed the consideration for the deed, but not the whole of it, the deed would not be wholly void as regards the plaintiff, but would be valid as against him to charge the estate for the amount necessary to be raised. The evidence is not such as to enable their Lordships to determine what, if any, portion of the advances made to the defendant No. 1 were made for purposes for which according to Hindoo law she would as an heiress have been entitled to alienate the estate. Therefore even if their Lordships should affirm the findings upon the first and second issues of fact in favor of the plaintiff, it would be necessary to remit the case to the Lower Court to enquire whether all or any, and, if any, what part of the advances which formed the consideration for the deed were made for purposes for which the defendant No. 1 could lawfully alienate a portion of the estate; a course which was adopted in the case reported in 8 Moore's Indian Appeals, 556.*

Such an enquiry would be attended with considerable expense, and would cause great delay, and if the enquiry should result in a finding favorable to Joymungul, the decision might not be final in his favor, because the present plaintiff might die in the lifetime of the widow, and the estate might never come to him. Further, there are others who might prove a preferable title to the plaintiff and to the defendant No. 1, and who would not be bound by any decision in this or in the former suit to which they are no parties. It appears, therefore, to their Lordships that they would not be exercising a sound discretion in sending the case for a further enquiry, which, after causing considerable expense and delay, would not be binding upon the whole family.

Under these circumstances, therefore, their Lordships think that they ought not to advise Her Majesty to make a declaratory decree with respect to the deed executed in favor of Maharajah Joymungul Singh. In this view of the case any finding upon the first and second issues of fact becomes unnecessary, and their Lordships abstain from expressing any opinion as to the finding or rather the expression of the opinion of the High Court upon those issues, so that it may be left open to all parties hereafter to raise the question as to the family custom set up by the plaintiff. Their Lordships will therefore humbly advise Her Majesty to set aside the finding of the High Court upon the first and second issues of fact as being unnecessary, and to affirm their decree dismissing the plaintiff's suit. It will then be open to any of the parties to raise the question of family custom hereafter, if they deem it necessary, and the decree in this suit will not be *res judicata* as to the first and second issues of fact. Their Lordships think that the appellant, having failed in his appeal, the great object of which was to recover possession from the widow, must pay the costs of this appeal.

The 24th May 1878. •

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Enhancement of Rent—Onus Probandi—Act VIII of 1869 (B.C.) s. 4.
On Appeal from the High Court at Calcutta.*

* 2 W. R. P. C. 65; 1 Suth. P. C. R. 481.

Rajah Nilmoney Deo Bahadoor

versus

Modhoo Soodun Roy and others.

In this case it was held that the plaintiff had failed to sustain the burden cast upon him by s. 4 of the Bengal Act VIII of 1869, of proving that the land, of which he sought to enhance the rent, had not been held at a fixed rent from the time of the permanent settlement.

This suit was brought by the Rajah of Pachete, in his character of zemindar, against the respondents for enhancement of the rent of lands occupied by them. Of the only two issues that were settled in the cause one was whether the notice of enhancement was legal, and whether it had been properly served; and the other, which was expressed in very broad and general terms, was whether the tenure was liable to enhancement. The first issue may be dismissed from their Lordships' consideration, both Courts having apparently held that the notice was legal and properly served.

The respondent defendants may be taken to be ryots within the meaning of the 4th Section of the Bengal Act No. VIII of 1869, which is in these words:— "Whenever in any suit under this Act it shall be proved that the rent at which land is held by a ryot in any such province has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that the land has been held at that rent from the time of the permanent settlement, unless the contrary be shown, or unless it be proved that such rent was fixed at some later period." It is clearly established by the evidence, and indeed the fact is no longer contested, that the defendants have held the lands, the rent of which the plaintiff now seeks to enhance, for a period of twenty years before the commencement of the suit, without any change in the amount of that rent, that amount being Sicca Rs. 65. The defendants therefore having the benefit of the statutory presumption, it lay upon the plaintiff to show that the rent had been varied since the time of the perpetual settlement, or that it was fixed at some later period. He has sought to do this in two ways. In the first place, he has attempted to show that, under certain former proceedings, there has been an adjudication that those lands were held at a variable rent, and that his right to enhance was thereby established. The following are the proceedings relied on:— In 1837 a suit was brought by a person claiming as lessee under the then Rajah for the enhancement of this rent. The Rajah intervened and objected that to any suit for enhancement of the rent he was a necessary party, either as sole or joint plaintiff. That objection prevailed, and the suit was dismissed on the 25th February 1837. The suit, which has been called in the Record No. 98 of 1838, was then brought by the Rajah jointly with the other party for the enhancement of the rent, and on the 25th January 1841 judgment was given by the Moonsiff in favor of the right to enhance. From that judgment there was an appeal, either nominally to the Governor-General's Agent in that part of the country, which was then a non-regulation province or district forming part of Lower Bengal, or directly to the Principal Sudder Ameen. But, however that may have been, the cause undoubtedly came, either by transmission from the Governor-General's Agent or in the ordinary way, before the Principal Sudder Ameen, who affirmed the judgment of the Moonsiff, and dismissed the appeal.

Upon the last two judgments the plaintiff relies as being in the nature of *res judicata* and establishing his title to enhance. On this part of his case, however, he is met by a decree produced on the part of the defendant, namely, that of the Moonsiff of the 18th August 1846. From the recitals in that decree it appears that in 1846 the plaintiff with one Boidyonath, the son and representative of the ijaradar, who had been his co-plaintiff in the suit No. 98 of 1838, brought a fresh suit, not for an enhancement of the rent on proceedings taken in the ordinary way, but for the recovery of the enhanced rent alleged to have been decreed in the suit No. 98 of 1838; that on the face of their plaint it appeared that in that

former suit, after the decree of the Principal Sudder Ameen, there had been a special appeal to some higher Court, which had directed the plaintiffs to give further proof of the receipt of rents at varying rates, and had remanded the cause to the Moonsiff's Court for re-trial on that point; and that on that remand the cause had been finally disposed of by an order in the nature of a nonsuit. The decree further shows that this suit of 1846 also resulted in a nonsuit. If, then, this alleged decree of 1846 has been satisfactorily proved, it is clear that in the former litigation there has been no final adjudication as between the parties to this suit either in favor of or against the Rajah's title to enhance. That being so, the material question on this part of the case is whether the existence of the suit and decree of 1846 have been satisfactorily established by the office copy of the decree which has been produced in this suit.

Their Lordships do not deny that some suspicion attaches to the document by reason of the manner in which it was brought in by a witness who has been pronounced to be untrustworthy, and still more by reason of its purporting on the face of it to have been delivered out, not to the defendants or those whom they represent, but to the mohurrir of the plaintiff, the then Rajah. Nevertheless, they feel it is impossible, upon the evidence before them, to dissent from the conclusion which the High Court have drawn in favor of this document, founded upon these two considerations: first, that if that of which it purports to be a copy were not a genuine decree, or there never was, as suggested, any suit in which such a decree could have been made, the natural course would have been to examine Boidyonath, who was a witness in this cause, and is stated to have been one of the plaintiffs in the suit of 1846, as to the existence of that suit and the proceedings therein. Secondly, that if there never was such a decree or such a suit as that in which it purports to have been made, the decree of the Moonsiff, confirmed by the Principal Sudder Ameen in suit No. 98 of 1838, presumably would have stood. And yet we find it established beyond all possibility of doubt that for twenty years and more since the making of that decree the defendants have been allowed to remain in undisturbed possession of their lands at the old rent of Sicca Rs. 65. Their Lordships therefore think that the case of the plaintiff, if it is to be established at all, is not assisted by the judicial documents on which he relies, but must rest entirely upon the oral evidence given in the cause.

With respect to this, their Lordships concur with the learned Judges of the High Court in thinking that it is insufficient to support the plaintiff's case. It seems to have been suggested in the course of the former proceedings that the rent payable at the time of the decennial settlement was only Rs. 33, and therefore that it must have been at some subsequent date raised to Rs. 65. Again, Boidyonath has deposed that during the tenure of his father, which was determined some time about 1844, the rent was raised from Rs. 49 to Sicca Rs. 65. But this statement is unsupported by documentary evidence, nor is there any specific mention of this alleged variation in the proceedings in the suit No. 98 of 1838. The other witnesses, although entitled to whatever weight may be due to them, from the fact that the Judge of the Court below was pleased with their demeanour and thought them credible, gave evidence of so loose a character that their Lordships feel themselves unable to act upon it in opposition to the judgment of the High Court. It is further to be observed, with respect to the alleged variation from Rs. 33 to some higher sum, that, although that case was attempted to be proved in some of the earlier proceedings by the quinquennial papers, no such quinquennial papers have been produced in the present suit; and no sufficient grounds have been assigned why the Rajah, if he was able to produce evidence of that kind on the former occasion, was unable to produce it in this suit.

On the whole, therefore, their Lordships feel it impossible to say that the learned Judges of the High Court were in error in holding that the plaintiff had failed to sustain the burden which the Statute casts upon him, of proving that

the lands had not been held at the fixed rent of Sicca Rs. 65 from the time of the permanent settlement, and in reversing the judgment of the Court of First Instance; and they must humbly recommend Her Majesty to affirm their decree, and to dismiss this appeal.

The 29th May 1878.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Right of Occupancy—Undivided Share of an Estate—Holding as Ijaradars—Agreement to renew Lease (Effect of)—Duration and Rate of Rent of New Lease—Measurement.

On Appeal from the High Court at Calcutta.

Messrs. Jardine, Skinner, and Company

versus

Rani Surut Soondari Debi.

A right of occupancy may be acquired in respect of an undivided share of an estate.

Holding as ijaradars prior to and during their lease does not create in them a right of occupancy. After the lease they held over, subject to the terms of the lease.

Nor does the agreement contained in the pottah to grant a renewal of the lease create or vest in the lessees a fresh term of years. It merely gave them a right to a renewal of the lease, and to compel the lessor to renew it if the latter should attempt to turn them out of possession at the expiration of the term. It also gave the lessor a right to the land, and to rent it to others if the lessees should refuse to accept a pottah and execute a kubooleut within the time prescribed for duly ascertaining and fixing the rent to be paid during the renewed term.

Where nothing is said in the ijara as to the duration of the new lease, a term for a longer period than the original term cannot reasonably be implied. Accordingly, it was held to be too late for the lessees in this case to rely upon their title to a renewal of the lease which, if it had been granted, would now have expired.

Nor had the lessor in this case the right to measure the lands in the absence of the lessees, or herself to determine finally the rent at which the lease should be renewed. If the rent at which the lessor offered to renew the lease were too high, the lessees were not bound to accept it, but could compel the lessor to renew at a proper rate having regard to the stipulations of the lease.

Sir James Stephen, Q.C., Mr. Leith, Q.C., and Mr. C. Bowen for Appellants.
Mr. Doyne for Respondent.

Sir Barnes Peacock delivered the following judgment:—

The appellants in this case are Messrs. Jardine, Skinner, and Company. They were the defendants in a suit brought against them by Rani Sarut Soondari Debi to recover possession of a 2 annas 15 gundas share of upwards of 20,000 beegahs of chur land.

The question is whether the plaintiff was entitled at the time, when she commenced her suit, to treat as trespassers the defendants who had unquestionably held as ijaradars under her. The ijara was dated the 12th Jeyt 1272, corresponding with the year 1865, and was to continue for a term of five years. It comprised a large quantity of land besides the chur land now in dispute. As to the latter the kubooleut executed by the defendants' agent, contained the following stipulation:—"Having fixed a yearly rent of Rs. 609 4 annas for your nij share of 20,950 beegahs, describing them as per boundaries given in the schedule below, you have included it in the aforesaid ijara rent of Rs. 4,417 9 5." I shall be in possession of the said chur as a jote. Upon the expiration of the term of the ijara of the said mehals, a pottah and kubooleut will be respectively given and

taken in respect of the jote, regard being had to the quantity of land and amount of rent that shall be determined to belong to your nij share in accordance with the productive power of the land within the area determined by a measurement of the said chur. If I do not take a pottah and give a kubooleut within two months after the fixing of the rate of that land, you will make a settlement with others." In other words, the defendants were to be entitled at the expiration of the term of five years to a renewal of the lease of the land in dispute at a rent to be fixed according to the measurement of the land to be made at that time, and to the productive powers of the land.

The defendants at the expiration of the lease continued in possession. Nothing was done with regard to assessing the rent for the new lease for nearly three years afterwards, but the defendants remained in possession, and continued to pay the old rent into Court, the plaintiff having apparently refused to accept it. In Pous 1279 the plaintiff caused a notice to be served upon the defendants. That notice, after referring to the above-mentioned stipulation in the kubooleut, and stating that a jumabundi had been made of the said land assessing the rent at Rs. 1,448 8 2 under a measurement, the rates being fixed in accordance with the productive powers of the various sorts of land mentioned in the schedule, and the rates paid by tenants of a similar class for lands of a similar description, proceeded as follows: "Notices have been repeatedly given to you requiring the exchange of pottah and kubooleut, but you have notwithstanding failed to appear and make any settlement. For this reason you are again informed by means of this notice that in accordance with the provisions of the kubooleut dated 14th Jeyt 1272 B.S., given by you, you shall appear personally or through your manager or other authorised person within two months from the date of the service of this notice at Putia, the Sudder Cutcherry of my zemindary and appertaining to Zillah Rajshahye, and taking a pottah at the rent mentioned in this notice, deliver a kubooleut. If you do not do this within the said period, after its expiration a settlement will be made with others." There is no proof of the former notices mentioned in this document. For all that appears from the evidence, this was the first notice served upon the defendants. Some further correspondence took place, but nothing was settled between the parties, and the plaintiff filed her plaint in August 1874. The defendants insisted that by reason of a long occupation of the lands they had acquired a right of occupancy, and that the plaintiff had no right to turn them out of possession. In paragraph 2 of their written statement they say: "The lands in dispute have been held by us in jote right for upwards of 12 years since their formation, and the plaintiff therefore included the said jote in the pottah of 12th Jeyt 1272 and realised rent accordingly. The rents of the years 1277, 1278, 1279, and 1280 have been deposited by us in the Moonsiff's Court at Jungipore. We have acquired the right of occupancy in the plaintiff's share of the said lands, and possess a legal right to hold and enjoy the same on payment of a rental of Rs. 609 4 annas per year." They claimed, therefore, a right of occupancy acquired, by virtue of the provisions of Act VIII of 1869 of the Bengal Government, or under Act X of 1859 of the Governor General in Council.

With reference to this claim the Judge of the Court of First Instance laid down two issues, the 4th and 5th, which are: "Was there a jotedar holding by defendants of plaintiff's share antecedent to, independent of, and not merged in the interest conferred by the ijara lease. If there were such a jotedar holding, has it ripened into a right of occupancy?" In his judgment at page 97 he says: "I find that the defendants had a jotedary tenure antecedent to the ijara lease, and not merged therein; but that this tenure has not been shown to have been strengthened by the acquisition of a right of occupancy in the lands included therein." As their Lordships understand the learned Judge in this part of his judgment, he held that there was a jotedary holding, but that the defendants had

not gained a right of occupancy which entitled them to hold possession as against the plaintiff independently of the stipulation in the ijara.

The High Court put their conclusions on the above issues far more clearly. They say : " At any rate it seems an irresistible conclusion that the occupancy of the defendants in these lands was connected with and arose entirely out of their tenure as ijaradars of the pergunnah. That being so, the case falls under the repeated decisions of this Court that no farmer or leaseholder can, during the term of his lease, create for himself a subtenure which is to enure after the lease expires to the prejudice of the owner whose *locum tenens* he is during the term of his lease. But even if that were not so it is impossible to see how the defendants could have acquired either a right of occupancy or a jotedar right in respect of an undivided share of an estate."

Their Lordships do not concur in the view thus expressed by the High Court, to the effect that a right of occupancy cannot be acquired in respect of an undivided share of an estate ; but they fully concur in the conclusion that the defendants' holding as ijaradars prior to and during the lease of 1865 did not create in them a right of occupancy, and that after the expiration of the lease of 1865 they held over, subject to the terms of that lease.

They are also clearly of opinion that in point of law the agreement contained in the pottah to grant a renewal of the lease did not create or vest in the defendants a fresh term of years. It merely gave them a right to a renewal of the lease, and to compel the plaintiff to renew it if she should attempt to turn them out of possession at the expiration of the term. It also gave the plaintiff a right to the land, and to let it to others if the defendants should refuse to accept a pottah and execute a kubooleut within two months after the rent to be paid during the renewed term should have been duly ascertained and fixed. Accordingly, when after the expiration of the lease, and before the defendants acquired a right of occupancy, the plaintiff gave them notice that unless they renewed the lease according to the terms which she pointed out, she would settle with others, or in other words that she would turn them out of possession, the defendants might if they had pleased have required the plaintiff to perform her agreement, and to grant them a lease upon the terms stipulated ; but even if they had done so they could not, in their Lordships' opinion, have compelled her to grant a lease for a longer period than five years. Nothing is said in the ijara as to the duration of the new lease, and a term for a longer period than the original term could not reasonably be implied. The defendants however took no measures to obtain a renewal of the lease, and at the present moment the period of five years from the expiration of the lease of 1865 has expired. The Judges of the High Court say : " She waited for three years after the expiry of the ijara lease before she gave notice to the defendants, and allowed the defendants to occupy at the old rate, which was very much less than what was now demanded. After that she waited for two years more before she brought the present suit ; and finally about six or seven years have now elapsed since the termination of the ijara, and the defendants are still holding at the rate of Rs. 609 that which the plaintiff claims to be worth Rs. 4,000. Having regard simply to this circumstance, it appears to us that the defendants had already had the full benefit which they could have derived from the stipulation in the ijara pottah. They could not have required the plaintiff to give them the land for more than five years, nor could they have expected to hold the land at anything like so favorable a rent as that at which they have been so long enjoying." Their Lordships are of opinion that the plaintiff had no right to measure the lands in the absence of the defendants, or herself to determine finally the rent at which the lease should be renewed. If the rent at which the plaintiff offered to renew the lease were too high, the defendants were not bound to accept it ; but in that case it lay upon them to take measures to compel the plaintiff to renew at a proper rate, having regard to the stipulations of the lease. This they

did not do at any time before the commencement of the suit otherwise than by stating in the letter of the 4th November 1873 (p. 52) their readiness to accept a renewal at a rent to be fixed in accordance with the terms stipulated. Even in their defence to the suit, though they stated that they were ready to take a pottah upon the terms stipulated, they still, as already stated, set up a right of occupancy at the rent of Rs. 609 4 annas a year. It appears that a great portion of the land has been diluviated, and it would be impossible now to measure the land as it existed at the time of the expiration of the lease, or to ascertain what were the productive powers of the land at that time.

Their Lordships are of opinion that the plaintiff had a right to turn the defendants out of possession at the expiration of the term granted by the lease of 1865, except so far as that right was qualified by the stipulation for a renewal; that the defendants at the expiration of that lease had an equitable right to a renewal according to the stipulations in the agreement; but that it is too late for them to rely upon their title to a renewal of the lease which, if it had been granted, would now have expired. They have, therefore, no equity to resist the plaintiff's claim to recover the possession of the land.

Under these circumstances their Lordships are of opinion that the decree of the High Court ought to be affirmed, and they will humbly advise Her Majesty to that effect. The appellants must pay the costs of this appeal.

The 31st May 1878.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Practice (Privy Council)—Re-opening or varying Order in Council—Default—Coram non judice—Res Judicata.

Petition of Trilokinath in the matter of the Appeal of *Maharajah Pertab Narain Singh* versus *Maharane Subhao Koer and others*, from the Court of the Commissioner of Fyzabad in Oudh.

An order of Her Majesty in Council cannot be re-opened or varied unless, by some accident, without any blame, and without any default on the part of the party himself, he has not been heard, and an order has been inadvertently made as if he had been heard—but not on the mere ground that he was not properly represented upon the appeal or cited to appear to it, and where it could not be said that there had been no default on the part of the petitioner.

The objection that the petitioner was never properly made a party to the suit in the Courts below, and that the proceedings in India, so far as he was concerned, were *coram non judice*, was held to be one which could only be properly tried in a new suit, since, if the facts alleged could be established, the final decree in the suit, considered independently of the Order in Council, and merely as a decree of the Indian Courts, would probably not be *res judicata* against the petitioner.

Sir James Stephen, Q.C., Mr. Doyne, and Mr. Ross for Petitioner.
Mr. Leith, Q.C., and Mr. Graham for Appellant.

Sir James Colvile gave judgment as follows :—

This application seems to involve two distinct questions :—

1st. Whether the petitioner, if assumed to have been properly made a party to the suit in the Courts below, and bound by the proceedings therein, is entitled to have a re-hearing of the appeal by reason of his not having entered an appearance as respondent to the appeal, or authorised any person to do so for him; and

of the appellant having failed to take the usual steps against him in order either to compel his appearance, or to have the appeal regularly heard *ex parte* against him.

2ndly. Whether, under the circumstances stated in the petition, he ought not to be treated as a person not properly represented in the suit in the Courts below, and therefore not bound by the proceedings therein; and if so, whether he is entitled to have the Order of Her Majesty in Council varied so as to prevent its being used against him as a bar to any proceedings which he might otherwise be entitled to take in the Courts of India.

The first question must, their Lordships think, be answered in the negative. The jealousy with which this tribunal regards any attempt to question the finality of one of its judgments, particularly after its confirmation by an Order in Council; the very rare instances in which such an Order has been allowed to be re-opened or varied; and the peculiar grounds upon which, if at all, this can be permitted, are elaborately considered in Lord Brougham's judgment in the case of *Rajundernarrain Rae v. Mohundenarrain Rae*, 1 Moore's P. C. Cases, 117; and in the more recent case of *ex parte Kistonaath Roy*, L. R., 2 P. C. Appeals, 274. It results from these authorities that the thing cannot be done unless by some accident, without any blame, and without any default on the part of the party himself, he has not been heard, and an order has been inadvertently made as if he had been heard.

Now, what are the facts in this case as regards the proceedings on the appeal here. The appellant, who has been successful here, brought his suit in the proper Court of Oudh for a declaration of his title as the successor to the talookdary estates of the late Maharajah Man Singh (not praying for a decree of possession) against the Maharanee and widow of Man Singh, the petitioner, then an infant, as represented by Luchmi Nath, his brother and guardian, and two other parties (one being Luchmi Nath in his own right), who, for the present purpose, may be left out of consideration. The Court of First Instance dismissed the plaintiff's claim, and that decree was affirmed by the Appellate Court, with only a variation as to the costs of the suit, which the Appellate Court directed to be paid to all parties out of the estate, instead of leaving each party to bear his own costs. In the heading of both decrees the petitioner is named as one of the defendants; in the Lower Court as an infant, appearing by his guardian Luchmi Nath; in the Appellate Court as an ordinary defendant.

The crucial question in the cause was, whether an instrument in the nature of a will executed by the late Maharajah on the 22nd April 1862, and under which his widow had executed an appointment in favor of the petitioner, had been revoked by the Maharajah in his lifetime.

This tribunal decided this question in favor of the plaintiff (appellant), reversing the decrees of both the Courts below, and substituting a declaration of the title of the appellant as heir to the Maharajah under cl. 4 s. 22 of Act I of 1869. The report to Her Majesty was made, after a full hearing, on the assumption that the petitioner, as well as the Maharanee, was represented by the Counsel who appeared as for the respondents on the appeal; and the Order in Council made in pursuance of it is, on the face of it, a final adjudication against both in favor of the appellant's title.

It is now said, however, that the petitioner never appeared to, and was not represented on, this appeal; and that the proper steps to have it heard against him *ex parte* were not taken. This case is supported by the affidavit of Mr. Wilson, the solicitor, who ostensibly conducted the appeal for the respondents, who swears that he was retained only for the Maharanee; that he entered an appearance for her alone; that he had no instructions to appear for the petitioner, and never entered an appearance on his behalf; and that although the case filed by him was intitled in the same manner as the appellant's petition of appeal,

and was headed, "Case of the above respondents," this was by a clerical error, which was not discovered by him until it was *recently* (that is presumably after the hearing of the appeal) brought to his notice.

On the other hand, it seems to their Lordships to be established by the affidavits of Mr. Lattey and of his clerk, Mr. Hewett, by the Record itself, and by the bill of costs hereafter mentioned all taken together, that although Mr. Wilson sent to Messrs. Watkins and Lattey, the solicitors for the appellant, a note to this effect, "*Maharajah Pertab Narain Singh v. Maharanee Subhao Koer*—I have this day entered appearance for the respondent in the above appeal," Messrs. Watkins and Lattey, on the 26th May following, when they sent the manuscript Record to Mr. Wilson in the usual course of business, distinctly asked him by letter whether he appeared for all the respondents, and received no answer to that enquiry; that afterwards, and in the month of November 1876, when a clerk of Mr. Wilson's, and Mr. Hewitt, on behalf of Messrs. Watkins and Lattey, met at the Council Office for the examination of the printed record, the former endorsed his own, and allowed the appellant's proof of the record to be endorsed, "T. L. Wilson, for the respondents;" that the record as finally printed bears that indorsement; that Mr. Wilson, in May and June 1877, was served with orders calling upon him to bring in the printed cases of all the respondents; that he made no objection to the form of such orders, but ultimately brought in the printed case, headed as the case of "the above-named respondents;" that he thus induced his opponents and this Committee, on the hearing of the appeal, to believe that he was acting for all the respondents; and that after their Lordships had pronounced their decision, which, amongst other things, directed the costs of all parties to the appeal to be taxed, with a view to the payment of them out of the estate, he brought in before the Registrar a bill of costs, which was not only headed as the bill of costs of all the respondents, but contained items of charge relating to the correspondence between himself and the petitioner in India with reference to the appeal.

Their Lordships must remark that if the case stood here, they would, upon these facts, have serious ground of complaint against Mr. Wilson, whose conduct of the case of his admitted client, if he really had no authority to represent the petitioner, was such as to mislead not only his opponents, but their Lordships. They cannot admit his explanation that the heading of the case was a mere clerical error, and that in fact he was acting, and purporting to act, for the Maharanee alone. Whatever may have been his personal knowledge of these proceedings, he must be held to be responsible for the acts of his clerks, and cannot be acquitted of, to say the least, gross carelessness in allowing the appeal to be conducted as he says it was.

The case, however, does not rest on Mr. Wilson's conduct of the appeal. The petitioner has himself filed an affidavit, from which it appears that in May 1875, after the decree of the Appellate Court in India, but whilst the appeal to Her Majesty was pending, the Maharanee executed a further appointment in his favor, by which she relinquished the life interest which she had reserved by the former instrument; that he, being then of full age, though a minor when the suit was commenced, was put into possession of the property; and in 1877 corresponded directly with Mr. Wilson touching the appeal, in which, in fact, he had become the sole person interested, and furnished the funds for defending it, at all events in the name of the Maharanee. He had, therefore, full knowledge of the pendency of the appeal; and unless he was content, as he might well be, since their title was almost identical, to defend it in the name of the Maharanee, he might have taken, and ought to have taken, the necessary steps to appear by separate Counsel in order to defend his interests. It seems, then, to their Lordships that his is not a case in which, according to the principles laid down in the cases above referred to, the Order of Her Majesty can be re-opened or varied, on the mere ground that

he was not properly represented upon the appeal, or cited to appear to it. It cannot be said there has been no default on the part of the petitioner.

He asserts, however, that he was never properly made a party to the suit in the Courts below, and that the proceedings in India, so far as he is concerned, were *coram non judice*. He alleges that his brother Luchmi Nath was not his guardian; that the objection was taken in an early stage of the suit; that Luchmi Nath was then dismissed from the suit, not only as a defendant in his own capacity, but also as the supposed guardian of his infant brother; that no guardian, *ad litem*, was ever appointed in his place; that whatever part Luchmi Nath afterwards took in the management of the suit, he took as agent on behalf of the Maharanee alone; that he, the petitioner, was never properly represented in the suit, was never duly served with process therein, and that if his name was retained in the title of the cause, it was so retained irregularly and improperly. If these facts can be established, it may be that the final decree in the suit, *i.e.*, the declaration of the plaintiff's title, considered independently of the Order in Council, and merely as a decree of the Indian Courts, would not be *res judicata* against the petitioner. But it is clear that that issue can only be properly tried in a new suit in India. And there is the more reason for trying the question in India, since what the petitioner desires is not a mere re-hearing of the cause on the evidence as it stands, which would probably be of little advantage to him, but a re-trial of it on fresh evidence.

It is, however, said that in such a suit in India the Order in Council might be opposed to him as a fatal bar. It would, however, be open to the petitioner to contend that it was not such a bar, if he should succeed in showing that he was not bound by the decree against which the appeal was preferred. Their Lordships do not wish to prejudge that question, as they would prejudge it, if upon this application they were to recommend Her Majesty to vary the Order in Council. Should a new suit ever be brought, the determination of the Indian Courts upon that, as upon any other question raised in such suit, will be subject to appeal. Their Lordships, therefore, will humbly recommend Her Majesty to dismiss this petition with costs.

The 5th June 1878.

Present :

Lord Selborne, Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Legislative Power of Governor-General in Council—Jurisdiction of High Court (Exclusion of)—Act XXII of 1869—Power of Lieutenant-Governor to extend the Act—Conditional Legislation—Garo, Khasi, and Jaintia Hills.

On Appeal from the High Court at Calcutta.

The Queen

versus

Burah and another.

Act XXII of 1869 was in its general scope within the legislative power of the Governor-General in Council; and so far from being in contravention of any of the provisions of the Statute 24 and 25 Vic. c. 104, or of the Letters Patent issued under that Statute (as altered by the 28 and 29 Vic. c. 15), such an exercise of legislative power by the Governor-General in Council, as might remove the Garo Hills or

any place or territory from the jurisdiction of the High Court at Calcutta, is expressly contemplated and authorised both by those Statutes and by the Letters Patent themselves.

Section 9 also of the Act of 1869, which entrusted a discretion to the Lieutenant-Governor of Bengal to extend the Act to the Khasi and Jaintia Hills, was not *ultra vires* of the Indian Legislature ; it being conditional legislation, and not a delegation of legislative power.

Sir James Stephen, Q.C., and Mr. Graham for Appellant.

Mr. J. B. Norton, Mr. Raikes, and Mr. Eardley Norton for Respondent.

Lord Selborne delivered the following judgment :—

This appeal has been brought under the following circumstances :—

In the year 1869, the Indian Legislature passed an Act (No. XXII of 1869), purporting (1) to remove a district called the Garo Hills from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of Revenue, constituted by the regulations of the Bengal Code and the Acts passed by any Legislature then or theretofore established in British India, and from the law prescribed for such Courts and offices by such regulations and Acts ; and (2) to vest the administration of Civil and Criminal Justice, within the same territory, in such officers as the Lieutenant-Governor of Bengal might, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint. This Act was to come into operation on such day as the Lieutenant-Governor of Bengal should, by notification in the "Calcutta Gazette," direct. By the 9th Section, the Lieutenant-Governor was empowered "from time to time, by notification in the 'Calcutta Gazette,' " to "extend, *mutatis mutandis*, all or any of the provisions contained in the other sections to the Jaintia Hills, the Naga Hills, and such portion of the Khasi Hills as might, for the time being, form part of British India," being, as their Lordships understand, a mountainous district, continuous towards the east with the Garo Hills.

The Lieutenant-Governor of Bengal, by notification in the manner prescribed by this Act, fixed the time at which it should come into operation in the Garo Hills ; and afterwards, by another notification published in the "Calcutta Gazette," on the 14th October 1871, he extended all its provisions to the district of the Khasi and Jaintia Hills, declaring the administration of civil and criminal justice within that district to be vested in the Commissioner of Assam, subject to the general direction and control of the Lieutenant-Governor ; and adding, that the Commissioner should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the district ; provided, that no sentence of death should be carried out without the sanction of the Lieutenant-Governor, and that it should be competent for the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him might seem fit ; and that the Deputy-Commissioner of the district, and his assistants, the native chiefs and officers, and the subordinate officers of Government, should exercise the same powers as they had hitherto exercised, until otherwise directed.

Under this Act, and these notifications, one Burah (the respondent here) and another person, since deceased, were in the year 1876 tried by the Deputy Commissioner of the Khasi and Jaintia Hills upon a charge of murder committed within that hill territory. They were convicted and sentenced to death, but on the 23rd April 1876, the sentence was commuted, by the Chief Commissioner of Assam, to transportation for life. On the 9th July 1876, they presented a petition of appeal to the High Court at Calcutta ; and a majority of the Judges of that Court (four against three) decided, after argument in Full Bench, that the case fell within their appellate jurisdiction ; and they sent for the record of the proceedings, with a view to an adjudication thereon. From that decision the present appeal has, by special leave, been brought.

The ground on which the majority of the High Court assumed jurisdiction was, that s. 9 of the Act of 1869, purporting to authorise the Lieutenant-

Governor of Bengal to extend the Act of 1869 to the Khasi and Jaintia Hills, was in excess of the legislative powers of the Governor-General in Council.

In the argument before their Lordships, the jurisdiction of the High Court was sought to be supported, not on that ground only, but on two others also—*viz.* (1), that the Act of 1869 did not, according to its true construction, exclude the jurisdiction of the High Court as to the Garo Hills, and, therefore, could not do so as to the Khasi and Jaintia Hills, assuming them to have been brought within its operation; and (2) that the whole Act of 1869 (at least so far as it might affect the jurisdiction of the High Court), and not s. 9 only, was void, and *ultra vires* of the Indian legislature. The latter of these arguments had been urged unsuccessfully before the High Court at Calcutta; but the former was not presented to that Court, and was first suggested, at the hearing before their Lordships, by the junior Counsel for the respondent.

Their Lordships will first deal with that argument.

It was founded on the proposition, that s. 4 of Act XXII of 1869 purports to remove the Garo Hills, not from the jurisdiction of the High Court, established by Her Majesty's Letters Patent under the authority of Imperial Statutes, but only from that of the Local Courts, constituted by the Regulations of the Bengal Code, or by Acts of the Indian Legislature; and, therefore, that even if the jurisdiction of those Local Courts was effectually taken away, and others (constituted by the appointment of the Lieutenant-Governor of Bengal), substituted for them, the appellate jurisdiction of the High Court remained.

Assuming (but not deciding) that "the Courts of Civil and Criminal Judicature," mentioned in the 4th Section of the Act of 1869, were only the Courts of original jurisdiction established under the Indian Regulations and Acts, their Lordships think that the supposed consequence does not follow. It may be possible, that under the terms of the 8th and 9th Sections of the High Courts Act (24 and 25 Vic., cap. 104), together with the 27th and 28th Sections of the Royal Letters Patent (28th December 1865), under which the Calcutta High Court is constituted, appeals might have gone to that Court from criminal Tribunals of First Instance, established by the Lieutenant-Governor of Bengal in the Garo, or the Khasi and Jaintia Hills, if Act XXII of 1869 had made no other provision for such appeals. But the 5th Section of that Act distinctly authorised the Lieutenant-Governor to appoint Tribunals, not of First Instance only, but also of "Reference and Appeal;" and, by the notification now in question, he has done so, giving the powers of the High Court to the Commissioner of Assam, with an ultimate controlling authority to himself. Unless, therefore, the whole Act of 1869, or the 9th Section of that Act, was void, as being in excess of the legislative powers of the Governor-General in Council, the jurisdiction of the High Court has been excluded.

The next question is, whether the whole Act of 1869 is void? It is said to be so, because the jurisdiction of the High Court was established by the Act of the Imperial Parliament already referred to (24 and 25 Vic., cap. 104), which passed in the same Session with the Indian Councils Act; and because, by s. 22 of the Indian Councils Act (24 and 25 Vic., cap. 67), the power of the Governor-General in Council "to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places or things whatever within the said territories," is qualified by certain conditions; one of which is, "that the Governor-General shall not have the power of making any laws or regulations which shall repeal, or in any way affect, any of the provisions of any Act passed in this present Session of Parliament, or hereafter to be passed, in any-

wise affecting Her Majesty's Indian territories, or the inhabitants thereof." None of the other conditions, expressed in the Act, apply to this case.

The question, therefore, is, whether an exercise of the legislative power of the Governor-General in Council, purporting to exclude the jurisdiction of the High Court within these particular districts, is inconsistent with any of the provisions of 24 and 25 Vic., cap. 104?

Now, it appears to their Lordships, from the express terms of the Act 24 and 25 Vic. cap. 104, that (unless there should be anything to the contrary in the Letters Patent under which the High Court is established) the exercise of jurisdiction in any part of Her Majesty's Indian territories, by the High Courts, was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council, as to "all Courts of Justice whatever."

By the 1st Section of that Act, Her Majesty was authorized, by Letters Patent, "to erect and establish a High Court of Judicature for the Bengal division of the Presidency of Fort William," and others at Madras and Bombay. The next six Sections relate to the qualifications, tenure of office, and emoluments, etc., of the Judges of such Courts. The 8th Section abolishes, from the date of their establishment, the previously existing Supreme and Sudder Courts in the several Presidencies. The material provisions as to jurisdiction are contained in the 9th, 11th, and 12th Sections. The 10th and 18th may be laid out of the case, because they were both repealed by a subsequent Act of 1865 (28 and 29 Vict., cap. 15). But, as some argument was founded on the 18th, it may be fit here to observe, that, by that Section, Her Majesty was empowered to make orders in Council transferring any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, "and generally to alter and determine the territorial limits of the said several Courts:" and that the same power was, in substance, conferred upon the Governor-General of India in Council (not in his legislative, but in his executive capacity) by the repealing Act of 1865.

The 9th Section of 24 and 25 Vic., cap. 104, expressly says, that each of the High Courts shall, within its own Presidency, have such civil, criminal, and other jurisdiction "as Her Majesty may, by her Letters Patent, grant and direct;" and that, "save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council," the High Court in each Presidency shall have all the jurisdiction of the former Supreme and Sudder Courts, abolished by s. 8. The authority of the Indian Legislature over the jurisdiction of the High Courts (so far, at all events, as the exercise of that authority might be consistent with Her Majesty's Letters Patent) is here distinctly recognized.

The 11th Section is similar in effect. It enacts that, after the establishment of the High Courts, every provision in any Act of Parliament, Order in Council, Charter, or Act of the Legislature of India, which had been applicable to the Supreme Courts of Bengal, Madras, and Bombay, shall be applicable to the High Courts, as far as may be consistent with that Act itself, and the Letters Patent to be issued under it, "and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of India in Council." The 12th Section contains nothing of importance to the present question.

The Act of 1865 (under which the Calcutta Letters Patent of the 28th December 1865 were actually issued), concludes with an express saving of "the power of the Governor-General in Council at meetings for the purpose of making laws and regulations."

Lastly, by the Letters Patent of the 28th December 1865 (clause 44), it is "ordained and declared that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations."

So far, therefore, from being in contravention of any of the provisions of the

Statute 24 and 25 Vict., cap. 104, or of the Letters Patent issued under that Statute (as altered by the Act of 1865), their Lordships find that such an exercise of legislative authority by the Governor-General in Council, as might remove any place or territory from the jurisdiction of the High Court at Calcutta, is expressly contemplated and authorized both by those Statutes and by the Letters Patent themselves. Their Lordships, under these circumstances, agree with the High Court, that Act No. XXII of 1869 was, in its general scope, within the legislative power of the Governor-General in Council: and they are therefore brought to the consideration of the more limited question, whether, consistently with that view, the 9th Section of that Act ought nevertheless to be held void and of no effect.

The ground of the decision to that effect of the majority of the Judges of the High Court was, that the 9th Section was not legislation, but was a delegation of legislative power. In the leading judgment of Mr. Justice Markby, the principles of the doctrine of agency are relied on; and the Indian Legislature seems to be regarded as, in effect, an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself.

Their Lordships cannot but observe that, if the principle thus suggested were correct, and justified the conclusion drawn from it, they would be unable to follow the distinction made by the majority of the Judges between the power conferred upon the Lieutenant-Governor of Bengal by the 2nd and that conferred on him by the 9th Section. If, by the 9th Section, it is left to the Lieutenant-Governor to determine whether the Act, or any part of it, shall be applied to a certain district, by the 2nd Section it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem *a fortiori* to be an act of legislation to bring the law originally into operation by fixing the time for its commencement.

But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, (in which category would, of course, be included any Act of the Imperial Parliament, at variance with it), it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions and restrictions.

Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils Act. Nothing of that kind has, in their Lordships' opinion, been done or attempted in

the present case. What has been done is this: The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by and responsible to the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, not to make what law he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, "in the other territories subject to his government." The Legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time, and the manner, of carrying it into effect, to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. This having been done as to the Garo Hills, what was done as to the Khasi and Jaintia Hills? The Legislature decided, that it was fit and proper that the adjoining district of the Khasi and Jaintia Hills should also be removed from the jurisdiction of the existing Courts, and brought under the same provisions with the Garo Hills, not necessarily and at all events, but if and when the Lieutenant-Governor should think it desirable to do so; and that it was also possible, that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district. And accordingly the Legislature entrusted, for these purposes also, a discretionary power to the Lieutenant-Governor.

Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (No. XXII of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordship's judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it: and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it. Many important instances of such legislation in India are mentioned in the opinions of the Chief Justice of Bengal, and of the other two learned Judges who agreed with him in this case. Among them are the great Codes of Civil and of Criminal Procedure (Acts VIII of 1859, XXIII of 1861, and XXV of 1861).

By s. 385 of the Code of Civil Procedure, it is provided that "this Act shall not take effect in any part of the territories not subject to the general regulations of Bengal, Madras, and Bombay, until the same shall be extended thereto by the Governor-General in Council" (not in his legislative capacity), "or by the Local Government to which such territory is subordinate, and notified in the Gazette." Section 445, in the Code of Criminal Procedure, is precisely similar.

And by s. 39 of Act XXIII of 1861, when any such extension as that authorised by s. 385 of the Act of 1859 is made, it may, with the previous sanction of the Governor-General in Council (not in his legislative capacity), be declared to be "subject to any restriction, limitation, or proviso which the Local Government may think proper." If their Lordships were to adopt the view of the majority of the High Court, they would (unless distinctions were made on grounds beyond the competency of the Judicial office) be casting doubt upon the validity of a long course of legislation, appropriate, as far as they can judge, to the peculiar circumstances of India; great part of which belongs to the period antecedent to the year 1861, and must therefore as (as Sir Richard Garth well observed) be presumed to have been known to, and in the view of, the Imperial Parliament, when the Councils Act of that year was passed. For such doubt their Lordships are unable to discover any foundation, either in the affirmative or in the negative words of that Act.

Their Lordships will, therefore, humbly advise Her Majesty that the Appeal in the present case should be allowed, and the judgment of the High Court reversed.

The 22nd June 1878.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Oudh Talookdars Relief Act (XXIV of 1870)—Rule 8—Interest—Limitation—
Jurisdiction—Act VIII of 1859, s. 333.*

On Appeal from the Court of the Commissioner, Lucknow Division, Oudh.

Ramjisdas and Imtiaz Ali

versus

Rajah Bhagwan Bax and another.

The combined effect of the Oudh Talookdars Relief Act XXIV of 1870 and of the 8th Rule made under it being that the manager of an estate is to determine the amount due for principal and interest up to the date of his determination calculated according to the contract rate (if any), and may allow subsequent interest on the amount so determined (as upon a judgment-debt) up to the time of payment at a rate not exceeding 6 per cent., the manager in this case awarded future interest at a higher rate than 6 per cent. The Commissioner on appeal, aware of the difficulty in the way of his hearing the appeal raised by the limitation of appeals prescribed by s. 10 of the Act, erroneously proceeded to act under s. 333 Act VIII of 1859, and varied the manager's order so far as it gave the rate of interest prohibited by law.

Under the exceptional legislation with which they had to deal, and the exceptional circumstances of the case, their Lordships were not so clearly satisfied that the Commissioner had not this power to deal with the order of his subordinate officer, as to feel themselves driven to a decision the effect of which would be to reverse an order which appeared to them (except in one particular, i.e. as to the date from which the 6 per cent. interest should commence) just and proper, and to set up another which, if acted upon, would practically repeal the 8th Rule made under the Act; and they therefore only varied the Commissioner's order as to the date.

Mr. Doyne for Appellants.

Mr. Mayne for Respondent.

Sir Robert Collier gave judgment as follows:—

This is an appeal from a judgment of the Commissioner of the Lucknow Division of the Province of Oudh, by which he varied an order made by the

Superintendent of Encumbered Estates under the "Oudh Talookdars Relief Acts of 1870.

To make the judgment and the grounds of appeal from it intelligible a short history of the case is necessary.

On the 3rd June 1870, Rajah Omrao Sing, Talookdar of Pakhra Ausari, executed a deed whereby he acknowledged that he had received Rs. 60,000 from the appellants, for which sum he pledged his estate to them. They were to hold the estate and receive the rents and profits of it for twelve years, after which time he was to be entitled to repay them the principal and interest at 12 per cent. per annum and to recover possession of the estate.

Soon after another advance of Rs. 12,000 was made to the Rajah, and Rs. 3,000 were advanced to his brother for which he became security. Some other small sums were advanced to him at 18 per cent.

His estate was soon after taken possession of by the Court of Wards on a representation, which turned out to be unfounded, of his incapacity; subsequently on his application the provisions of the "Oudh Talookdars Relief Act" (XXIV of 1870) were duly applied to the estate.

The order directing the application of the Act to the estate, and appointing a manager, was dated October 30th 1871. Mr. Glynn, the Deputy Commissioner of the Province, who had been the manager under the Court of Wards, was appointed manager under the Act. In November 1872 he was succeeded by Mr. Finn.

"The Oudh Talookdars Relief Act" appears to have been enacted mainly in the interest of the talookdars, for the purpose of protecting them in some degree against the claims of money-lenders by which their estates were being consumed, and undoubtedly some of its provisions are somewhat stringent against creditors. With its policy, however, we have no concern. The Act, after restraining proceedings in execution against the talookdar and his estate,—invalidating all incumbrances created by him during the management, investing the manager with large powers for protecting and improving the property, and other purposes, and providing for the proof of debts, proceeds to enact as follows:—

"9. The manager shall in accordance with the rules to be made under this Act determine the amount of the debts and liabilities due to the several creditors of the talookdar, and persons holding mortgages, charges, or liens on the said property, or any part thereof.

"10. An appeal against any refusal, admission, or determination under ss. 7, 8, or 9, shall lie, if preferred within six weeks from the date of such determination, to the Commissioner of Division to whom the manager is subordinate, and the decision of such Commissioner or of the manager if no such appeal has been so preferred, shall be final.

"11. When the total amount of such debts and liabilities has been finally determined, the manager shall prepare and submit to the Chief Commissioner a schedule of such debts and liabilities, and a scheme for the settlement thereof; and such scheme when approved by the Chief Commissioner shall be carried into effect. Until such approval is given, the Chief Commissioner may, as often as he thinks fit, send back such scheme to the manager for revision, and direct him to make such further enquiry as may be requisite for the proper preparation of the scheme."

Section 20 enables the Chief Commissioner to make rules consistent with the Act in all matters connected with its enforcement, and declares that "such rules when approved by the Governor-General of India in Council, and published in the local official *Gazette*, shall have the force of law."

Rules were duly made in pursuance of the Act, of which the 8th is in these terms:—

"When the amount of any debt, both principal and interest, has been determined, the manager may direct that interest, at a rate not exceeding 6 per cent,

per annum, shall be paid on the aggregate sum declared to be due from the date of decision till the date of payment." The combined effect, therefore, of the Act and of the Rule made under it is that the manager is to determine the amount due for the principal and interest up to the date of his determination, calculating such interest according to the contract rate (if any), and may allow subsequent interest on the amount so determined, as upon a judgment debt, up to the time of payment, provided the rate of such subsequent interest does not exceed 6 per cent.

Mr. Glynn on the 4th September 1871, while he was manager under the Court of Wards, made the following Memorandum :—

"The claim (of appellants) for Rs. 60,000 + Rs. 12,000 will now be registered. There were Rs. 3,000 let off, and I will not bring them in now against the Rajah after a compromise. About the remaining Rs. 3,107 8 annas enquiry will be made on copies of the claimant's books being received. The Rajah will be referred to also about this money, and it will be admitted if no valid reason be shown against my doing so by the Rajah."

After Mr. Glynn was appointed as manager under the Act, the following memoranda were made by him :—

"Will not let off more than the Rs. 3,000. Imtiaz Ali will let off 10 per cent. for cash payment on interest.

"27th April, 1872."

"The interest on the Rs. 72,000 will be according to the bond up to September 1871, and after that at 6 per cent. per annum. The claim for Rs. 3,107 8 annas in respect to Babu Gurdatt Singh is not admitted. The Babu has his own village, and the Babu should be proceeded against.

"10th June 1872."

It has been contended on the part of the respondent that this last memorandum was a "determination" by Mr. Glynn, under s. 10 of the Act, and that not having been appealed against within six weeks it became final. Their Lordships, however, do not regard it as such a determination. On the appointment of Mr. Finn as manager in November 1872, the appellants brought their claim before him, contending, and rightly as it appears to their Lordships, that there had been no final determination by his predecessor, whereupon Mr. Finn made an order, which he was induced to alter on review. His order on review, dated 25th November 1872, increased the principal sum, and thus concluded—

"Interest on the debt to date of decision will be calculated at the rate agreed upon. Future interest upon the sum covered by the bond at 1 per cent. (per mensem), and remainder of the debt at 6 per cent. per annum."

Soon after this order the Rajah died, and was succeeded by his infant son, who is a respondent together with the manager (or Superintendent) of the Incumbered Estates.

After a good deal of delay this order was brought to the attention of the Chief Commissioner, who, acting probably under the powers conferred on him by s. 11 of the Act, appears to have disapproved of so much of it as directed future interest at 12 per cent. per annum, regarding this rate of interest as prohibited by the 8th Rule, in which view their Lordships concur. Thereupon (and on the 8th June 1874) the following proceeding was recorded by Pundit Kali Sahae, described as Superintendent of Incumbered Estates, Lucknow Circle :—

"A docket, No. 1,322, dated 29th April 1874, has been received from the personal assistant to the Chief Commissioner under cover of the Commissioner's docket, No. 1,704, dated 4th May 1874, directing that the Superintendent was not authorised to award interest at a higher rate than 6 per cent. Wherefore a higher rate of interest than 6 per cent. will not be allowed.

"Ordered that a letter be addressed to the decree holders, communicating to them the above information. This proceeding will be filed with the record."

On this the appellants became unable to avail themselves of Mr. Finn's order,

and a deadlock appears to have ensued. The next material proceeding was taken by the present appellants, who appealed to the Commissioner of the Lucknow Division against the foregoing order of Kali Sahae. The Division Commissioner referred them to the Chief Commissioner, who declined to interfere in their behalf, whereupon they preferred another appeal to the Division Commissioner, dated 10th September 1874, wherein they contended that Mr. Finn's order was right and that it was final. The petition concludes in these terms :—

“ Under these circumstances your petitioner most respectfully re-submits his petition of appeal with enclosures, and prays that it may be formally admitted and judicially disposed of to enable any of the parties feeling aggrieved by the decision to prefer his appeal under s. 4 Act VI of 1874 to Her Majesty's Privy Council.”

The present appellants therefore, in September 1874, desired a judicial determination on substantially the same questions as are raised in the present appeal.

It does not appear what, if anything, was done upon the appeal of September 1874, and it may be inferred that the proceedings dropped, or were superseded by those next to be mentioned.

On the 23rd October 1874, an appeal raising the same question in another form was presented by the present respondents against the order of Mr. Finn, on the ground (among others) that it was illegal on the face of it in giving a rate of interest prohibited by law. On this appeal the Commissioner ordered that Mr. Finn's calculation of principal being adopted, the interest should be calculated under the terms of the deed up to Mr. Glynn's order of 10th June 1872, and thereafter at 6 per cent. per annum.

This is the judgment now appealed against, and the point mainly relied upon is, that the appeal being out of time, the Commissioner had no jurisdiction to entertain it. The Commissioner was aware of the difficulty in the way of his hearing the appeal raised by the limitation of appeals prescribed by s. 10 of the Oudh Talookdars Relief Act, and appeared to think that s. 333 of Act VIII of 1859 might apply to the case, in which view their Lordships cannot concur. He proceeded to dwell on the exceptional nature of the case, on the fact of the respondent being a minor and incapable of exercising his right to appeal, except through the manager, who himself made the order, and could scarcely be expected to appeal against it,—a state of things which the Act does not seem to contemplate—he referred to the action of the Chief Commissioner, who objected to the allowance of interest beyond the lawful rate, practically setting aside Mr. Finn's order, and he might have referred to the appeal of the now appellants against the order of the 8th June 1874, whereby they desired an adjudication on practically the same question as that raised in the appeal before him, expressly with the object of getting rid of the deadlock occasioned by the conflicting decisions in Oudh by an appeal to Her Majesty in Council. He finally came to the conclusion that he had power to amend so much of the order as was manifestly at variance with the law. Their Lordships, although the case is not free from difficulty, are not so clearly satisfied that under the exceptional legislation with which they have to deal, and the exceptional circumstances of this case, the Commissioner had not this power to deal with the order of his subordinate officer, as to feel themselves driven to a decision the effect of which would be to reverse an order which appears to them except in one particular just and proper, and to set up another which, if acted upon, would practically repeal the 8th Rule made under the Oudh Talookdar Relief Act. The particular referred to is that the order directs the 6 per cent. interest to commence from the 10th June 1872, the date of Mr. Glynn's Memorandum; whereas in their opinion that date should be the 25th November following, when the gross amount then due for principal and interest was finally determined by Mr. Finn. They will therefore humbly advise Her Majesty that

the order appealed against be varied so far as to direct that the amount determined by Mr. Finn on the 25th November 1872 to be due should be adopted, and that subsequent interest should be allowed thereon at the rate of 6 per cent. per annum. There will be no costs of this appeal.

The 19th November 1878.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Oudh Sub-Settlement Act (XXVI of 1866)—Holding under Contract.

On Appeal from the Court of the Judicial Commissioner of Oudh.

The Maharajah of Bulrampore

versus

Uman Pal Singh and Ganesh Singh.

Under-tenures held under contract, or under any arrangements from which a contract may be inferred, are within the definition of sub-proprietary rights given in the rules annexed to Act XXVI of 1866, and their holders are entitled to a sub-settlement.

Mr. Cowie, Q.C., and Mr. Graham for Appellant.

No one for Respondent.

Sir Montague Smith gave judgment as follows:—

In this case the Settlement Officer has found that the respondents are entitled to a sub-settlement for certain villages in respect of under-proprietary rights held under the Maharajah of Bulrampore. The Commissioner of Fyzabad has confirmed that finding; and upon appeal to the Judicial Commissioner, he saw no reason to disturb it.

The question turns upon the construction of Act XXVI of 1866, and the rules, which have the effect of legislative rules, scheduled in that Act.

It appears that the Raj of Bulrampore is a large and ancient estate, and that these respondents have held the villages—a part of that large Raj—for a very considerable period of time. The documentary evidence shows that they have been in possession from at least as early as the year 1771. Mr. Cowie admits that they held as sub-tenants; that there was an under-tenure under which they legally held the villages; and the only question is whether they held so as to bring their under-tenures within the definition of sub-proprietary rights given in the rules annexed to Act XXVI of 1866.

The rules are not very clearly worded, but they seem sufficiently clear to enable a plain decision to be given in this case. Rule 2 says, "To entitle a claimant to obtain a sub-settlement, he must show that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." It is not necessary to enquire what "the period of limitation" means, for no question of limitation arises. The important part of rule No. 2 is, "He must also show that he, either by himself or by some other person or persons from whom he has inherited, has by virtue of his under-proprietary right, and not merely through privilege granted on account of service or by favor of the talookdar, held such lands under contract (pucka) with some degree of continuousness since the village came into the talooka." "Some degree of continuousness" is a vague

phrase, but No. 3 supplies a definition of it. Rule No. 3 is, "The words 'with some degree of continuousness,' will be interpreted as follows: If the village was included in the talooka before the 13th February 1836"—and this village falls within that category—"the lease must have been held for not less than twelve years between that date and the annexation of the province." Undoubtedly, if there was a holding under contract in this case, the necessary degree of continuousness has been satisfied; and the only question is, whether or no there was sufficient evidence that these lands were held "under contract (pucka)."

Mr. Cowie has referred to some of the documentary evidence which appears to show that they were held under what are called leases. The Settlement Officer has found that the holding was, within the meaning of these rules, a holding under contract. Their Lordships think, supposing the evidence supports his finding as to the lease, and being confirmed by the Commissioner, they are not disposed to look too narrowly at the facts, that in point of law the decision is correct. The terms "holding under contract" embrace any holding under arrangements from which a contract may be inferred. Then the Settlement Officer has found that the land was not granted "on account of service, or by favor of the talookdar."

Their Lordships having looked at the judgments of the Settlement Officer and of the Commissioner of Fyzabad, have observed that both those Officers took very considerable pains to arrive at a correct conclusion in this case; and their Lordships see no reason whatever to suppose that they have not come to a correct decision.

Their Lordships will therefore humbly advise Her Majesty to affirm the decrees appealed from, and to dismiss this appeal.

The 21st November 1878.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Oudh Sub-Settlement Act (XXVI of 1866)—Birt Zemindary—Subordinate
Tenure—Malikhana.*

On Appeal from the Court of the Judicial Commissioner of Oudh.

Gouri Shunker

versus

The Maharajah of Bulrampore.

HELD that the grant of the Birt Zemindary interest in this case should be treated as the conveyance of a subordinate zemindary interest, and that the holder of it was entitled to a sub-settlement under Act XXVI of 1866, but without prejudice to the talookdar's right, if any, to malikhana.

Mr. Doyne for Appellant.

Mr. Leith, Q.C., and Mr. Graham for Respondent.

Sir James Colvile gave judgment as follows:—

The broad question raised by this appeal is whether the plaintiff is entitled to any and what rights in four villages which must be taken to be parcel of the talook of Tulsipore, of which the defendant, the Maharajah of Bulrampore, is now the proprietor as talookdar within the meaning of the Oudh Estates Act, No. I of 1869.

The estate of Tulsipore was formerly the property of one Dirgh Narain Singh, who, it is said, was at the time of the first capture of Lucknow during the mutiny a rebel, and imprisoned in the residency, and afterwards went, still in custody, to the Alumbagh, where he died. His heirs continued in rebellion, and the result was that in 1859 the estate of Tulsipore was created into a talook under the new system, in favor of the Maharajah of Bulrampore, who was allowed to engage for the revenue as talookdar at the summary settlement of that year. His title has since been confirmed in the fullest manner by the Oudh Estates Act, and therefore it must be taken for granted that he is talookdar of all the villages for which he then settled, as included in the talook of Tulsipore.

The title of the plaintiff arose in this way: The former Rajah of Tulsipore, on the 4th March 1856, a very few weeks after the first annexation of Oudh, borrowed from the plaintiff a sum of Rs. 7,001, and, as a security for that sum, executed to him the instrument in the nature of a mortgage by way of conditional sale, which is found at page 3 of the Record. That instrument, after declaring that he had borrowed this money, and that in lieu of the same he had made a conditional sale to the plaintiff of the four villages in question, with all the four boundaries, and birt zemindary rights for the period of four years, commencing from the 4th March 1856, and ending on the 4th March 1860, goes on to say, "The above-named creditor is allowed to take possession of the aforesaid villages, to pay the Government revenue, and to appropriate the surplus profits to his use in lieu of interest. Neither will I have any claim to profits, nor will the creditor have any claim to interest. I shall be entitled to get back the deed when I pay the money at the stipulated period."

At the summary settlement which the British Government proceeded to make upon the first annexation of the province, the plaintiff, the mortgagee, applied to have the settlement of these four villages made directly with him. That settlement was not completed until the 4th June 1857,—a period very shortly antecedent to that at which British rule ceased for a time in the province of Oudh; and, when made, was made to endure only for the time during which the plaintiff would be in possession of the villages strictly in the character of mortgagee, that is only up to the time fixed for the redemption of the mortgage. Then came the mutiny. After that came Lord Canning's proclamation of the 15th March 1858, the effect of which has been so often discussed here, that it is not necessary more particularly to refer to it. Early in 1859 the Government, having apparently retained during the intermediate period this estate of Tulsipore under some kind of attachment, finally determined to grant it to the respondent. The sunnud, if any, granted to him is not upon the Record, but it is established that he was admitted to engage for the revenue on the 21st January 1859, and that the settlement was completed on the 25th of the following May. The plaintiff, who was in actual possession of the villages as mortgagee, was dispossessed on the 31st January 1859, when, in anticipation of the final settlement, the Maharajah of Bulrampore was put in possession. The plaintiff subsequently made various attempts to assert his rights, and to recover possession, with which we have on the present occasion no concern; and on the 15th May 1866 he was referred to the regular settlement which was afterwards to be made, and told that he must prefer any claim which he could substantiate at that settlement. Accordingly in October 1870, when the settlement was in progress, he filed his plaint in the present suit.

The plaintiff in terms asserted proprietary right as mortgagee, and prayed that the regular settlement might be made with him. On the 3rd March 1873 the claim was dismissed by the Assistant Settlement Officer, who treated it apparently as one for the direct settlement of a superior proprietary right, and held that, as such, it was barred by the Oudh Estates Act, and the rights which the talookdar had acquired. There was an appeal to the Commissioner of the

district, Mr. Capper ; and before him the suit assumed the character of one for a sub-settlement of a sub-proprietary right, which it has ever since retained. That it is competent to the Courts to allow a plaintiff so to modify his claim was ruled by their Lordships in the case of the widow of *Shunker Sahai v. Rajah Kashi Pershad*, L. R. 4 I. A. 198.*

Mr. Capper in his judgment of the 10th May 1873 ruled that the mortgagee, if his title were perfected by foreclosure, would be the legal owner of birt zemindary rights subordinate to the talookdar ; but that the mortgage was still redeemable. He thought, however, that the case was not ripe for decision, and remanded it for the trial of an issue whether the plaintiff had got possession of all or any of these villages prior to Phagun 1267 Fusli. This issue was found in the affirmative ; and the fact was not disputed by the respondent when the case came back to Mr. Capper. Mr. Capper on the 28th August 1873 then made a decree in these terms : " The Court orders and decrees the appeal and cancels the decree of the 3rd March 1873. Gouri Shunker, plaintiff, and his co-sharers, if any, are decreed an under-proprietary zemindary title in Mouzah Bairwa, Mouzah Bijwa Kalan, Mouzah Bindhwa, and Mouzah Katya Bhari, and possession under the terms of the deed of conditional sale dated Phagun, Sudi 13th, 1263 Fusli, till such time as the lien shall be redeemed, or till the title shall be perfected by foreclosure." The respondent then appealed from this decree to the Judicial Commissioner, Mr. Currie. That officer, on the hearing before him of the 31st March 1874, seems to have objected to the decision of Mr. Capper on the ground that he had assumed what ought to have been proved. He said, " It is very material, for a proper determination of this case, that the exact nature of the title intended to be conveyed under the deed should be decided. The defendant urges that the title intended to be conveyed was the full proprietary title, and this view of the case is supported by the fact that this suit is laid for the full proprietary title. On the other hand, the plaintiff urges that the deed never intended to convey to him more than an under-proprietary title, that is, a title as birtia, the wording of the deed being 'with all the rights attaching to a birt zemindary.' " He accordingly sent the case down to the Settlement Officer, that is, the Judge of First Instance, for the investigation and determination of two issues : the first was, " What is the meaning of the term ' with all the rights appertaining to a birt zemindary ' in the mortgage bond on which the plaintiff bases his claim ? " The second was as to the date and circumstances of the seizure by the Government of the villages as part of the property of the rebel Rajah of Tulsipore. Nothing, however, ultimately turned upon the finding upon this issue, which was in accordance with the facts already stated.

On the first issue a number of witnesses were examined before the Lower Officer. He, upon that evidence, whilst professing that he knew very little himself about these tenures, came to the conclusion " that the deed pledged the proprietary title in these four villages ; that it was intended that the mortgagee should hold independently for the four years named ; and that at the end of that period, on failure to redeem, the plaintiff would have become the independent proprietor of the property." And he accordingly found on the first issue that the meaning of the words " with all the rights appertaining to a birt zemindary," did in this case signify independent proprietary possession, and not a right of property to be held in subordination of the talookdar.

The case, with these findings and the evidence on which they were based, went back to the Judicial Commissioner, who then made the decree which is the subject of the present appeal. He dismissed the suit upon the grounds stated in his judgment at page 52 of the Record.

Before considering those grounds in detail, it is desirable to observe, that the Judicial Commissioner seems to have agreed with the Commissioner, Mr. Capper,

* *Ante* p. 4.

that if the effect of the mortgage was to create a tenure subordinate to that of the talookdar, the claim of the plaintiff to a sub-settlement would be valid. The question upon which the determination of the suit thus depended was that which was principally argued here, namely, what was the nature of the estate conveyed by way of conditional sale; that is, whether, supposing the mortgage deed to have become absolute, the plaintiff would have held the villages from that time as an independent zemindar or as a zemindar, in some sense subordinate to the talookdar, the villages remaining in that way parcel of the Tulsipore estate.

It need hardly be said that if the Judges in Oudh had given a clear interpretation of the words "birt zemindary," their Lordships would have been very slow to question that interpretation, or even to draw from the evidence any inference other than that which those who are acquainted with the tenures of the province had already drawn. Mr. Capper, an experienced officer, assumed that the words "birt zemindary" import a subordinate tenure. From the first part of the final judgment of the Judicial Commissioner, it seems that he would have understood the words in the same sense as if they had stood alone. He says, "The conclusion at which I arrive is that had this deed been executed prior to the annexation of the province, the introduction into it of the words 'birt zemindary' would have conveyed the meaning that the mortgagee agreed to hold the property mortgaged in subordination to the mortgagor, or, in other words, that he consented to the mortgaged villages being retained in the mortgagor's kubooleut, instead of his entering into direct engagements with the Government officials for the revenue of such villages." He then goes on to consider how this construction of the words ought to be affected by a consideration of the surrounding circumstances under which the deed was executed, and the probable intention of the parties, and he proceeds: "But as the deed was executed subject to the annexation of the province by the British Government, and at a time when the policy was to do away with talookdars, and to deal with village occupants as independent proprietors, and considering also that immediately after the execution of the mortgage the plaintiff demanded and was admitted to direct engagement with Government for the land revenue due on the mortgaged villages, I can but conclude that the nature of the title intended to be conveyed under the deed was the full proprietary title, and not merely the subordinate and dependent title of 'Birtia.'" There are therefore two reasons assigned for the conclusion to which he came, and neither of them, in their Lordships' judgment, appears to be satisfactory. The deed, no doubt, was executed subsequent to the annexation of the province, but there is no reason to suppose that, at the time it was executed, the parties were at all aware of what the future policy of the Government, when it came to change the fiscal arrangements of the Nawabee, would be, for that policy at that time had not even been declared; and therefore it is unreasonable to suppose that the parties contracted with reference to a system under which the Government would make the new settlement with the village occupants as independent proprietors. Then again, their Lordships think that little, as to what the intention of the parties at the time may have been, can be inferred from the fact that after that policy had been declared, and the Government proceeded to make summary settlements with the immediate possessors of villages, and in fact adopted the policy of breaking up the great talookdary estates, the mortgagee did go in under that system to settle for the revenue of these villages. It was, after all, a mere fiscal arrangement; and the very terms of the settlement which he did make treated his interest as a defeasible interest, and confined the summary settlement made with him to the period which the mortgage had to run before it became redeemable. Their Lordships cannot attach much weight to the statement which he then made and which is not in the terms of the mortgage deed, as to what his rights would be had not redemption taken place. The Judicial Commissioner, however, having for these insufficient reasons come to the conclusion above stated, held that the

plaintiff being in possession of the villages at the date of Lord Canning's proclamation under a title which would give him the full proprietary right in the soil, when and if his mortgage became absolute, fell within the scope of the proclamation; and that his title was by that proclamation swept away, and was not set up again by the subsequent explanation of the proclamation which is contained in the two letters annexed to Act I of 1869. Everything in this decision, therefore, turns upon the correctness of the finding, that the intention of the parties was to pass the full proprietary title in the event of the mortgage not being redeemed at the proper time, and that there was therefore no sub-proprietary right in the villages as included in the talook settled in 1859 which could be the subject of a sub-settlement. Their Lordships have already intimated that they are not satisfied with the reasons which the learned Judge gives for his construction of the instrument, or rather for the qualification of that which he would understand to be imported by the words "birt zemindary right," by reason of the particular circumstances of the case; and in their own opinion it is highly improbable that the intention of the parties when the contract was made was such as is imputed to them. They do not think it likely that the Maharajah (the mortgagor) at that time contemplated the impossibility of his redeeming the mortgage; or that, if he did, he intended in such an event to lose that influence and power and consideration which the great landowners of Oudh derived from the inclusion of subordinate zemindaries in their talooks; and if the words "birt zemindary," as seems to be admitted, may import the transfer of merely a sub-proprietary right, their Lordships conceive that to be in this case the more rational construction to be put on them. And it is in their opinion a strong argument in favor of this construction, that it makes all the subsequent acts of the Government and the parties which have led to the inclusion of these villages in the talook of Tulsipore consistent with reason and justice. It is clear that the Government did not intend to grant anything except that which was properly and legitimately part of the estate of the rebellious Rajah of Tulsipore. It is also clear that as Lord Canning's proclamation had then been explained and was understood, the plaintiff, if he had acquired the absolute interest as zemindar in these villages, and if the villages were thus wholly severed from the talook, would have been allowed to engage for the revenue, not as talookdar, but as independent zemindar. Nevertheless, the villages when the settlement was made were treated as part of Tulsipore; and were accepted by the Maharajah as part of his talook. He had no other title to them except the grant of the estate of Tulsipore; and it is more reasonable to conclude that they were properly so included, than to say that by mistake the Government took property which belonged to another man, put it into an estate to which it no longer belonged, and that by reason of the Estates Act and the other proceedings which have taken place a wrong has been done which is now irremediable.

Their Lordships will now deal with an argument which was much pressed, *viz.*, that there can be no sub-proprietary right unless there be a substantial rent or service to be rendered by the sub-proprietor to the talookdar, and that in this case all that could be paid by the mortgagee after foreclosure would be the Government revenue assessed upon these villages, without giving the Rajah any beneficial interest in the collections of the villages. This objection does not appear to have occurred either to Mr. Capper or to Mr. Currie; nor was it treated as an objection in the case already referred to in the 4 Law Reports, Privy Council Indian Appeals,* in which a sub-settlement was granted to a lady who does not appear to have paid anything to her former co-sharer in the estate (as he in fact was) in respect of the four villages of which she was found to be sole proprietor. Nor do their Lordships find, either in the letters of Lord Canning or in the rules annexed to Act XXVI of 1866, anything which necessarily imports

* *Ante* p. 4.

that it is essential to the enforcement of the rights of one who would otherwise be a subordinate zemindar, that the talookdar should have some pecuniary interest in the sub-tenure. Those rules, and some expressions in the letters, no doubt, contemplate that in the ordinary case of a sub-tenant he would pay something to the superior lord. Their Lordships, however, do not find that those provisions are exhaustive, or that there are any negative words which say that there shall not be a sub-settlement of a subordinate zemindary included in a talook, unless the zemindar is bound to pay some substantial rent to his superior.

It might be open to consideration whether, if this were not in the strict sense of the term a sub-proprietary interest, the case in the 4th Law Reports, Indian Appeals,* would not have justified a sub-settlement of it. It is not necessary however for their Lordships to go that length in the present case. It is sufficient for them to say that upon the whole they think this grant of the birt zemindary interest should be treated as the conveyance of a subordinate zemindary interest; that the villages were at the time of the settlement properly treated as still included in the talook of Tulsipore settled with the respondent, and therefore that the judgment of Mr. Capper declaring the right of the plaintiff is correct.

The only doubt their Lordships entertain is, whether that decision has fully and completely satisfied the terms of Act XXVI of 1866 by giving to the Maharajah the right which that Statute seemed to contemplate that the talookdar shall always have, viz., that of receiving a malikhana of not less than 10 per cent. That malikhana was given in the former case to which their Lordships have already referred. It is not very clear whether Mr. Capper assumed that the amount of this malikhana would be afterwards fixed when the interest of the plaintiff should cease to be a mortgage interest, and be perfected by foreclosure.

Their Lordships think that in recommending to Her Majesty (as they propose to do) to allow the appeal and to confirm the decision of Mr. Capper, they should also recommend that the order should declare that it is without prejudice to the right, if any, of the Maharajah to malikhana at a rate not less than 10 per cent., and that he is to be at liberty to apply to the Courts below for the settlement of such malikhana as he may be advised. The costs of the appeal must follow the result.

The 23rd November 1878.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Customs of Jains (Proof of)—Hindoo Law (Inheritance)—Mitacshara—Widow's Estate—Daughters.

On Appeal from the High Court at Calcutta.

• Chotay Lall

versus

Chunnoo Lall and others.

The customs of the Jains, where they are relied upon, must be proved by evidence as other special customs and usages varying the general law should be proved; and, when so proved, effect should be given to them. In the absence of proof, the ordinary law must prevail.

Under the Mitacshara law a widow's estate, inherited from her husband, is a limited and restricted estate only.

A daughter, inheriting from her father, does not stand in a position higher than or different from that of a widow.

Mr. Cowell for Appellant.

Mr. Cowie, Q.C., and Mr. Doyne for Respondents.

Sir Montague Smith delivered the following judgment :—

This suit was brought by the respondents, the plaintiffs below, to try the right to considerable moveable property which was taken into the hands of the Administrator-General on the death of Luckhy Bibee, the wife of the appellant, who was the defendant below. The property in suit was the self-acquired property of Thakoordass Baboo, who died at Calcutta on the 13th February, in the year 1860, without any male issue or widow, but leaving an only daughter, Luckhy Bibee. This daughter was married in November 1863 to the defendant, and died on the 4th September 1872 without issue, her husband, the defendant, surviving her.

The plaintiffs are grandsons of a brother of Thakoordass, and it is admitted that they would have been the heirs of Thakoordass if he had left no issue. The question now is, whether they or the defendant as the husband of Luckhy Bibee became entitled to the property in question upon her death.

The first question which has been argued relates to the law which governed Thakoordass and his family at the time of his death. Thakoordass was a native of the North-West Provinces, and came to reside in Calcutta in 1814, and lived there until his death. It is the common case of both parties that he retained the personal law of the place of his birth. He appears to have belonged to the sect of Jains; and the first contention of the learned Counsel for the defendant is that the right of succession must be determined by the customs of the Jains,—that those customs have not been ascertained, and that the suit ought to be remanded for the purpose of ascertaining them.

The proceedings in the suit as to an enquiry into these customs certainly assume a somewhat singular shape, and the parties have apparently changed sides with regard to it in the course of the suit. The plaint in the first paragraph thus describes Thakoordass :—“ One Thakoordass Baboo, of the race or sect of Jains, and a resident in the North-West Province of India, in or about the year of Christ 1814 came to Calcutta, and there remained until his death, retaining and following the usages of his said sect.” The written statement of the defendant in the 9th paragraph contains this passage : “ The said Thakoordass Baboo, deceased, was, and the plaintiffs and the defendant are governed by the Mitacshara law of inheritance which obtains at Behar in the North-Western Province of India.” That is a distinct and simple assertion that the family was governed by the law of the the Mitacshara. There is no allegation that that law was modified by any custom of the Jains. This being the original allegation of the defendant, now that the right has been decided according to the law of the Mitacshara which he had invoked, he turns round and alleges that this is wrong, and that the succession ought to be determined by the usage and custom of the Jains. Mr. Cowell, who very ably argued the case, has done all that possibly could be done to find a foundation for this contention, but the case does not really afford, when it comes to be examined, sufficient materials for the purpose.

The point arises in this way : Issues were settled, the first and second of which were—“ First, was Thakoordass a Jain ; if so, what is the law of succession applicable to Jains ? ” At the hearing of the cause before Mr. Justice Pontifex, the advocates of both parties proceeded to consider the effect of the Mitacshara law as bearing upon the trial of these issues, and the contention was stated by the Judge in his judgment thus :—Having stated the issues : he says, “ But Mr. Kennedy, on behalf of the plaintiffs, insists that under Mitacshara law, apart from any peculiar law of inheritance affecting the succession to property among Jains, the deceased Luckhy Bibee took only a qualified interest in the property in dispute, which

interest was not transmissible to her heirs; but upon her death the property reverted to the next heirs of her father; and it was not disputed, on behalf of the defendants, that the plaintiffs would be entitled to the property in question in this suit if it was established that under the Mitacshara law a daughter does only take a qualified estate in her father's descended property similar to the qualified estate of a widow." It is important to observe what was then not disputed by the defendants' advocate. The judgment proceeds as follows: "Mr. Evans, on behalf of the defendants, nevertheless insisting that under the Mitacshara law the daughter takes an absolute interest in property descending to her from her father, which interest on her death descends to her own heirs and not to the heirs of her father. Under these circumstances of the case I consider it right that the question of inheritance and Mitacshara law should be argued before trying the issues above referred to." In consequence of the line thus taken by the advocates of the parties, Mr. Justice Pontifex, having heard their arguments on this question, decided that by the law of the Mitacshara the daughter took a restricted estate only. The defendant appealed to the High Court from that judgment. Their Lordships have looked through the memorandum of appeal, and they find no objection or complaint on the ground that Mr. Justice Pontifex had not tried the issues as to the customs of the Jains. When the case came before the High Court it directed the case to be remanded for the trial of these issues. The reasons for this judgment do not appear upon the Record. The Court probably acted on its own motion, desiring to be informed upon those issues; for the remand was certainly not warranted by any objection appearing in the grounds of appeal.

On the trial of these issues two witnesses only were called. Neither side appears to have gone into evidence as to the customs of the Jains, or to show that the rule of inheritance amongst the sect of Jains, to which Thakoordass and his family belonged, was different from the ordinary law. Mr. Justice Pontifex, who heard the evidence, found upon it that, although the father was a Jain, the case was governed by the law of the Mitacshara, and the judgment of the High Court, now appealed from, has proceeded upon that finding.

The plaintiffs objected to the finding on the above issues. Their objection was that the learned Judge in the Court below was wrong in holding that the case was governed by the Mitacshara law, and that he ought to have held that the case was governed by the Hindoo law of the Bengal school; and secondly, that if it were not so governed, it was governed by the Hindoo law of the Benares school. Those objections were taken by the plaintiffs in the belief that the law of the schools they referred to would be more favorable to them than the law of the Mitacshara; but what is material on the present point, and why attention is now called to these objections, is, that the defendant did not object to the finding of the Judge upon the ground that the Judge ought to have gone into the evidence as to the laws and customs of the Jains. By the Code of Procedure, s. 354, if the defendant meant to insist that the laws and customs of the Jains had not been ascertained, he ought to have objected at that time. The Section is clear: "Either party may, within a time to be fixed by the Appellate Court, file a memorandum of any objection to the finding, and after the expiration of the period so fixed the Appellate Court shall proceed to determine the appeal." The defendant, having that opportunity of objecting, did not think fit to do so, and accordingly the High Court proceeded to consider the case upon the law of the Mitacshara.

Mr. Cowell ultimately argued the case as if it was to be presumed that all Jains were governed by customs with regard to inheritance differing from the ordinary law, and he suggested that a case which was recently before this tribunal supported that view. The case he referred to is *Sheo Singh Rai v. Mussamut Dakho and another*, L. R. 5 Indian Appeals, page 87;* but their Lordships think

* *Ante*, p. 529.

that that case does not support it. On the contrary, the effect of that case is that the customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and that in the absence of proof the ordinary law must prevail. If Mr. Cowell's argument is right, it would be only necessary that a man should be found to be a Jain to establish the conclusion that the ordinary law did not apply to him. The contrary is certainly to be inferred from the decision of this Board.

As this argument was rather strongly pressed by Mr. Cowell, it will be well to refer to some passages in the judgment in that case. In page 107, in commenting upon the judgment of the High Court, it is said: "The Judges then proceed to an elaborate review of the decisions in India, in which the laws and customs of the Jains have been considered. It appears to have been contended before them—to use the words of the Court—that the applicability to Jains of the laws of the Brahminical Hindoos, or what is generally termed Hindoo law, had been established by so many rulings that the Court was bound to apply it to this case; and further, that no uniform and consistent body of customs and usages existed amongst the Jains which would enable the Court to affirm that the general law was modified by them. It certainly appears that, in most of the decisions referred to by the Judges, the Courts had held that there was no sufficient proof of the existence of special customs among the Jains to displace or modify the general law, though in others, where sufficient proof of special customs appeared, effect had been given to them. Their review of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the Jains might be governed, as to some matters, by special laws and usages, and that where these were satisfactorily proved effect ought to be given to them. The learned Counsel for the appellant who argued the case at their Lordships' Bar felt himself unable to dispute the correctness of this conclusion." Their Lordships proceed to say: "It would certainly have been remarkable if it had appeared that in India, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed to usages and customs differing from the ordinary law, whether Hindoo or Mahomedan, the Courts had denied to the large and wealthy communities existing among the Jains the privilege of being governed by their own peculiar laws and customs, when those laws and customs were by sufficient evidence capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise." The result of the decision is stated in the following passage:—"In the present case their Lordships consider that the Judges of the High Court were right in thinking that their decision should be governed by the evidence taken in this suit." This decision did no more than adopt and affirm the law, to be deduced from a long roll of cases in India, that when the customs of the Jains are set up they must be proved like other customs varying the ordinary law, and that, when so proved, effect should be given to them.

The result of a review of the proceedings in the present case is, that the defendant cannot now impeach the judgment appealed from on the ground that the customs of the sect of Jains, to which this family belong, have not been ascertained.

The remaining question is, whether the High Court has taken a correct view of the law, which is now assumed to be that of the *Mitacshara*, in holding that *Lucky Bibee's* right was a qualified right only, and not an estate of the nature of *streedhun*.

The law of inheritance in the case of women has been recently declared in the case of a widow by two decisions of this Board. Both are to be found in the 11 *Moore's Indian Appeals*. The first is *Mussamut Thakoor Deyhee v. Rai Baluk Ram and others*, page 139;* and the other is *Bhugwandeem Doobey v. Myrna Baie*,

page 487.* After a very full consideration of the authorities, and in two elaborate judgments discussing at length those authorities, this tribunal decided that under the law of the Mitacshara a widow's estate inherited from her husband is a limited and restricted estate only.

After these decisions the question is reduced to the point, whether a daughter inheriting from her father stands in a higher and different position from that of a widow? Reliance has been placed on the often-cited text in the Mitacshara relating to woman's property. The words most relied upon are contained, not in the text, but in an interpretation of the text. The 11th Section of the 2nd chapter, paragraph 1, defines what is woman's property. The important part of the paragraph is: "The author, now intending to explain fully the distribution of woman's property, begins by setting forth the nature of it. 'What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition), is denominated a woman's property.'" It seems that the word in the original text "any other" is "*adi*," and that the proper translation of the word would be "or the like," so that the passage ought to be read "or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, *or the like*." The interpretation gives a more specific definition, and instead of "or the like," there are given the words which have been so often cited, and have given occasion to so much discussion. "Also property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by Menu, and the rest, woman's property." The original text does not afford any foundation for the argument in favor of the right of the widow and daughter to the entire interest in land acquired by inheritance; the interpretation, no doubt, does. No decision of this tribunal has been referred to with regard to the estate taken by the daughter inheriting from her father, but the arguments which were pressed at their Lordship's bar in the present case by Mr. Cowell were presented and fully developed in the former cases before this tribunal relating to widows. The reasons by which these arguments were answered in the judgment of the Court—reasons which it is not necessary to repeat—are, for the most part, applicable to the case of a daughter.

But their Lordships cannot regard the question of the daughter's estate as "*res integra*." It has been the subject of numerous decisions in India. The Indian authorities are carefully collated in the judgment of Mr. Justice Pontifex and of the Judges of the High Court. The result appears to be that the Courts in Bengal and Madras have determined in a series of decisions that the daughter takes a qualified estate only. No doubt, in the Courts of Bombay, there have been rulings and *dicta* in favor of the view that she takes the entire property. Their Lordships do not think it necessary, especially after their own decisions as to widows' estates, to go into an examination of the Indian cases. They agree in the conclusion of the High Court, which affirms that which was stated many years ago to be the law by Sir William Macnaghten in his Treatise on Hindoo Law, page 22, in these terms: "But though the schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death in default of issue male. According to the law, as received in Benares and elsewhere, it does not go as *streedhun* to her husband or other heir, and according to the law of Bengal also it reverts to her father's heirs."

With regard to the case, most relied upon, in the High Court of Bombay, it would seem to have been there admitted that, after the decisions which have taken place, the daughter's estate, according to the Benares school, was only a restricted one. The family of Thakoordass is apparently governed by the law of that school. Certainly it is not governed by the law of the Mayukha, which was held to be the governing law in the Bombay case.

Their Lordships may observe that the authorities are collected and discussed in Mr. Mayne's learned Treatise on Hindoo Law.

Their Lordships think that after the series of decisions which has occurred in Bengal and Madras, it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts; and they agree in the observations which are to be found at the end of the judgment of the High Court, that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions, unless, indeed, it is manifestly opposed to law and reason. They do not think this rule is opposed to the spirit and principles of the law of the Mitacshara; on the contrary, it appears to them to be in accordance with them. The result is that they will humbly advise Her Majesty to affirm the decree appealed from, and to dismiss this appeal with costs.

The 6th December 1878.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Sale of Tenure—Act VIII of 1859—Act VIII of 1869 (B.C.) s. 59.

On Appeal from the High Court at Calcutta.

Doolar Chand Sahoo and others

versus

Lalla Chabeel Chand.

Doolar Chand Sahoo and others

versus

Lalla Biseshur Dyal and others.

(Consolidated Appeals.)

In attaching property of a judgment-debtor under Act VIII of 1859, the judgment-creditor can only attach and sell the right, title, and interest of the judgment-debtor; whereas if he sells the tenure under s. 59 Act VIII of 1869 (B.C.), he would get rid of all under-tenures, and the purchaser be entitled to the whole tenure free from all incumbrances.

Mr. C. W. Arathoon for Appellants.

Mr. Doyne for Respondents.

Sir Barnes Peacock delivered the following judgment:—

In these two cases the property in respect of which the actions were brought was the mouzah called Mouzah "Inglis" in the district of Shahabad. That mouzah many years ago was granted to Gooran Khan, an invalided havildar, under the provisions of s. 33 of Reg. XLIII of 1793. By virtue of that Section Gooran Khan held the property free of revenue and free of rent during his life as a jagheer, but upon his death the property became liable to be assessed, and by virtue of the Section, to which allusion has been made, the assessment would be in the nature of rent payable to the zemindar of the estate in which the mouzah was situate. The zemindar in question was the Maharajah of Domraon. Upon the death of Gooran Khan, Bachoo Khan, his son and heir, came in as his representative, and the property then being liable to assessment, he entered into a settlement with the Maharajah in September 1827, upon which a rent was reserved to the Maharajah in respect of the tenure. Bachoo Khan died in October

1860, a period within 12 years before the commencement of the suit. He left a widow, Nazirun, and a son, Gooder Khan, and three daughters, Nazeerun, Sahcebun, and Peerzadi. The son was entitled to a share of 5 annas 7 pies and 4 krants, and the three daughters were entitled to shares amounting together to 8 annas 4 pies and 16 krants of the mouzah. The widow appears to have given up her share altogether, and it may be assumed for the purpose of this decision that the son took the widow's share, which together with his own share of 5 annas 7 pies and 4 krants gave him an interest to the extent of 7 annas 7 pies and 4 krants. That interest added to that of the daughters makes up the whole amount of the 16 annas of the mouzah.

After the death of Bachoo Khan, his son, Gooder Khan, was sued in respect of a loan which had been made to Bachoo Khan. Proceedings went on, and a decree was ultimately obtained under arbitration against Gooder Khan. Gooder Khan, in order to raise money to satisfy that decree, borrowed a sum of money from Ram Jeawan Singh. Gooder Khan was sued by Ram Jeawan Singh in respect of the money so borrowed; and although Gooder Khan had mortgaged a 12-annas share of the mouzah to Ram Jeawan as a security for the loan, the action against Gooder Khan was treated merely as one for an ordinary debt, and Ram Jeawan obtained a decree against him for the money due, and interest. Upon that an execution was issued. Biseshur purchased under that decree, not the 12-annas share, which had been mortgaged, but merely the right and interest of Gooder Khan, which, as already stated, amounted to 7 annas 7 pies and 4 krants. The Maharajah also brought a suit against Gooder Khan for three years' rent, which was due under the settlement made with him. That suit was brought under the provisions of Act VIII of 1869 of the Government of Bengal. In that suit it was ordered that an *ex parte* decree be passed in favor of the plaintiff, that the plaintiff do recover the amount claimed, with costs, and interest at the rate of 6 per cent. per annum up to the day of realization from the defendant. The Maharajah proceeded to execute that decree against Gooder Khan. On the 31st March 1872 he applied to have it executed. He gave the names of the parties, and then he stated what redress he sought from the Court. He stated under that head, "The attachment and sale of the property belonging to the judgment-debtor,"—that is, the property belonging to Gooder Khan. The petition ran in this way: "The decretal money due to your petitioner is payable by the judgment-debtor under a decree mentioned above. Your petitioner therefore begs to file this petition along with an inventory of the property belonging to the judgment-debtor, and prays that by attachment and sale of the judgment-debtor's property the decretal amount, together with costs and future interest up to the day of realization, be ordered to be recovered from the judgment-debtor." An inventory was attached to that petition in the following words: "Inventory of the invalid lands, being the kasht (cultivation) of the judgment-debtor, situated in Mouzah Rampore Pergunnah Bhojepore, for the recovery of the arrears of rent whereof the present decree is passed, amounting to 120 beegahs." It therefore appears clear that that application was merely that by attachment and sale of the judgment-debtor's property the decretal amount might be realized. By virtue of the 59th Section of the said Act VIII of 1869, the Maharajah, if he had pleased, was authorized to apply for the sale of the tenure. By that Section it is enacted that, "Whenever a decree shall be passed for an arrear of rent due in respect of an under-tenure, which by the title deeds or the custom of the country is transferable by sale, and the judgment-creditor shall make application for the attachment and sale of such under-tenure, the Court shall, so soon as such under-tenure shall have been ordered to be sold, cause to be hung up in some conspicuous part of the building in which such Court sits, and of the buildings in which the Collector and Judge of the district within which the land comprised in such under-tenure is situate, and to be fixed on some conspicuous place on such land,

and on some conspicuous place in the town or village in or nearest to which such land is situated, a notice for the sale of such under-tenure on some fixed date, not less than 20 days from the hanging up of such notice in such Court." By s. 34 of the same Act it is enacted that, "Save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the Code of Civil Procedure passed by the Governor-General in Council, being Act No. VIII of 1859, and by such further and other enactments of the Governor-General in Council in relation to civil procedure as now are or from time to time may be in force; and all the provisions of the said Act and of such other enactments shall apply to such suits." It appears therefore that although the Maharajah might, if he had pleased, have applied to sell the tenure in execution of his decree, he had also a power to proceed against the property of the defendant. It has already been shown what the application of the Maharajah was. He asked that the decree might be realised by the sale of the property of the judgment-debtor. Upon that application the Moonsiff issued a perwannah described as a "Perwannah for execution of decree under s. 233 to s. 238 Act VIII of 1859." If he had considered that the application was an application to sell the tenure under s. 59 of Act VIII of 1869, it would have been described as a procedure under that Section, and not under the sections of the Civil Procedure Code to which the Moonsiff refers in his perwannah. The perwannah issued to the officer was as follows: "Pursuant to an order of this day, you are required to attach the under-mentioned properties under the provisions of Act VIII of 1859 as they may be pointed out by the decree-holder, and submit the inventory of the property attached, with your report, within a week." Then he describes the property "Invalid land held in cultivation," and he gives the boundaries of the land. So that the perwannah was merely to attach that property under the provisions of Act VIII of 1859. Now it is clear that in attaching the property of a judgment-debtor, whether in an under-tenure or in an ordinary leasehold interest, under Act VIII of 1859, you can only attach and sell the right, title, and interest of the judgment-debtor; but if you proceed to sell a tenure under s. 59 of Act VIII of 1869, then you sell the tenure; and by virtue of s. 66 of the same Act, the purchaser, under the provisions of ss. 59 and 60 of the Act, acquires it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement. So that if this tenure had been sold under the provisions of s. 59, the sale would have got rid of all under-tenures, and the purchaser would have been entitled to the whole interest in the tenure, free from all incumbrances, in the same way as if the tenure had been sold under the provisions of the law for the sale of an estate for the arrears of Government revenue. Having issued that perwannah to the officer to execute the decree, notice of the intended sale was given. That will be found at page 71 of the Record. It is headed "Sale notification," not under s. 59 of Act VIII of 1869, but "A sale notification under s. 246 of Act VIII of 1859;" and it proceeds: "Auction sale of the rights and interests in the under-mentioned properties for the realization of the amount covered by the decree." And then it states: "Notice is hereby given to the public that Sahib Ram filed, on the 31st March 1872, an inventory of the under-mentioned property, praying for their auction sale for the realization of the decretal money; therefore this proclamation is issued for the information of the public, to the effect that on Friday, July 19th 1872, A.D., corresponding with 28th Assar 1279 Fusli, the auction sale of whatever rights and interests Gooder Khan, the judgment-debtor, has in the property detailed below will be commenced at noon in the place where the property is situated in Pergunnah Bhojepore, Zillah Shahabad. If any one wishes to purchase the said rights, he ought to appear at the aforesaid time and place, either personally or through his mookhtar,

and purchase it. The rights and interests of other persons in the said property will not be sold by auction besides that of the judgment-debtor." So there was an express notice that under the sale in execution of the decree only the rights and interests of the debtor were to be sold ; and it was also expressly pointed out that the rights and interests of other persons in the said property, other than those of the judgment-debtor, would not be sold. Under that notification Doolar Chand and others, the defendants in the two suits out of which this appeal arises, purchased. The sale to them was confirmed, and they were put into possession and obtained a certificate of sale. The certificate which they obtained was as follows: "On a petition having been filed for execution of a decree of the Civil Court passed by the Moonsiff of Buxar Zillah Shahabad, dated the 2nd December 1871, A.D., in suit No. 16, against the judgment-debtor, and for the sale of his property, a sale notification was, under the order of this Court, issued, and the property sold at auction on the 25th July 1872. Whatever rights and interests the judgment-debtor had in the said property were purchased by Doolar Chand," and so on. Those are the defendants. "Hence, this certificate being made over to Doolar Chand Baijnath and Ram Saran Sahoo, etc., the auction purchasers, it is proclaimed that whatever rights and interests the said judgment-debtors have in the property aforesaid have ceased to exist from the 25th July 1872, the date of the auction sale, and become vested in the auction purchasers, Doolar Chand Baijnath Sahoo and Ram Saran Sahoo." Nothing then can be clearer than that both the perwannah and the notice of sale, as well as the certificate, gave express notice to the purchasers that nothing would be sold, and that nothing was sold to them, save and except the rights and interests of the judgment-debtor.

Here it may be observed that if the notice of sale had stated that the tenure was to be sold under the provisions of Act VIII of 1869, the three sisters of Gooder Khan might have protected the tenure from sale, by satisfying, in accordance with the provisions of that Act, the decree of the Maharajah. The purchasers having been let into possession, Chabeel Chand, one of the plaintiffs, purchased the interests of the three sisters. They were entitled to 8 annas 4 pies and 16 krants in this tenure, and the plaintiff, Chabeel Chand, purchased that right, and he contended that under his purchase he was entitled to recover from the auction purchasers, under the Maharajah's decree, the 8 annas 4 pies and 16 krants which he had purchased from the sisters. Lalla Bisheshur Dyal, who had purchased under the decree of Ram Jeawan Singh, also claimed that he was entitled to recover possession of what he had purchased under Ram Jeawan Singh's decree, and that he had purchased under Ram Jeawan Singh's decree the right, title, and interest of Goodur Khan previously to the sale under the Maharajah's decree. The Judges of the Lower Courts dismissed the claims both of Bisheshur and of Chabeel Chand. But the High Court reversed those decisions, upon the ground that Dooli Chand and others had purchased under the Maharajah's decree only the right, title, and interest of Gooder Khan. If they purchased the tenure they would have been entitled to retain possession, and the plaintiffs would have failed in their suit. On the other hand, if they purchased merely the right, title, and interest of Gooder Khan, then in the one case Chabeel Chand was entitled to recover the 8 annas 4 pies and 16 krants share of the mouzah which he had purchased from the sisters, and Bisheshur was entitled to recover the other portion of the estate which he had purchased as the right, title, and interest of Gooder Khan. It has already been shown what the nature of the sale in execution of the Maharajah's decree was, and their Lordships think that the High Court were right in the conclusion at which they arrived, that Dooler Chand and others, the defendants in the suits, had purchased merely the right, title, and interest of Gooder Khan, and not the whole tenure free from all encumbrances and the rights of others who were interested therein.

Under these circumstances they are of opinion that the High Court was right

in holding that Chabeel Chand was entitled to recover the 8 annas 4 pies and 16 krants, and that Bisheshur Dyal was entitled to recover the interest which he purchased under the sale in execution of Ram Jeawan Singh's decree. The High Court however appear to have made a mistake. They appear to have been under the impression that Gooder Khan, instead of being entitled only to a 7 annas 7 pies and 4 krants share, was entitled to a 12-annas share in the property, and they accordingly gave Bisheshur a decree for a 12-annas share, as well as a decree to the other plaintiff for an 8 annas 4 pies and 16 krants share. It is impossible that those two decrees can stand, because that would give a right to the two plaintiffs to recover against the defendant 20 annas 4 pies and 16 krants out of 16 annas. It is clearly an oversight, and Mr. Doyne, the learned Counsel for Bisheshur, has admitted that the decree in Bisheshur's case was erroneous, and that instead of a 12-annas share it ought to have been a 7 annas 7 pies and 4 krants share.

Their Lordships therefore will humbly advise Her Majesty that the decision of the High Court in Chabeel Chand's suit be affirmed, and that in Bisheshur's case the decree be amended by ordering that he shall recover a 7 annas 7 pies and 4 krants share of the estate from the defendants.

Their Lordships are also of opinion that the respondents in both appeals are entitled to their costs.

The 21st January 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

• Delay in impeaching a Deed—Onus Probandi.

On Appeal from the High Court at Calcutta.

Gossain Luchmi Narain Poori

versus

Pokhraj Singh Din Dyal Lal and others.

One of the obvious consequences of a long delay in bringing a suit to impeach a deed as not genuine is that, after the lapse of years, witnesses disappear, and the recollection of those who survive becomes dimmed and less accurate than it might have been if the enquiry had taken place at an earlier period. In this case the three persons who were principals, and two at least of the attesting witnesses, were dead, and the plaintiff was held to have failed in presenting a strong case, as he was bound to do, when he asked the Court to set aside a deed which had been acted upon for nearly twelve years.

Mr. C. W. Arathoon for Appellant.

Mr. Graham and *Mr. Horace Smith* for Respondents.

Sir Montague Smith gave judgment as follows:—

The question upon which this appeal depends is, whether a mokurruree lease granted by one Mitterjeet, a mohunt, and a member of a mendicant fraternity, is a genuine or a forged document. The High Court has found it to be genuine. The question is one purely of fact, and their Lordships are entirely unable to see their way upon the evidence in the record to disturb the finding of the High Court.

The property of Mitterjeet was confiscated by the Indian Government in or some time before the year 1859, in consequence of his having joined in the rebellion. A good deal of evidence appears in the Record as to the history of this property.

but it is quite unnecessary to refer to it, inasmuch as it has been assumed throughout that Mitterjeet was in rightful possession of, and had full power of disposition over it. Under proceedings taken in the Collectorate the property of Mitterjeet was sold by auction, after confiscation, by order of the Government. The estates in question in this suit, namely, eight annas of Mouzah Baghour and two annas thirteen dams and six kowrees of one-third of Mouzah Bhandajore, were purchased at that auction sale by a predecessor of the present plaintiff in the name of Futteh Singh, who, upon being made a party to this suit, disclaims all interest. The plaintiff having become the owner of the rights in the mouzahs, under this Government sale which was made on the 23rd September 1859, in May 1871 brings this suit to set aside a mokurruree which, it is alleged, had been granted by Mitterjeet prior to his leaving the country and joining the rebels.

It appears that Mitterjeet had on the 8th December 1856 made a zuripeshgee lease of the above mouzahs and others to one Himmut Ram for fifteen years in consideration of an advance of a sum of Rs. 10,000, upon which a rent was reserved of Rs. 94. It is a part of the case on both sides that that lease was valid, and there is no doubt apparently entertained that the sum of Rs. 10,000 was advanced to him. The mokurruree in question bears date in the following year, the 28th July 1857, and purports to be made, in consideration of Rs. 5,000, to Baboo Girwurdhari Singh, son of Ressal Singh. A question has arisen whether the son, Girwurdhari, took the mokurruree in his own right or as benamee for his father. That question, however—though it might arise between the son and the representatives of the father—is not material to be considered in the present case, except so far as it bears upon some conflicting evidence which appears to have been given on the part of the several defendants.

Several parties are made defendants to the suit; first, the three sons of Ressal Singh, of whom Girwurdhari is one; then Dal Chand, the alleged purchaser of a share in the mokurruree, and Dindyal Lal, who was the purchaser of another share in it under an execution. Futteh Singh, to whom reference has before been made, is also a defendant; and the last defendant is Narain Poori, who was an intervenor in the suit, and claimed to be entitled to a moiety of the interest purchased at the Government sale.

The first consideration which demands notice in the case is the delay which took place on the part of the plaintiff in putting forward this claim. The Government sale was in 1859. In the proceedings which took place prior to that sale various persons put in petitions of objection, and, amongst others, those who claimed under the mokurruree. There were petitions refuting the claim, and it was decided by the Collector that the question of the validity of the mokurruree could not then be gone into; that all that could be done was to sell the right and interest of Mitterjeet in the property, the purchaser taking it with notice of the claim under the mokurruree. Therefore the purchaser bought with full notice of the claim under the mokurruree. But for the mokurruree the purchaser would have been entitled to a share of the rent reserved upon the zuripeshgee, which was Rs. 94. Yet prior to the commencement of the present suit no attempt was made to enforce the payment of this rent. That the parties entitled to the mokurruree were claiming the zuripeshgee rent was fully known to the plaintiff, because in the year 1867 a suit was brought by Ressal Singh and others who claimed under the mokurruree against the representatives of Himmut Ram to recover the arrears of the rent under the zuripeshgee; and in that suit the plaintiff intervened and denied the right of the plaintiffs under the mokurruree to receive this rent. It was held that he was not entitled so to intervene, and that if he wished to question the validity of the mokurruree he must do so by a regular suit. That was in the year 1867, and this suit was not brought until the year 1871, which was nearly twelve years after the original purchase from Government. In considering the evidence it is necessary to bear in mind this great delay on the part of the plaintiff.

Coming to the evidence, their Lordships find that on the part of the plaintiff, who sought to set aside the deed as a forged and fabricated document, there is no affirmative evidence whatever to establish that the deed was forged or fabricated. A great number of witnesses, mohunts and disciples of Mitterjeet, no doubt, say that they never heard of it, and refer to circumstances which more or less tend to raise a probability, but a probability only, that he did not execute it. Many of these witnesses speak to his having executed other deeds, and there can be no doubt that they had full knowledge of his handwriting; yet the question is not put to any one of them whether the signature to this deed, purporting to be that of Mitterjeet, is of his handwriting.

Supposing the case had rested there, could it be held that the plaintiff had given sufficient *prima facie* evidence to impeach a deed which has been acted upon for a period of nearly twelve years? The defendants did not, however, rely only upon the weakness of the case which the plaintiff has made for setting aside the deed, but called two or three people who were attesting witnesses to the deed, and several who were present, and spoke to the execution of this deed by Mitterjeet. They, and a great number of other witnesses, deposed to the actual payment of Rs. 5,000 to Mitterjeet by either Ressal Singh or his son Girwurdhari. Undoubtedly there is some discrepancy in the evidence, and their Lordships are far from saying that the case is very satisfactorily proved on the part of the defendants. But part of the inconsistency which appears on the evidence may be accounted for by the fact that the defendants have as between themselves conflicting interests. The sons of Ressal other than Girwurdhari have an interest in asserting that Ressal was the actual holder of the mokurruree; Girwurdhari, on the other hand, has his own separate interest, and asserts that the mokurruree was granted to him in his own right. It does happen that as between themselves they set up cases which are not consistent the one with the other; but the broad facts are proved by a great number of witnesses, who say that the deed was executed and that the money was paid. One of the obvious consequences of a long delay in bringing a suit to impeach a deed on the ground that it is not a genuine one is, that after the lapse of years witnesses disappear, and the recollection of those who survive becomes dimmed and less accurate than it might have been if the enquiry had taken place at an earlier period. In this case it appears that the three persons who were principals in these transactions, namely, Ressal, Mitterjeet, and Himmur Ram, are dead. It appears also that two at least of the attesting witnesses are dead. Surely there ought to be a strong case on the part of a plaintiff who comes into Court to set aside a deed at so late a period to induce a Court to give him relief. In this case there is certainly no such case presented on the part of the plaintiff; and there is evidence, though it may not be entirely satisfactory, to prove that the document was really executed, and the money really paid.

Under those circumstances, their Lordships think that the High Court were right in coming to the conclusion that the plaintiff had failed to establish his case. Mr. Arathoon endeavored to raise and argue a further objection to the mokurruree, *viz.*, that it was executed by Mitterjeet in contemplation of his joining the rebels, and with a view to escape the consequences of a forfeiture of his property. It is enough to say that that case is not made either in the plaint or in the pleadings; nor does it seem to have been raised in either of the Courts below. It is quite a different case from that which alone is put forward in the plaint, and which alone has been the subject of discussion in the Courts below.

In the result, therefore, their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss this appeal, with costs.

The 23rd January 1879.

Present :

Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Oudh—Lord Canning's Proclamation—Confiscation of Lands.

On Appeal from the Court of the Judicial Commissioner of Oudh.

Nawab Malka Jahan Sahiba

versus

The Deputy Commissioner of Lucknow in charge of the Nazul Department.

HELD, that Lord Canning's proclamation of the 15th March 1858 had the effect of vesting in the British Government the property (the subject of this suit), together with all other landed property in Oudh, and all who claim title to it must claim through the Government. Whether or not the sunnuds under which plaintiff formerly held would, if Oudh had remained under the old dynasty, have conferred upon her a life interest or an interest in perpetuity, it was clear that no more was granted to her than a permission to occupy for her life the palace to which she now asserted a right in perpetuity. If the acts of the Government officers allowing her so to occupy the palace, which she seeks to impugn, were nullities, it would follow that she has no interest at all, but that her property remains in the British Government to which it was confiscated.

Mr. Cowie, Q.C., and Mr. Doyme for Appellants.

Mr. Leith, Q.C., and Mr. Mayne for Respondents.

Sir Robert Collier gave judgment as follows :—

The material facts in this case may be shortly stated. The plaintiff was one of the widows of a king of Oudh, Momuddin Mahommed Ali Shah, who occupied the throne some time before the annexation of Oudh. In the years 1839 and 1840 this lady had four sunnuds from the king, granting to her a large tract of land within the city of Lucknow, comprising royal palaces, gardens, houses, and shops. The form of those sunnuds, which are substantially (if not in words) the same, is this :—"We have graciously been pleased to grant to Malka Jahan Nawab Tajun Nissan Begum, according to the details herein given, the Baradari on the road, together with the Mehal Sarai belonging to Government, containing an area of 38,330 square yards, situated in Tilpura *alias* Dowlat-pura, a mohalla of Lucknow city, which is the seat of Government. All the civil clerks, Government officers, and darogas, present and future, are directed to transfer the said houses to the possession of the said Begum and her descendants in perpetuity generation after generation, to see that this command is durably executed, and to give no annoyance by demanding any tax. Neither shall they call for a fresh deed year after year."

On the suppression of the mutiny in Oudh the well-known proclamation of Lord Canning was issued on the 15th March 1858. That proclamation, among other things, contains these words :—"The Governor-General further proclaims to the people of Oudh that, with above-mentioned exceptions" (in favor of certain loyal talookdars) "the proprietary right in the soil of the province is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting." It proceeds : "To those talookdars, chiefs, landholders, with their followers, who shall make immediate submission to the Chief Commissioner of Oudh, surrendering their arms and obeying his orders, the Right Honorable the Governor-General promises that their lives and honor shall be safe, provided that their hands are not stained with English blood murderously shed. But as regards any further indulgence which may be extended to them, and the condition in which they may hereafter be placed, they must throw themselves upon the justice and mercy of the British Government. To those amongst them who shall promptly come forward and give to the Chief Commissioner their support in the restoration of peace and order, this indulgence will be large, and the Governor-General will be ready to view liberally the claims which they may thus acquire to a restitution of

their former rights." It does not appear either that the plaintiff took any part in the rebellion or that she promptly came forward and gave her support for the restoration of peace and order.

Their Lordships have before now had occasion to express the opinion to which they adhere, that the effect of the proclamation was to divest all the landed property from the proprietors in Oudh, and to transfer it to, and vest it in, the British Government.

There followed two proclamations of Sir James Outram, dated respectively the 22nd March 1858 and the 25th March 1858. The first is in these terms :— "It is hereby notified for those who have fled away from the city, having locked up their houses, that if they would not return within ten days and re-occupy their houses, the property with their houses will be confiscated." The second, addressed to the landholders, runs thus :—"The Major-General, Chief Commissioner of Oudh, in sending you this proclamation, wishes to inform you that if you at once come in ready to obey his orders, provided you have taken no part in the atrocities committed on helpless Europeans, none of your lands will be confiscated, and your claims to lands held by you prior to annexation will be heard." These proclamations of General Outram cannot be taken as changing the effect of the proclamation of Lord Canning, or having any operation, in as far as they may be inconsistent with it. Certainly they could not have the effect of divesting any property from the British Government which had been vested in it. The object of General Outram, doubtless, was to exhibit a conciliatory policy to those who should promptly come in and tender their submission to the British Government.

The next document that it is necessary to refer to is a letter of the 8th April of the same year, addressed by the Secretary of the Chief Commissioner of Oudh to Mr. George Campbell, who was then the Judicial Commissioner of Oudh, in these terms :—"Sir,—The Chief Commissioner requests that you will consider the Nazul Department as under you, and that you will at once order lists to be made out and carefully prepared of all Nazul property." (Nazul property being State property, which had accrued to the State from forfeiture, lapse, or any other cause.) "The houses and gardens of all rebels should be *prima facie* entered in the lists, and can be restored or not, as may hereafter appear expedient. The property of the late royal family will necessarily all come within the lists."

It has been contended on the part of the appellant that for "royal family" should be read "king," but their Lordships do not adopt that construction. The question is, what was done by the Government? And looking to this document, coupled with others which will be referred to, it appears to their Lordships that the intention of the Government, which was carried into effect, was to put upon the Nazul Register all the property which in any sense could be considered property of the royal family, or royal property, including the property in question.

The next document to be referred to is a letter of the Judicial Commissioner of Oudh to the Commissioner and Superintendent, Lucknow Division, dated the 26th July 1858. "Sir,—In settling what buildings, etc., are to be retained as Nazul and what restored to the former possessors it will be necessary to distinguish between estates made over in full proprietary right to the proper owners, and those which are in fact Nazul as belonging to the former Government, but are held as residences by the Begums and others connected with the Court. The latter are clearly not transferable, but will in most instances eventually lapse to Government, and I trust that you will see that the distinction is maintained. For instance, the great palace hitherto held by the Begum Malka Jahan is evidently a mere jointure house in which she lived when all Lucknow was in possession of the Court, but it is in no way her private property, nor can it be said that her house has been taken from her. She is merely in the altered circumstances of Lucknow and of the royal family, the occupation by British troops and destruction of so many buildings, assigned accommodation more reasonable and moderate than

the enormous palace of other times. In other cases similar arrangements may be made so that those who have lost all by the demolitions may be provided for and those who happen to escape may not unreasonably monopolise the accommodation to the exclusion of others. In the Nazul list there should be first statement of estates in immediate possession, and second, statement of those in which the Nazul has a reversionary interest." It would seem that the Deputy Commissioner acted upon this letter of the Judicial Commissioner, for we find this account of "Proceedings of the Collector's Office of the Lucknow District recorded by Mr. Simson Nicholas Martin, Deputy Commissioner, on the 3rd August 1858. A letter dated 28th July 1858, No. 212, giving cover to Judicial Commissioners, letter No. 206, dated 26th idem, has been received from the Commissioner directing a distinction to be made in the Nazul Register between those houses which are in reality Nazul, but which were given to Begums to live in; for instance, the large house which was formerly in the possession of Malka Jahan, the Judicial Commissioner says that this house certainly belonged to the King, and was given by the King of Oudh to the Begum merely to live in. Where such is the case a note will be entered in the column of remarks to the effect that the house will be regarded as Nazul property after the death of the party at present in possession. Ordered that an injunction be issued to the Nazul Daroga, directing him to make the required note in the column of remarks where such a large house is in the possession of any Begum." Whether or not that entry in the Nazul was immediately made is not very clear: it would perhaps be the better opinion that it was made subsequently in June 1859, because on the 2nd June 1859 we find the following letter from Mr. A. Abbott, the Commissioner and Superintendent, to the Deputy Commissioner. "With reference to your letter No. 598, dated 23rd ultimo, I have the honor to forward for your information and guidance the annexed copy of a letter, No. 1,049, dated the 31st idem, from the Secretary to the Chief Commissioner sanctioning the grant to Mohsan-ud-dowla of that portion of the house of Malka Jahan made over to him by the Judicial Commissioner in full satisfaction of all claims on account of houses demolished, and to request that you will file an acknowledgment of the Nawab to the effect stipulated, and see that that portion of the premises in the occupation of Malka Jahan is in the Nazul list. The building was declared Nazul by the Judicial Commissioner in his letter No. 206, dated the 26th July 1858, declaring Malka Jahan to have only a life interest in it. On her death it will lapse to the Government."

Probably an entry to that effect in the Nazul list was then made. The allusion to Mohsan-ud-dowla in this letter is thus explained. The Government determined to allow the plaintiff to reside in a large portion of the great aggregation of buildings, but they thought fit to give a portion of it to Mohsan-ud-dowla, who appears to have deserved well of the Government, in lieu of certain property of his which had been taken for military purposes. Whether or not the plaintiff assented to this division between herself and Mohsan-ud-dowla may be questioned, but is not material. She does not in the present action claim that portion of the palace which was assigned to Mohsan-ud-dowla.

A good deal of correspondence was read which took place about this time, and their Lordships infer from it that although there does not appear to be any distinct and formal entry of a notification having been given to this lady that she would be allowed to remain only as an occupier for life of the premises, she must have been aware of the terms on which the permission was granted. Indeed, she appears on one occasion to have been heard by her mookhtar before the Commissioner or the Deputy Commissioner to state her case.

About this time the lady went on a pilgrimage and remained absent for several years, leaving the palace in the possession of her servants in the interim. Upon her return, some time in 1865, she made a claim for the whole of the palace, and that claim is thus dealt with by the authorities. The Under-Secretary

to the Government of India writes thus to the Chief Commissioner of Oudh, from Fort William, on the 22nd February 1866 :—" Sir,—In reply to your Junior Secretary's letter, dated 10th instant, No. 563, reporting on the claim of Malka Jahan Begum to the whole of the buildings known as 'Malka Jahan's Estate,' I am directed to intimate that the Governor-General in Council, concurring in your view of the case, declines to recognise the claim advanced by the Begum, and desires that she may be informed accordingly."

In the next year she again pressed her claim, and we have, on the 26th July 1867, another letter from the Secretary of the Governor-General to her attorneys, in these terms : "Gentlemen,—In reply to your letter dated 1st March last, submitting a petition from Malka Jahan, in which she lays claim to the house at Lucknow known as 'Aga Mir Ki Deorlu,' a portion of which has been made over to Nawab Mohsan-ud-dowla, I am directed to inform you that the Governor-General in Council, after careful enquiry, sees no reason to modify his previous orders respecting this claim."

The lady appears to have taken no steps in the matter for six years after this, but on the 7th May 1873 she presented a petition to the Commissioner of the Lucknow Division, asserting her right to the premises in perpetuity, and requesting the Government to allow it. She goes on to say : "That certain farmans, bearing the royal stamp, relating to the grant of the said houses, are in my possession, which corroborate the fact that these houses were granted to me as my permanent and transferable property for generation after generation. Notwithstanding all this a strange thing has happened, that on the arrival of a letter from your honorable Court, the said houses have been inserted to the Nazul Register under the hypothesis that the King of Oudh, my deceased husband, has granted me the houses for occupation for life only." Then she says : "As I had proceeded on pilgrimage to 'Karbala,' therefore no steps could be taken from my side to regulate this error. Whereas the groundlessness of this hypothesis will be developed to you even by a perusal of the above-mentioned farmans, in which it is specifically recorded that the proprietary and transferable right of the houses has been given to me for perpetuity." Then she goes on to say : "It is, therefore, essentially necessary and equitable to correct this mistake by striking off the words 'for occupation only'" —which are in italics and inverted commas—"from the Nazul Register, because by the existence of such a mistake a considerable loss shall be sustained by me, my heirs, and relatives, whose maintenance and protection are incumbent on Government, in compliance with the testamentary contracts of the late King, my husband. In conclusion I respectfully beg that after the perusal of the farman, and making other necessary enquiries, you will be humane enough to correct this mistake, by making known generally that this property may remain exempt from all interference after me as it now is." On the 18th September following, she seems to have sent copies of these farmans, with a petition (not set out in the Record) which the Commissioner thus deals with on the 18th October : "Read a petition dated 18th September 1873 from Nawab Malka Jahan, submitting certain sunnuds, with a view to their genuineness being tested. Ordered that the sunnuds be returned to petitioner, with the remark that officiating Chief Commissioner has no power to enquire into their validity. If she has any doubts on the subject she had better apply to the Civil Court for a declaratory decree, or such other legal advice which the officiating Chief Commissioner is not competent to give."

Thereupon she brings the present action on the 30th March 1874. The plaintiff claims a declaration of plaintiff's absolute title in the premises, describing them. It states, "That the plaintiff has been in absolute proprietary possession of the above houses by virtue of the aforesaid grants for last 36 years ; that in 1858 the defendant by proceedings dated the 3rd August 1858,"—that is the memorandum which has been referred to of the proceedings in the Collector's Office in Lucknow,

acting on the letter of Sir George Campbell —“ declared that the plaintiff had a life interest in the houses aforesaid, which were to lapse to the Nazul Department on the death of the plaintiff, the present holder, as a property of the ex-king of Oudh. That the plaintiff in 1873 presented a memorial to the Local Government setting forth her legal title to the aforesaid houses, on the strength of the royal grants mentioned above, and prayed for the rectification of the mistakes committed by the Nazul Department in respect of the ownership of the aforesaid houses, whereupon she (the plaintiff) was directed to seek redress in the Civil Court, *vide* Chief Commissioner's No. 581, of 28th October 1873, herewith enclosed. Plaintiff therefore sues for the declaration of her title in the houses aforesaid as the absolute owner thereof.” She further asserts that the cause of action arose when she presented her last petition and the Government refused to act upon it.

The Deputy Commissioner pleads first that “the suit is barred by limitation. The palace having been declared to be a State building in 1858, and plaintiff having been then informed that it was in no way her private property, and that she was allowed to occupy a portion of it as a jointure house,” and then he refers to the letters and proceedings which have been read. “The suit in its present form is inadmissible. Plaintiff really wants consequential relief of a most valuable nature, and hence the suit should be brought on full stamps. The sunnuds relied upon are of no force opposed to the declaration of Government after re-occupation, that the palace was State property and the fact of Government having dealt with it as such. For these reasons the suit should be dismissed with costs.”

The suit was first heard by Mr. Lincoln, the Civil Judge, who gave judgment in favor of the plaintiff. An appeal was preferred to the Commissioner, who gave judgment for the defendants, on the ground that the act which was complained of, and sought to be set aside, was an act of State, and could not be taken cognizance of in a Civil Court. On further appeal to the Judicial Commissioner, he affirmed the judgment on the ground that the claim was barred by limitation, and this is the judgment now appealed against. The Commissioner appears to have supposed that Sir George Campbell and the officers who dealt with this property at Lucknow were acting under Reg. XIX of 1810, s. 7, which enacts that the general superintendence of all Nazul property is vested in the Board of Revenue. Their Lordships think it right to observe that this Regulation, which was never extended to Oudh, was clearly not the authority under which they acted; their authority was the proclamation of Lord Canning, and the other proceedings of the Government which have been referred to.

Their Lordships are of opinion that this suit cannot be maintained. The proclamation of Lord Canning, as has been before stated, had the effect of vesting the property, the subject of the suit, together with all other landed property in Oudh, in the British Government, and all who claim title to it must claim through the Government. The question then is, what interest, if any, has been granted or allowed to this lady by the Government? Their Lordships do not think it necessary to determine the effect of the construction of the sunnuds under which she formerly held, whether they would, if Oudh had remained under the old dynasty, have conferred upon her a life interest or an interest in perpetuity. It does not distinctly appear whether or not these sunnuds were called to the attention of Sir George Campbell, acting as the Nazul Officer of the Government; but whether they were, or were not, or whether Sir George Campbell took a right or a wrong view of what the lady's rights were before the proclamation of Lord Canning, appears to their Lordships immaterial. Those rights, whatever they were, were confiscated, and the sole question is, what interest, if any, was re-granted to her? Looking at the whole of the proceedings which have been quoted, it appears to their Lordships abundantly clear that no more was granted to her than a permission to occupy the palace for her life. If the acts which she

seeks to impugn on the part of the officers of the Government were nullities, it would follow she has no interest at all, but that her property remains in the British Government to which it was confiscated.

Their Lordships may further observe that this being a declaratory suit, it is clearly not maintainable on the ground that no possible relief could be given. The suit thus failing on two grounds, it is not necessary to enter into the question of the Statute of Limitations. For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Judicial Commissioner dismissing the suit be affirmed, and this appeal dismissed, with costs.

The 1st February 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Hindoo Law (Mitacshara)—Mortgage of Ancestral Property by Father—Auction Purchasers (Execution Sale)—Notice of Co-sharer's Claim—Effect of Execution Sale on deceased Judgment Debtor's Share.

*On Appeal from the High Court at Calcutta.**

Suraj Bunsai Koer, as Mother and Guardian of Ram Sahai and
Bhuggobutti Sahai (Minors)

versus

Sheo Prosad Singh and others.

An *ex parte* decree for money having been obtained against a Hindoo governed by the Mitacshara law, upon a bond whereby he had mortgaged his ancestral immoveable property, the same was attached. Prior to the execution sale, the judgment debtor died; and his infant sons and co-heirs, on filing a petition of objections, had been referred to a regular suit. In a suit after the sale by the said infants against the execution creditor and the purchasers, for the adjudication of their right to and confirmation of possession in the property sold, and to have the mortgage bond, the *ex parte* decree, and the execution sale set aside, it appeared that the father's debt had been incurred without justifying necessity.

HELD that as between the infants and the execution creditor, neither they nor the ancestral property in their hands was liable for the father's debt.

HELD, as regards the purchasers, that they, having purchased after objections filed by the plaintiffs, must be taken to have had notice, actual or constructive, thereof; and therefore to have purchased with knowledge of the plaintiff's claim, and subject to the result of the suit to which they had been referred;

HELD, as regards the judgment debtor's undivided share in the estate sold, that whether or not his own alienation was valid by the law as understood in Bengal, it was capable of being seized in execution, and that the effect of the execution sale was to transfer the said share to the purchasers, the execution proceedings having at the time of the judgment debtor's death gone so far as to constitute in favor of the execution creditor, a valid charge thereon which could not be defeated by the judgment debtor's death before the actual sale.

Mr. Cowie, Q.C., and Mr. Doyne for Appellant.
Mr. Leith, Q.C., and Mr. Graham for Respondents.

Sir James Colville delivered the following judgment:—

The question to be determined on this appeal is, what are the respective rights of the infant plaintiffs and appellants on the one hand, and of the respondents, claiming as purchasers at an execution sale on the other, in an eight-anna share of Mouzah Bissumbhurpore, a village situate in the district of Tirhoot. The material facts out of which this question arises are the following:—

Baboo Adit Sahai, the father of the plaintiffs, became on the death of his father Nursing Sahai in 1862, or by virtue of a subsequent partition effected with

* From the judgment of Glover and R. C. Mitter, J.J.,—decided 21st July 1875, reported in 24 W. R. 281.

a coparcener, the sole owner of certain ancestral immoveable property in Tirhoot, including eight annas of Mouzah Bissumbhurpore. It has been assumed throughout the proceedings that the case was governed by the law of the Mitacshara; that, or the Mithila law which is the same in respect of the questions raised in the suit, being the general law of the district. He had afterwards two sons, who are the infant plaintiffs. Of these, Ram Sahai was born in 1862, and Bhuggobutti in October 1869. These dates were disputed, but have, in their Lordships' opinion, been conclusively established in the suit. On January 21st 1870 Adit Sahai executed, in favor of one Bolaki Chowdry, a defendant in the suit, though not a respondent on this appeal, an instrument in the form of a bond and Bengali mortgage, whereby he bound himself to repay the sum of Rs. 13,000 which he had borrowed from Bolaki, with interest at the rate of 15 per centum per annum, and pledged as security for such repayment the whole and entire proprietary shares owned and possessed by him in Mouzah Surakdeeha (also part of the ancestral estate) and Mouzah Bissumbhurpore. This bond does not expressly state any reason for incurring the debt, but it refers to a negotiation for a loan of a smaller sum from another party, which had fallen through, and says that that sum was not then sufficient to meet the payments of the obligor's several creditors. It was registered on the 21st January 1870.

On the 30th December 1872, Bolaki Chowdry, suing on this instrument, obtained an *ex parte* decree against Adit Sahai *alone* for the sum of Rs. 16,901 13 3, the amount due for principal, interest, and costs. The terms of this decree were in the usual terms of a decree in such a suit, *viz.*, that the sum decreed should be realized by the sale of the mortgaged property, and that if the said property should not be found sufficient to meet the payment of it, the person and other properties of the judgment debtor should be held liable for it.

On the 21st March 1873 Adit Sahai presented a petition to the Court. This, after stating that, execution having been issued in the usual way, the mortgaged property had been ordered to be put up for sale; that on production of Rs. 3,000 out of the decretal amount the Court had granted time for one month, and postponed the sale to the 7th April; that the petitioner was very ill, and would be ruined by a forced sale, prayed the Court to grant a further postponement of the sale, and, under the provisions of s. 243 of Act VIII of 1859, to appoint a surbarakur of the mouzahs in question, and certain other portions of the ancestral estate. From the order made on this petition it appears that the attachment of Bissumbhurpore had for some reason been already quashed, and that a new attachment was about to be made; and it was accordingly directed that in the meantime the petition should stand over (p. 174). That second attachment must have been made, for subsequent proceedings in execution were had, in the course of which Bindu Koer, the mother of Adit Sahai, claimed to be entitled in her own right to one anna of Mouzah Bissumbhurpore, and to some part of the other property taken in execution. Her latter claim was allowed, but that affecting Bissumbhurpore was rejected; and the execution sale stood fixed for the 23rd May 1873, when, on the 19th of that month, Adit Sahai died. The proceedings against Adit Sahai were thereupon revived in the usual way against his two sons as his heirs, and the 28th July 1873 was fixed as the day of the sale of the property liable to the execution. On the 14th of that month, however, Mussumat Sooraj Bunsu Koer, as the mother and guardian of the infant appellants, filed a petition of objections for the protection of their interests as the sons of, and, therefore, under the Mitacshara law, the co-sharers with, their father in his lifetime in the property; and the order passed on that petition was in effect that the objections could not be heard and decided in the execution department; but that if the petitioners had any interest in the property attached apart from and other than what their late father possessed, they could obtain their remedy by bringing a regular suit. The execution accordingly proceeded, the sale took place on the 28th July, and the lot

described as "the eight-anna share of the judgment debtor in Mouzah Bissumbhurpore, part of the mortgaged property as per inventory of the decree holder" was purchased by the respondents for Rs. 6,600. The sale proceeding was ordered to be duly kept with the record. Whether the usual certificate was afterwards issued to the purchasers, or in what terms, if issued, it was expressed, does not clearly appear on the record; but it is certain that they had not been put into possession on the 27th August 1873, when the present suit was commenced.

That is a suit by the infant appellants, suing, by their mother and guardian, against the respondents as the purchasers of the eight annas of Bissumbhurpore at the execution sale, and also against Bolaki Chowdry the execution creditor. The plaint prayed for the adjudication of the right of the plaintiffs to, and the confirmation of their possession in the eight annas of Bissumbhurpore; to have the mortgage bond of the 21st January 1870, the *ex parte* judgment obtained by the defendant Bolaki thereon, the miscellaneous orders rejecting the plaintiffs' objections, and the auction sale of the 28th July 1873 set aside; and for an injunction to restrain the delivery of possession of the disputed property to the respondents. The claim to this relief was founded on the rights which, under the law of the Mitacshara, a son acquires on his birth in ancestral property, and the consequent limitation on the father's power to alienate, encumber, or waste that property; and the plaint contained the charges, usual in such cases, of immoral and extravagant conduct on the part of Adit Sahai.

The Subordinate Judge, by his judgment of the 27th April 1874, found for the plaintiffs on all the issues in the suit, and gave them a decree for the confirmation of their possession, and the cancellation of the bond of the 21st January, the decree founded thereon, and the execution sale.

He found in particular that there was no justifying necessity for the loan of the Rs. 13,000, or for the former loans in repayment of which part of that money was employed; that the balance of the money was not shown to have been applied to family purposes; that Bolaki had failed in his duty to make *bond fide* enquiry into the necessity, but had lent without such enquiry the money to a man whom he well knew to be over head and ears in debt, and living a life of debauchery and sensuality; that consequently the *ex parte* decree was void of all legal form against the family estate of which the debtor was but a joint owner; and that for the same reason the execution sale effected thereunder could not stand so far as the family property was concerned. He also held that the rights of the purchasers stood on no better ground than those of the execution creditor; that they were "not innocent purchasers in the proper sense of the term, since notice was given before the sale by the plaintiffs that the family property advertised for sale could not legally be sold for the debt of one of the joint members of the family."

On appeal to a Division Bench of the High Court the learned Judges, in their judgment of the 21st July 1875, said:—

"The Subordinate Judge has decided (in the words of the well known case of *Hunooman Pershad* (6 Moore, I.A. 421)* that although the creditor would have been justified in advancing his money if he had made such enquiry as was open to him, and satisfied himself, as well as he could, as to the existence of the necessity, he did not in this case make such enquiry; or rather, perhaps, his words may be taken to mean that the result of any enquiry must have shown him quite clearly that the only necessity of Adit Sahai was his own improper and immoral way of life, which required the expenditure of funds not derivable from his regular income. And this decision would, we think, have been perfectly fair and right, were we dealing with Bolaki Chowdry only; for he appears to have acted as the family mahajun for a long time previous, and must necessarily have been acquainted with Adit's circumstances and way of life."

* 18 W. R. 81n; 2 Suth. P. O. R. 29.

The learned Judges, however, proceeded to rule that the purchasers (the respondents) stood on higher ground; that under the authority of the case of *Muddun Thakoor v. Kantoo Lal*, L. R. 1 I. A. 321,* they were to be treated as strangers who had purchased at public auction for valuable consideration, and had bought on the faith that the decree under which the sale was made was a proper decree, and properly obtained. In a subsequent part of their judgment they threw out that the *onus* of showing against the purchasers that the decree was an improper one lay upon the plaintiffs; and that the evidence in the cause as to the habits and immoral conduct of Adit Sahai, though strong enough to support a decree against Bolaki Chowdry, might not be strong enough to support one against the purchasers. The formal decree passed was that the decree of the Lower Court should be reversed, and the suit as against the purchasers, defendants, dismissed.

The result, then, of the judgment and decree under appeal is that the plaintiffs had established, as against the execution creditor, a case which, had he been the purchaser at the execution sale, would have entitled them to full relief against him; but that they had not established a title to any relief against the purchasers, the respondents.

The extreme contention on the part of the appellants is that nothing passed or could pass to the respondents under the execution sale, because, on the death of the judgment debtor before the sale, the whole of his interest vested by survivorship in his sons, leaving nothing upon which the execution could operate.

The extreme contention on the part of the respondents is that the sale took effect on the whole of the mortgaged property, and passed the interest of the sons, as well as that of the father therein.

An intermediate proposition is that the sale was operative upon the right, title, and interest of the judgment debtor in the property put up for sale, so as to pass the share to which, upon a partition effected in his lifetime, he would have been entitled in eight annas of Mouzah Bissumbhurpore.

The arguments addressed to their Lordships make it desirable to consider, somewhat in detail, what are the principles of the Hindoo law which are the foundation of the plaintiff's claim, and what the rights which flow from them. These questions are of course determinable by the texts of the Mitacshara, as interpreted by judicial decisions either of the Courts of India or of this Board; and it cannot be said that the course of decision has been altogether uniform and consistent.

That under the law of the Mitacshara each son upon his birth takes a share equal to that of his father in ancestral immoveable estate is indisputable. Upon the questions whether he has the same right in the self-acquired immoveable estate of his father, and what are the extent and nature of the father's power over ancestral moveable property, there has been greater diversity of opinion. But these questions do not arise upon this appeal. The material texts of the Mitacshara are to be found in the 27th and following slokas of the first section of the first chapter. It was argued at the bar that, because in the third sloka of the above section it is said that the wealth of the father becomes the property of his sons, in right of their being his sons, and that "that is an inheritance not liable to obstruction," their rights in the family estate must be taken to be only inchoate and imperfect during their father's life, and in particular that they cannot, without his consent, have a partition even of immoveable ancestral property. There was some authority in favor of this proposition, notwithstanding the texts to the contrary which are to be found in the Mitacshara itself (see Slokas 5, 7, 8, 11 of the 5th Section of the 1st chapter). But it seems to be now settled law in the Courts of the three Presidencies that a son can compel his father to make a partition of ancestral immoveable property. On this point it is sufficient to cite

* 22 W. R. 56; 2 Suth. P. C. B. 984.

the cases of *Laljeet Singh v. Rajcoomar Singh*, 12 Bengal L. R., 373,* and *Raja Ram Tewarry v. Luchman Persad*, Bengal Full Bench Rulings from 1863 to 1867, p. 731,† decided by the High Court of Calcutta; that of *Kaliparshad v. Ram-Charan*, 1 Allahabad Reports, 159, decided by the High Court of the North-West Provinces; that of *Na'galinga Mudali v. Subbiramaniya Mudali and others*, 1 H. C. Madras, 77, decided by the High Court of Madras; and the case of *Moro Vishvanath and others v. Ganesh Vithal and others*, 10 Bombay H.C., 444, decided by the High Court of Bombay. The decisions do not seem to go beyond *ancestral* immoveable property.

Hence, the rights of the coparceners in an undivided Hindoo family governed by the law of the Mitacshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindoo law imposes upon sons (a question to be hereafter considered), and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate.

The right of coparceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the Courts of India, and it cannot be said that there has been complete uniformity of decision respecting it.

All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied, at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult coparceners, their express consent is not required; but this is a question which does not arise in the present case.

To what extent an unauthorized alienation can be impeached by coparceners is a more important question, and one upon which there has been a greater conflict of authorities. Nor can it be said that the same law even yet prevails in all parts of India upon it.

A distinction has been often made, both by Courts of Justice and by text writers, between alienations by private contract and conveyance, and alienations under legal process, as in the case of joint family property seized and sold in execution of a decree against one member of the family for his separate debt.

Since the decision, however, of the cases of *Virasavami Gramini v. Ayyasvami*, 1 Madras H.C., 471; of *Peddammuthalatty and others v. N. Timma Reddy*, 2 Madras H. C., 270; *Palanivelappa-Kaundau v. Mannaru Naikan and another*, 2 Madras H. C., 416; and *J. Rayarcharu v. J. V. Venkataramaniah*, 4 Madras H. C., 60, it has been settled law in the Presidency of Madras that one coparcener may dispose of ancestral undivided estate, even by private contract and conveyance, to the extent of his own share; and *a fortiori* that such share may be seized and sold in execution for his separate debt.

That the same law now obtains in the Presidency of Bombay, is shown by the cases of *Damodhar Vithal Khare v. Dhamodar Hari Soman*, 1 Bombay H. C., 182; *Pandurang Anandrav v. Bhaskar Shadashiv*, 11 Bombay H. C., 72; and *Udaram Sitaram v. Ranu Panduji and another*, 11 Bombay H. C., 76. But it appears from the case of *Vrandavandas Ramdas v. Yamunabai*, 12 Bombay H. C., 229, and the cases there cited, that, in order to support the alienation by one coparcener of his share in undivided property, the alienation must be for value. The Madras Courts, on the other hand, seem to have gone so far as to recognize an alienation by gift. There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindoo family; and the law as established in Madras and Bombay has

* 20 W. R. 386.

† 8 W. R. 15.

been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition. See 1 Strange H. L., 1st edition, p. 179, and App. Vol. II, pp. 277 and 282.

In Bengal, however, the law which prevails in the other Presidencies as regards alienation by private deed has not yet been adopted. In a leading case on the subject, that of *Sadabart Prasad Sahu v. Foolbash Koor*, 3 Bengal L. R., Full Bench Rulings, p. 31,* the law was carefully reviewed, and the Court, refusing to follow the Madras and Bombay decisions, held that, according to the Mitacshara law as received in the Presidency of Fort William, one coparcener had not authority without the consent of his co-sharers to mortgage his undivided share in a portion of the joint family estate, in order to raise money on his own account, and not for the benefit of the family. In another part of the same case the Chief Justice intimated a doubt upon a question which did not then call for decision—viz., whether, under a decree against one coparcener in his lifetime, his share of joint property might be seized and sold in execution. That question must now be taken to have been set at rest by the recent decision of this tribunal in *Deendyal Lal v. Jugdeep Narain Singh*, L. R., 4 I. A., 247,† by which the law has so far been assimilated to that prevailing in Madras and Bombay, that it has been ruled that the purchaser of undivided property at an execution sale *during the life of the debtor* for his separate debt does acquire his share in such property with the power of ascertaining and realizing it by a partition.

But then the question arises, what is the consequence of the debtor dying before the execution is complete; whether in that event the coparceners take his undivided share by survivorship, so as to defeat the remedy which the creditor would otherwise have against it.

This was much considered in the case already cited from the 11 Bombay H. C. Report, p. 76. There the debt was the separate debt of a son joint in estate with his father. The suit was brought, after the death of the son, against the father. A decree was obtained against the father and the son's widow, and it was sought, in a supplemental suit, to enforce that decree against the son's undivided share in joint property, treating that share as liable, in the father's hands, for the son's debt. It was ruled that this could not be done; that, though a son might be liable to pay his father's separate debts, there was no corresponding obligation on a father to pay his son's debts; that the right of a son to a share in the joint ancestral property had died with him; and that his share, having survived to the father, was no longer a subject upon which the execution could operate. This case is the more important, because the Court, whilst coming to the above decision, fully recognized the alienability of the share of one coparcener, as established at Bombay; and showed, with some detail, how the remedy against such a share is to be worked out by the holder of a decree in the debtor's lifetime.

Mr. Mayne, in his valuable Treatise on Hindoo Law and Usage, s. 288, states that there had recently been a decision to the same effect as that just stated at Madras. Indeed, this was stronger than that at Bombay, because the debtor had died after decree, though before execution. The case is cited as that of *Koop-pookonan v. Chinnayen*, 1 Madras Reporter 63, but their Lordships have been unable to obtain access to a copy of those reports, and can refer only to the abstract of the case in Mr. Mayne's work. The Chief Justice in that case seems to have taken a distinction between a specific charge on the land and a mere personal decree. The existence of such a distinction would be the logical consequence of the power of a coparcener, as recognized at Madras and Bombay, to sell or mortgage joint property to the extent of his undivided share.

In his judgment in the Bombay case, see p. 85 of 11 Bombay H. C. Reports, Westropp, Ch. J., cites a decision of the High Court of the North-West Provinces, *Goor Pershad v. Sheodin*, 4 N.-W. Prov. Report, 137, which is still stronger than

* 12 W. R. F. B. 1.

† *Ante*, p. 467.

the last-mentioned case at Madras, because there the property had been actually attached in the debtor's lifetime.

It may be further observed that the Chief Justice, in the case already cited from 3 Bengal Reports (*see* p. 36, *et seq.*),* seems to have intimated an opinion in favor of the general rule that an undivided share in joint property cannot be followed in the hands of coparceners to whom it passed by right of survivorship. It was not, however, necessary to decide the point in that case.

Their Lordships have hitherto dealt with the powers and rights of ordinary coparceners. They have now to consider how far those rights and powers are qualified by the obligation which the Hindoo law lays upon a son of paying his father's debts. The obligation is thus succinctly stated by Chief Justice Westropp at p. 83 of 11 Bombay H. C. :—

“Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes), the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather.”

And as authorities for this proposition he cites Colebrooke's Digest, Book I., chap. V., fl. clxvii., and *Girdhari Lall v. Kantoo Lall*, L. R., 1 I. A., 34.† One of the earlier authorities cited at the bar upon this point was a case decided by the late Sudder Court of Lower Bengal in 1861, which is reported at p. 213 of the decisions of the Suddur Dewanny Adawlut of Bengal for that year. In it an infant son sued by his guardian, in the lifetime of his father, to set aside various conveyances which had been made by the father of portions of the joint family estate, and to recover the property sold under them, and also to recover other portions of the estate which had been sold under orders of the Court in execution of decrees. The family was governed by the Mithila law, and the first point decided was that the restrictions on a father's power of alienation over ancestral immoveable estate under that law were the same as those imposed by the law of the Mitacshara.

This case recognized the distinction between alienations by conveyance and those made under process of execution. The Court set aside the sales by conveyance because no justifying necessity for them had been established, and it did this although the considerations for the sales were in some instances money raised in order to satisfy either judgment or bond debts. On the other hand, it dismissed the suit so far as it sought to recover property which had been sold under decrees of Court, on the ground that the son was under an obligation to pay the debts of the father if not contracted for immoral purposes, and that he had failed in this case to prove, as against the purchasers under the decrees, that they were so contracted. The words of the judgment on this point are, “Freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts, under Hindoo law, can be successfully pleaded only by a consideration of the invalid nature of the debts incurred. Now we are clearly of opinion that the plaintiff has been unable to show that the expenses for which these decrees were passed were, looking to the decrees themselves, and we cannot now look beyond them, immoral, and such as, under Hindoo law, the son would not be liable for.”

The decision of this tribunal in the before-mentioned case of *Kantoo Lal* has, however, gone beyond this decision of the Sudder Dewanny Adawlut, because it treats the obligation of a son to pay his father's debts, unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover property sold in execution of decrees of Court. The judgment, moreover, and this is the portion of it that is chiefly material to the determination of the present appeal, affirms the principle

* 12 W. R. F. B. 1.

† 22 W. R. 56; 2 Suth. P. C. R. 984.

laid down in the judgment of the Sudder Dewanny Adawlut, that a purchaser under an execution is not bound to go further back than to see that there was a decree against the father; and that the property was property liable to satisfy the decree, if the decree had been given properly against the father. In such a case, one who has *bond fide* purchased the estate under the execution, and *bond fide* paid a valuable consideration for it, is protected against the suit of the sons seeking to set aside all that has been done under the decree and execution, and to recover back the estate as joint ancestral property.

This case then, which is a decision of this tribunal, is undoubtedly an authority for these propositions:—

1st. That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and, 2ndly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings.

Their Lordships have now to apply the principles to be extracted from the authorities which have been considered to the case before them.

It has been found by both the Indian Courts, and, in their Lordships' opinion, properly found, that the plaintiffs, as between them and Bolaki Chowdry, the judgment creditor of Adit Sahai, had established that neither they, nor the ancestral immoveable estate in their hands, were liable for the debt to Bolaki which had been contracted by their father. The two material issues on this point were, 1st, Whether the bond to Bolaki, executed by the late father of the minors, was legally valid so far as the minors' interest is concerned, and whether the money thus borrowed was devoted to the satisfaction of debts incurred when the minors had no existence; and, 2ndly, What sort of a life did Adit Sahai live; did he spend the money borrowed from Bolaki Chowdry in immoral purposes? The Subordinate Judge, upon a full consideration of the evidence, found both these issues in favor of the plaintiffs, and decreed to them the relief sought by their plaint. The judgment of the High Court does not impeach this finding as regards Bolaki Chowdry. On the contrary, the words of the learned Judge who wrote the judgment of the Court are, "And this decision would, I think, have been perfectly fair and right were we dealing with Bolaki Chowdry only." There is no doubt a subsequent passage to the effect that the onus was clearly on the plaintiffs of showing against the respondents, who purchased at the execution, that the decree against Adit Sahai was an improper one, and that the evidence was insufficient to prove the fact.

If in this last passage of the judgment the Court meant to rule that the evidence which was sufficient to prove the two issues above-mentioned, and the matters of fact involved in them against Bolaki Chowdry, was insufficient to prove them against the respondents, that ruling would, in their Lordships' opinion, be erroneous. The respondents were parties to the suit, they went to trial upon those issues, and had equally with Bolaki Chowdry the means of cross-examining the plaintiffs' witnesses, and of adducing counter evidence. This observation, however, leaves untouched the principal ground upon which the High Court dismissed the plaintiffs' suit as against the respondents, *viz.*, that upon the authority of the decision of this Board in *Muddum Thakoor v. Kantoo Lal*, the respondents are to be treated on the footing of purchasers for value, without notice; for it is one thing to prove a fact, and another to prove that a particular party had notice of that fact. Their Lordships desire to say nothing that can be

taken to affect the authority of *Muddun Thakoor's Case*, or of the cases which may have since been decided in India in conformity with it. The material passage of the judgment in Muddun Thakoor's case is in these words :—

“A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that if the decree was a proper one, the interest of the sons as well as the interest of the fathers in the property, although it was ancestral, was liable for the payment of the father's debts. The purchaser under the execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against the fathers; that the property was property liable to satisfy the decree, if the decree had been given properly against them; and he having enquired into that, and *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for it, the plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant.”

It appears to their Lordships that the present case is clearly distinguishable from that of Muddun Thakoor, and does not fall within the principle laid down in the passage just cited. It has been seen that before the respondents purchased, the claim of the plaintiffs was preferred in the Court wherein the execution proceedings were pending in the form of objections to the sale. The Court refused to adjudicate upon the claim in an execution proceeding, and accordingly allowed the sale to take place, but made an order referring the plaintiffs to a regular suit for the establishment of their rights. Their Lordships think that the respondents must be taken to have had notice, actual or constructive, of the plaintiffs' objections, and of the order made upon them, and therefore to have purchased with knowledge of the plaintiffs' claim, and subject to the result of this suit. It follows that, as against them as well as against Bolaki Chowdry, the plaintiffs have established that by reason of the nature of the debt neither they nor their interests in the joint ancestral estate are liable to satisfy their father's debt.

The question remains, Whether they are entitled to any and what relief as regards the father's share in this suit? It seems to be clear upon the authorities that if the debt had been a mere bond debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in the father's lifetime, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands. On the other hand, if the law of the Presidency of Fort William were identical with that of Madras, the mortgage executed by Adit Sahai in his lifetime, as a security for the debt, might operate after his death as a valid charge upon Mouzah Bissumbhurpore to the extent of his own then share. The difficulty is that, so far as the decisions have yet gone, the law, as understood in Bengal, does not recognize the validity of such an alienation.

Their Lordships are of opinion that it is not necessary in this case to determine that vexed question, which their former decisions have hitherto left open. They think that, at the time of Adit Sahai's death, the execution proceedings under which the mouzah had been attached and ordered to be sold had gone so far as to constitute, in favor of the judgment-creditor, a valid charge upon the land, to the extent of Adit Sahai's undivided share and interest therein, which could not be defeated by his death before the actual sale. They are aware that this opinion is opposed to that of the High Court of the North-West Provinces, 4 N.-W. Prov. Rep., 137, already referred to. But it is to be observed that the Court by which that decision was passed does not seem to have recognized the seizable character of an undivided share in joint property which has since been established by the before-mentioned decision of this tribunal in the case of *Deendyal Lal*. If this be so, the effect of the execution sale was to transfer to

the respondents the undivided share in eight annas of Mouzah Bissumbhurpore, which had formerly belonged to Adit Sahai in his lifetime; and their Lordships are of opinion that, notwithstanding his death, the respondents are entitled to work out the rights which they have thus acquired by means of a partition.

They will therefore humbly advise Her Majesty to allow this appeal, and to reverse the decree of the High Court, and also that of the Subordinate Judge, which is clearly wrong in so far as it absolutely set aside the bond, the decree, and the execution sale, and in lieu thereof to make an order declaring that by virtue of the execution sale to them the respondents acquired only the one undivided third share in the eight-anna share of Mouzah Bissumbhurpore, in the pleadings mentioned, which formerly belonged to Adit Sahai, with such power of ascertaining the extent of such third part or share by means of a partition as Adit Sahai possessed in his lifetime; and ordering that the appellants be confirmed in the possession of the said eight-anna share of Mouzah Bissumbhurpore, subject to such proceedings as the respondents may take in order to enforce their rights above declared. The order should further direct that the costs in the Courts below be apportioned according to the usual practice of those Courts, when the party plaintiff is only partially successful. But the appellants, having succeeded here on a material portion of their claim, are entitled to the costs of this appeal.

The 6th February 1879.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Limitation—Act IX of 1871—Adoption.

On Appeal from the High Court at Calcutta.

Raj Bahadoor Singh

versus

Achumbit Lal.

The provision in the schedule to the Limitation Act of 1871 that, with respect to a suit to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father," does not interfere with the right which, but for it, a plaintiff has of bringing a suit to recover possession of real property within 12 years from the time when the right accrued.

Mr. Cowie, Q.C., and Mr. C. W. Arathoon for Appellant.

Mr. Leith, Q.C., and Mr. Doyne for Respondent.

Sir Robert Collier gave judgment as follows:—

In this case the respondent (the plaintiff), Achumbit Lal, brought his suit to recover possession of certain property to which he alleged that he was entitled as joint heir with his brother, one Doorga Prosad. The defendant Raj Bahadoor Singh, to whom was joined the brother of the plaintiff, claims under the widow of Doorga Prosad, and the real question in the cause is whether, under a certain document called a waseutnamah, executed by Doorga Prosad on the 24th May 1820, the widow's estate was enlarged from the ordinary estate of a Hindoo widow to an absolute estate. The main contention in the Court below appears to have been that the document operated in the nature of a will, conferring upon her, or granting to her, an absolute estate; but the main contention before their Lordships has been somewhat different. It has not been seriously argued that the document conferred upon her or granted to her any estate which she had not before, but it

is contended that it operates by its recitals as an admission on the part of Doorga Prosad, by which a person claiming under him would be bound, that the widow had in fact a joint interest with Doorga Prosad in the property which is the subject of the waseeutnamah, a part of which is claimed in this suit.

The case was heard before the two Courts in India, both of whom found in favor of the plaintiff. The High Court was composed of Mr. Justice Glover and a very learned native, Mr. Justice Mitter, and those learned Judges had the original document before them. They appear to have considered that the translation which is now in the Record was to some extent imperfect, and they gave their decision upon the construction which they put upon the original document. It would have been more satisfactory to their Lordships if they could have had before them the translation of the document on which the High Court relied, and they cannot help thinking that it was incumbent on the appellant, who desires to satisfy them that the High Court was wrong, to furnish them with that translation, or at all events some information with reference to it. As it is, however, their Lordships must deal with the document which is before them. Undoubtedly it is somewhat ambiguous in many of its expressions, but they think it clear, as has been before observed, that there was no intention on the part of Doorga Prosad to grant any new estate to this lady; and they do not see their way to differ from the construction which was put upon it by the High Court, and which is expressed in these terms in the judgment of Mr. Justice Glover, agreed to by Mr. Justice Mitter: "I take the meaning of Doorga Prosad to be, that feeling old and unable to manage the complicated affairs of a large estate, and knowing that his wife, a *purdanasheen* lady, would likewise be incompetent to the business, he agrees to pay a manager to take all the trouble off their hands, and to do so at once. He speaks of his wife as being joined with him as owner, but these words cannot be taken literally, as throughout the document he speaks of himself as the sole proprietor, and all his arrangements are made with reference to his own comfort and advantage in the first instance. Jusoda Chowdhraim is to get nothing till his death. The warning given to his other heirs refers to the time between his own death and Jusoda's. That the lady herself did not understand the waseeutnamah to be a will giving her the property to dispose of after her death is clear from her own statement" in another suit. Their Lordships, on the whole, are not prepared to disagree with this view, which was taken by the learned Judges of the High Court, and this construction of the document disposes of the main point in this case.

It only remains to notice two subsidiary questions. The widow executed, on the 7th July 1851, a putnee lease in favor of Raj Bahadoor Singh of two out of three of the mouzahs which are the subject of this suit, and part of the prayer of the claim is that that putnee lease be set aside. Inasmuch as it has been found as a fact by both Courts that there was no necessity for borrowing the sum for which the putnee was granted, it follows that if the widow had no more than a Hindoo widow's estate, the putnee could only bind her life interest. It appears that the lady also executed what has been called a deed of adoption on the 24th May 1860, by which she professed to adopt, in pursuance of the permission of her husband, who had died in 1825, the father of Raj Bahadoor, to whom the putnee had been granted, and Chutturdhari Lal, the brother of the plaintiff and a defendant, and to make over to them her property. But the gift was not to take effect until her death, possession being retained by her during her lifetime. It has been admitted on the part of the appellants that this document cannot be seriously treated as an attempt on the part of the widow to adopt a son or sons as heirs to her husband, but is merely an adoption of heirs to herself, and in fact a disposition of her property, very much in the nature of a will, to them after her death. A part of the claim is that this document also be cancelled. Upon this part of the case a question has been raised concerning the Statute of Limitations and the

schedule to the last Statute of Limitations of 1871 has been quoted, wherein it is enacted that, with respect to a suit to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father." On the above view of the document, the words of the Statute would seem scarcely applicable to it. Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a plaintiff had of bringing a suit to recover possession of real property within 12 years from the time when the right accrued, and that they regard as the nature of this suit. Inasmuch as according to the admitted construction of the document the widow conveyed by it no more than she had, which was but a life interest, the document is innocuous, and it is immaterial to the plaintiff whether it be set aside or not. Their Lordships however think it well to say that the decree of the Court below in setting aside this document and the putnee lease, must be considered to have in effect decided no more than that the plaintiff was entitled to recover notwithstanding those documents, without in any degree compromising any rights which other parties may have under them.

Their Lordships will humbly advise Her Majesty that the judgment of the Court below should be affirmed, and this appeal dismissed with costs.

The 14th February 1879.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Hindoo Law (Mithila)—Adoption (Dattaka form)—Practice (Privy Council)—
Decree (Alteration of).*

*On Appeal from the High Court of Calcutta.**

Mussamut Adit Kooer

versus

Gunga Pershad Singh and others.

Where, at the suit of the collateral heirs, an adoption by a Hindoo widow in the Dattaka form was, according to the Mithila law, declared void, the Privy Council, in affirming that decision, thought it would be an inconvenient precedent to alter the decree by inserting the words "as against the reversionary heirs of the husband" after the word "void," as they were clearly of opinion that the decree could only be binding as between the plaintiffs and the defendants in the suit, and that it could not affect the interests of the defendants as between themselves.

This was an appeal from the decision of a Divisional Bench of the High Court of Judicature at Calcutta, dated the 3rd September 1875, affirming that of the Subordinate Judge of Tirhoot, dated the 26th May 1874.

Mr. Leith, Q.C., and *Mr. C. W. Arathoon* for Appellant.
Mr. Cowie, Q.C., and *Mr. Doyne* for Respondents.

The suit was instituted by the respondents, the collateral heirs of Luchmi Narain Singh, to set aside the adoption in the Dattaka form of Byjnath Pershad Narain Singh, her brother's son, as invalid according to Hindoo law, the family being governed by the law of Mithila, and because no permission to adopt was given to her by her late husband. The defendant asserted her husband's per-

* From the judgment of Glover and R. C. Mitter, JJ., dated the 3rd September 1875.

mission to the adoption, and that the adoption was made according to the Benares Shaster, the family having originally come from that place, and being still governed by its law. Both Courts below decided in favor of the respondents. The decree of the Subordinate Judge was as follows:—"That this case be decreed with costs; that the defendant's taking Byjnath Pershad Narain as a *dattaka-putter* and executing a deed of *Kurta-putri*, dated the 1st February 1869, be set aside and considered null and void; that the defendant, as an heir and widow of Luchmi Narain deceased, do continue to hold possession and occupation of the properties of the deceased aforesaid during lifetime; and that interest at the rate of Rs. 6 per cent. per annum be awarded on the amount of costs."

The judgment of the Judicial Committee was as follows:—

Their Lordships are of opinion that in this case the judgments and decrees of the Lower Court are correct, and that the judgment of the High Court ought to be affirmed, and this appeal dismissed with costs.

Their Lordships are clearly of opinion that this decree can only be binding as between the plaintiffs and the defendants in the suit, and that it cannot affect the interests of the defendants as between themselves. It cannot affect the right of the son as against the mother, or the right of the heir of the mother as regards the peculiar property of the mother. If their Lordships thought there was any doubt on the subject, they would perhaps insert these words: "as against the reversionary heirs of the husband" after the word "void"; but it would be inconvenient to make a precedent for altering a decree in this way, and they have no doubt that after this expression of their Lordships' opinion the objects of the parties will be attained.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

The 21st February 1879.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Gift (by Person of Weak Mind)—Mahomedan Law—Transfer of Possession.

On Appeal from the Court of the Judicial Commissioner of Oudh.

Nawab Umat-uz-Zohra

versus

Nawab Mirza Ali Kadr and another.

Where a Mahomedan of somewhat weak intellect and impaired health executed a deed in the form of a *hiba-bil-ewas* (which would, under the Mahomedan law, operate to transfer the property which was the subject of it without delivery of possession) by which he made a gift of certain immoveable, as well as a large quantity of moveable, property to his daughter in lieu of a ring set with diamonds which he had received from her; and it appeared that there was no intention on his part to make an immediate transfer of the property to her, and that she herself must have perfectly understood that the transaction was not a real one; and where neither she nor her husband was called to prove the transaction to have been a real one, or the manner in which the property was enjoyed between her and her father; the deed was held to be void and of no effect.

This was an appeal from a decree of the Judicial Commissioner of Oudh of the 21st August 1876, confirming a decree of the local tribunals at Lucknow.

Mr. Cowie, Q.C., Mr. Doyne, and Mr. W. G. Thorpe for Appellant.
Mr. Leith, Q.C., and Mr. Graham for Respondents.

Their Lordships, without calling upon the Counsel for the respondents, proceeded to deliver the following judgment:—

This is a suit brought by the plaintiff, who is the daughter of a gentleman in India of great fortune and position, Sir Mansin-ud-daula, originally against her half-brother alone, the son of Sir Mansin-ud-daula by another wife. Subsequently Sir Mansin-ud-daula was by order of the Civil Judge added to the Record, first in the capacity of a plaintiff, and secondly in that of a defendant. The claim is for restitution of certain goods, elephants, horses, and plate valued at Rs. 18,000, which the lady claims under a deed executed by Sir Mansin-ud-daula on the 28th April 1874, and which she alleges that her brother converted and carried off. The brother files an answer in which he denies her title under this deed on a variety of grounds, and Sir Mansin-ud-daula also denies the validity of the deed and the title of the plaintiff under it.

The case was first tried by the Civil Judge, who framed a number of issues, comprising the question whether the donor was of sound mind, and whether the deed was obtained by undue influence, one of which raised the question whether the deed was intended to operate as a transfer of the property. He decided all of these issues in favor of the plaintiff. The case went on appeal to the Commissioner, who dismissed the suit on the ground that the deed was a mere deed of gift, and that there had been no delivery of possession. The case then came on appeal to the Judicial Commissioner, who upheld the finding of the Commissioner, and dismissed the suit, but upon other grounds. As their Lordships understand, the Judicial Commissioner held that the deed, in form at all events, was what is called a *hiba-bil-ewaz*, and that it would operate under the Mahomedan law, if operative at all, to transfer the property without delivery of possession; but he came to the conclusion from all the circumstances of the case, amongst others from the absence of any change of possession, that the deed was not intended to operate as an immediate transfer or conveyance of the property, and that therefore it was void and of no effect.

It becomes now necessary to state some facts in order to make the case intelligible. Their Lordships collect from the whole of the evidence, which is to some extent conflicting, that Sir Mansin-ud-daula was of somewhat weak intellect and impaired health. Two medical men state that in their opinion he was not capable of managing his affairs. In such a state of mind he might be easily influenced and persuaded by persons about him to execute documents or to take other steps which a person of strong and sound mind might not be induced to do. The deed which the plaintiff relies upon is to be found at page 12 of the Record, was executed on the 28th April 1874, and states that while in possession of his senses, and so forth (according to the ordinary form), he (Sir Mansin-ud-daula) had made a gift of certain immoveable property, and also of a large quantity of moveable property, in lieu of a ring set with diamonds which he had received from his daughter. It further states: "I have transferred possession of all the property transferred by gift above referred to and detailed below, by putting the donee in possession thereof. The conditions of offer and acceptance, with transfer of possession, have been thoroughly completed. This is a valid and lawful gift." Then follows a schedule comprising the greater part of his property, both real and personal. On the 1st May he also executed a deed of the same description, transferring certain other property which is mentioned in the schedule to that deed. On this same first of May his daughter, the present plaintiff, professed to give to her father's *muta* wife a certain house for her lifetime; and a short time afterwards leased to him a portion of what had been previously his own house. The son, the defendant, had left his father in March 1874 in consequence of a quarrel, carrying with him a large quantity of jewellery to which he laid claim, and the father appears to have been a good deal annoyed. The son came back on the 6th May after the documents which have been referred to had been executed.

Sir Mansin-ud-daula was examined as a witness in the case, and their Lordships think it as well to refer to the account which he gives of the transaction. He says, "I had a quarrel with my son, and my servants, etc., said to me that from this quarrel serious loss would accrue to me (the principal adviser being Ram Parshad)"—a man who appears to have been in his service for a number of years, and to have had great influence over him,—“and that some arrangements should be made. I consulted the people of the house, and it was recommended that a deed of gift be prepared. All the men and women of my family, and the servants, advised me to this course. All my property ‘on heaven and earth’ was included in the deed.” That is certainly a mistake. Further on he says: “I wrote the document in anger in consequence of a quarrel, and hoped from fear to keep defendant apart, then to come together, not that I intended to ruin him. I expected that there would be a reconciliation, and that everything would come right. I did it only to frighten him.” If the account which is given by Sir Mansin-ud-daula is correct, it certainly would appear that he did not intend to part with the immediate control of his property to his daughter and make himself her pensioner; and having regard to the state of his mind, which has been referred to, their Lordships think this account which he gives not at all improbable. He may have supposed, or may have been persuaded by Ram Parshad, or other persons in the family who had influence over him, that by executing this deed he might possibly escape liabilities to which he might be subjected by his son or in consequence of his son’s conduct, or that the execution of a deed of this sort would tend to frighten his son, to bring him home, and produce a reconciliation. Their Lordships are disposed to credit his statement that he had no immediate intention of denuding himself of his property.

This view is supported by the tenor of the evidence. With reference to the elephants and horses, and property of that description, it appears that no change took place; that he paid the expenses relating to them just as he had before. With reference to the real property, although he went through the form of taking a lease from his daughter of his own house, it does not appear that he ever paid any rent; and further, although receipts were given for the rent of the land comprised in the conveyance in the name of the daughter (which would be consistent either with a real or with a benamtee transaction), it is in evidence that for ten months after the execution of the deed the rents continued to be paid as usual to the father. They both lived, as they had before, in the same house, the father occupying a portion, and the daughter and her husband another.

Their Lordships have come to the conclusion that the learned Judicial Commissioner who finally disposed of the case was right in finding, as he does, that there was no intention on the part of the Nawab to make an immediate transfer of the property to his daughter, and they think that the daughter herself must have perfectly understood that the transaction was not a real one. She was not called, nor was her husband, to contradict the statement of her father, who must have best known what his intention was, or to prove the transaction to have been a real one, or the manner in which the property was enjoyed as between her and her father.

Their Lordships have, therefore, come to the conclusion that the judgment appealed against was right on the ground above stated, and do not think it necessary to express their opinion on other questions adverted to in the judgments of the Commissioner and the Judicial Commissioner. They will therefore humbly advise Her Majesty to confirm that judgment and to dismiss this appeal with costs.

The 26th February 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Res Judicata—Vendor and Purchaser—Practice (Privy Council)—
Ex parte Appeal (Effect of Decree in).*

On Appeal from the High Court at Calcutta.

Juggodumba Dasseo

versus

Tarakant Bannerjee and others.

In a former appeal to the Privy Council, the first Court held that both the pleas in bar urged before it (*viz.*, one of limitation, and another in the nature of *res judicata*, whether the plaintiff's right of suit for the property in dispute was not barred by reason of a former decision between his alleged vendors and the defendants) had been made out and dismissed the suit on both grounds. The Sudder Court, on appeal, dealt only with the question of limitation, and confirmed the dismissal of the suit on that ground alone. The Privy Council, on that occasion, held that both Courts were wrong on the question of limitation, and that the plaintiff, whose application to intervene in the former suit had been refused, could not be bound by the decree in that suit; and remanded the case for trial on the merits. In the present appeal the Privy Council declined to allow the question as to whether there ever was a conveyance or not from the plaintiff's vendors as one which was decided by their Lordships on the former occasion.

Their Lordships always regret to have to hear an appeal *ex parte*; but their decision upon it, when heard, must stand as if all the arguments which the respondents, if present, could have raised upon the case had been addressed to them. The absent parties must bear the consequence of their own laches.

This was an appeal from a decision of a Divisional Bench of the High Court of Calcutta of the 7th August 1868, reversing a decree of the local tribunal at Dacca. The litigation had been going on for over fifty years.

Mr. Doyne for Appellant.

Mr. C. W. Arathoon for Respondents.

The judgment of their Lordships was as follows :—

The earlier history of this long litigation and the facts out of which it has arisen are set forth in the report of the case when it was before this Board in 1866, which is to be found in the 10th Moore, page 476.* It is not necessary to recapitulate those facts, though it will be necessary to refer to certain passages of the judgment delivered on that occasion.

The broad question to be determined between the parties is whether a considerable portion of land comprised within four villages belongs to a jote which the plaintiff claims to hold under the zemindars, who may be described as the Roy Zemindars, or to a talook of which the defendant Rasmoney Dasseo, who is now represented by the appellant, was the unquestioned owner. If the title of both parties—the title of the plaintiff, on the one hand, to the jote, and the title of the defendant on the other hand—were admitted, this question would of course be simply that which occurs in every case of parcel or no parcel, *viz.*, whether the land in dispute belongs to the one estate or to the other. The case however has come before their Lordships complicated by a further issue. The result of the former appeal to Her Majesty in Council was that the judgments of the two Indian Courts were reversed; the right of the plaintiff, notwithstanding those judgments, to maintain his suit was affirmed, and the cause remanded in order to try the principal issue, which had not been tried in the Courts below, of parcel or no parcel. Accordingly, when on the remand the cause came first before the Subordinate Judge, he settled only one issue, which was, in effect, whether the

* 5 W. R. P. C. 63; 1 Suth. P. C. R. 631.

land in suit was parcel of the jote or of the talook. At some period—it does not appear exactly when, but before he gave judgment—he seems to have either settled, or to have considered as open to the parties, the further issue whether the plaintiff purchased the jote as alleged by him.

The principal part of the evidence taken before him on the remand appears to have been addressed to that issue, which he decided against the plaintiff and in favor of the defendant. When the cause went to the High Court upon appeal from his decision, the Judges of that Court intimated that this issue was no longer open to the parties, and that the Subordinate Judge's finding upon it afforded no ground for dismissing the plaintiff's suit. In an ordinary case it would, of course, have been open to Mr. Doyne to question the High Court's decision, and it would have been for their Lordships on this appeal to determine which Court was right; but on the opening of the case their Lordships intimated to him that, for the reasons which are now to be stated, he was precluded from raising the question involved in the issue by the former decision of this Board, and consequently that it was not open to him to go into that part of his appeal.

The cause came before their Lordships on the former occasion in this way. In the Courts below certain issues directed to the question whether the suit could be maintained, as well as one which the Court described as "the real matter in dispute," being whether the land in suit belonged to the jote or to the talook, had been settled; and it had been determined that the former alone should be tried in the first instance; the "real matter in dispute" being left to be tried thereafter should it become necessary to do so. Of the issues in bar one was whether the claim was barred by limitation. Another, which seems afterwards to have dropped out of the cause, was whether, inasmuch as the validity of the deed of sale under which the plaintiff claimed was questioned, the proper stamp had been paid upon the suit; the second in point of order and the fifth, which was in these words, "Whether or no the Zemindar Baboo Ramrutton Roy, and others, are carrying on this suit in the plaintiff's name," seem both designed to raise the question whether the plaintiff's right of suit was not barred by reason of a former decision, which had been passed between his alleged vendors and the defendants. The Lower Court in India held that both the plea of limitation, and this plea in the nature of *res judicata*, had been made out, and dismissed the suit on both grounds. Upon appeal the Sudder Court dealt only with the question of limitation, and finding that the plaintiff, or those through whom he claimed, though dispossessed at a later date than that found by the Subordinate Judge, had nevertheless been out of possession for a period of more than twelve years before the institution of the suit, confirmed the dismissal of the suit on that ground alone. This Board held that both Courts were wrong on the question of limitation, inasmuch as the plaintiff, or those through whom he claimed, had been in possession up to the 18th November 1845, the date of the decision of Mr. Reid, who was then one of the Judges of the Court of Sudder Dewanny Adawlut. There then remained the question whether the plaintiff was barred by the plea of *res judicata*, upon which the Sudder Court had passed no judgment, and their Lordships had to deal with that question. What they say upon it is this: "The other point on which the Zillah Court decided against the appellant was that the matter was already adjudged in a suit by which he was bound. It has been stated that the original purchaser at the auction sale of the jote tenure sold to one Ramdhone Sircar. Before the sale he had instituted proceedings against the decreeholders under the title of the talook. Ramdhone Sircar purchased therefore *pendente lite*. He applied to be substituted in the suit in lieu of Juggutchunder Rae, which application was granted. This litigation terminated in the Zillah Court in favor of Ramdhone Sircar, the jote tenant. From that decision Rasmoney Dossee appealed. On her appeal the Sudder Court reversed that decision. This was the decree of Mr. Reid of the 18th November 1845, which this suit seeks to set aside. On this

Ramdhone Sircar instituted a regular suit against Rasmoney Dossee and others, claiming in substance the same relief which is sought by this suit. Pending that suit Ramdhone Sircar died, and his three sons, Mohemachunder Sircar, Anundchunder Sircar, and Greeschunder were substituted in his place in the Record. Pending this litigation the present appellant purchased the jote tenure from the sons of Ramdhone Sircar. He applied in his turn to be substituted on the Record, and to conduct the suit. One of the sons, however, denied the purchase, and the Court refused the application. In a few days afterwards the cause was decreed for the defendants. It is alleged that the actual plaintiffs conducted their case negligently, if not collusively. On the argument before their Lordships, the Attorney-General abandoned the case of fraud, but contended that the plaintiff was not barred by this decision, that he was not a party to the suit, and that his application to intervene in it having been refused, it would be unjust and inconsistent to hold him bound by the decree; that the decision followed so promptly on the refusal to allow him to intervene that he could not reasonably be expected in the interval either to appeal against the order refusing him leave to intervene or to institute a suit as supplemental to the one in which he sought to intervene. Their Lordships concur in this view of the subject. As the law allows a party interested to intervene in the suit, that right should not be rigorously dealt with. There is much danger in India of secret collusion. Their Lordships think that the defendants who obtained their decree so shortly after the above refusal, in the absence of the party really interested in contesting the matter with them, should not be permitted to prevail by this objection."

The question now is whether that was not a conclusive and final decision that the right of the plaintiff to maintain this suit was not taken away by the decree in Ramdhone's suit; and whether the order of remand did not imply that his title to the jote generally was not in the subsequent proceedings to be taken as established. It was argued that the defendants ought to be allowed to prove either that the kubala under which the plaintiff claimed had never been executed, in which case the title to the jote would be still in the sons of Ramdhone; or that, if it were executed, the plaintiff by reason of his position in life and want of means, was incapable of making the alleged purchase on his own account; and must be taken to have acted in the transaction as the mere creature of Ramrutton Roy and his co-sharers in the zemindary (for whom Ramdhone Sircar had also held *benamee*); and that on either view of the case the plaintiff's right to maintain the suit would be barred by the decree against the sons of Ramdhone in their suit with Rasmoney Dossee. The case is thus presented in an alternative form. Taking the latter alternative, their Lordships observe that it raises the precise question of which the former decision of this Board disposed. The judgment of the Lower Court which was then under appeal (see Supplemental Record, p. 127) proceeds expressly on the ground that Juggutchunder Rae, Ramdhone Sircar, and the plaintiff had all held *benamee* for Ramrutton Roy, who was in fact the person suing in both suits in the name of his creature. Again, the question whether there ever was a conveyance or not from the sons of Ramdhone Sircar might have been tried, and, as far as their Lordships can see, was tried and determined in the plaintiff's favor in the former proceedings; and to allow that question to be raised again would equally be to re-open that which was decided by their Lordships on the former occasion.

The case being thus reduced to the broad question whether these particular lands are parcel of the jote tenure or of the talook—the first question which arises is what was decided here with respect to possession on the former occasion. Their Lordships think it quite clear that the judgment delivered by Lord Justice Turner must be taken to have decided that the plaintiff and those through whom he claimed were in possession from at least the 7th August 1839, and that there was no change of possession from that time until the date of Mr. Reid's order of the

18th November 1845. This may raise a presumption of anterior possession, but such possession of the jotedars claiming as purchasers at the sale of 1836 cannot be carried beyond the date of that sale, because up to that time, and at least from 1814, the moonshees, as they are termed throughout these proceedings, were in possession both of the jote and of the talook, holding the jote as a subordinate tenure under the zemindars, the Roys, and the talook as a separate and distinct zemindary. There is, however, other evidence to show that the lands in question when in the possession of the moonshees were parcel of the jote. On the remand a local enquiry was made by the Court Ameen. The Subordinate Judge seems to have treated his report with very little respect, but the learned Judges of the High Court, in their careful and elaborate judgment, have said that they see no reason to doubt its honesty or correctness, and that it is supported by certain old documents to which they are disposed to attach credit. Then there are the circumstances which certainly have not been disproved, that these moonshees were some time between 1814 and 1819 dispossessed or interfered with by the zemindars; that they then, being at the time the owners of both estates, brought their suit against the zemindars, seeking to be replaced in the enjoyment of the jote, and described the lands in dispute as part of that jote. The latter circumstance seems to their Lordships to be the more important, because it involved an admission against their interest, inasmuch as it was clearly more desirable for them to hold the lands as part of their independent talook than as part of a subordinate tenure.

Their Lordships therefore fully concur with the High Court in thinking that a very strong *prima facie* title was made out by the plaintiff, which it lay upon the defendants to displace. Mr. Doyne has fairly, and their Lordships think on sufficient grounds, and without in any way abandoning the interests of his client, admitted that he cannot find in the Record any evidence sufficient to have that effect.

Their Lordships desire to add the following observations with respect to the decision of this Board upon the former appeal. It was said that that appeal was heard *ex parte*. Mr. Doyne candidly admitted that he could not on that ground dispute the effect of it. It is in their Lordships' opinion quite clear that it is impossible to allow the appellant to take advantage of her absence on that occasion, in order to re-open any question which either was expressly decided; or might have been raised and determined on that appeal. Their Lordships always regret to have to hear an appeal *ex parte*; but their decision upon it, when heard, must stand as if all the arguments which the respondents, if present, could have raised upon the case had been addressed to them. The absent parties must bear the consequence of their own laches. Why the then respondents in this case did not appear in 1866 it is not for their Lordships to say; they do not seem to have had the stock excuse of poverty and want of funds.

Their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss this appeal with costs.

The 1st March 1879. *

✧ *Present:*

Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Oudh Talookdars—Act I of 1869—Joint Hindoo Family—Trust.

On Appeal from the Court of the Commissioner of Seetapore in Oudh.

Thakoor Hurdeo Bux
versus
 Thakoor Jowahir Singh.

The respondent was presumed to have held the villages included in the summary settlement and talookdary sunnud made with and granted to him before the passing of Act I of 1869, as representative of and in trust for a joint Hindoo family governed by the Mitacshara law. HELD that the above Act did not operate to change the relative condition of the parties, so as to put an end to the trust upon which the respondent had previously held the estate, and to convert the estate so subject to the trust into an estate held by him for his own sole use and benefit discharged from the trust; there being no difference in this respect between an express trust and a trust implied or presumed from a fair and reasonable interpretation of the acts and declarations of the respondent.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Appellant.
Mr. Doyne for Respondent.

Sir Barnes Peacock delivered the following judgment:—

When this case was before their Lordships on a former occasion it was remanded, with a direction to the Commissioner to try or cause to be tried by the Settlement Officer the following issue, *viz.*: Whether the respondent had in any and what manner agreed or become bound to hold the villages comprised in the summary settlement or sunnud, or any and what part thereof, or of the rents and profits thereof, in trust for the appellant and Parbut Singh, or either and which of them.

The Commissioner very properly took upon himself the trial of the issue, and correctly disposed of the several objections which were raised in the course of the investigation.

The nature of the present suit, the circumstances under which it was instituted, the effect of the decision of the Settlement Officer, and of that of the Commissioner from which this appeal was preferred, are fully stated in the reasons expressed by their Lordships in recommending a remand of the case for the trial of the above-mentioned issue. The case is reported 4 *Law Reports, Indian Appeals*, p. 182.*

In those reasons their Lordships stated that they were of opinion that, up to the time of Lord Canning's proclamation, the whole of the villages mentioned in the summary settlement were the joint family property of the appellant, the respondent, and Parbut Singh, and that they were either ancestral or purchased with the proceeds of ancestral estate. Their Lordships also referred to the case of *Thakrain Sookraj Koowar v. The Government and others* (14 *Moore's Indian Appeals*, 112),† and also to the case of *Shunkur Sahai v. Rajah Kashi Pershad*, decided in the Privy Council on the 29th July 1873, and since reported (4 *Law Reports, Indian Appeals*, 198)‡ as an authority for the proposition "that a person who has been registered as a talookdar under Act I of 1869, and has thereby acquired a talookdary right, may, nevertheless, have made himself a trustee for another of the beneficial interest in the lands comprised within the talook, and be liable to account accordingly," and they remarked that the Lower Courts in the present case appeared to have decided the case merely upon the ground that the defendant was protected by the sunnud, without adverting to s. 15 Act I of 1869, or enquiring whether, notwithstanding the summary settlement, the sunnud, and the statute, the plaintiffs or the appellant had either *before* or *after* the passing of Act I of 1869 acquired or become entitled to a beneficial interest in any part of the property. They said that, looking to the allegations in the plaint and written statements, an issue ought to have been raised to try that question; that on the materials before them they did not feel competent to decide it, and that they had no evidence of the circumstances under which the summary settlement was made, nor of those under which the sunnud was granted, nor of what was done with respect to it or to the property comprised in it before the registration of the

* *Ante*, p. 427.

† *Ante*, p. 1.

‡ Also *ante*, p. 4.

defendant under Act I of 1869. The issue was accordingly directed, and there can be no doubt, and indeed it has not been disputed, that the evidence adduced upon the trial fully warranted the conclusion at which the Commissioner arrived, that the actual relation of the appellant, the respondent, and Parbut Singh remained that of a joint and undivided Hindoo family from the date of Lord Canning's proclamation up to the quarrel and removal of the respondent to Kaswara in 1865. The Commissioner also found, and in their Lordships' opinion correctly found, that the evidence proved that during that period there had been a joint interest in, and common management of, the property. Such an interest could not have existed unless the defendant had consented that the villages should be held as the joint property of the family.

Their Lordships are of opinion that the facts so found, coupled with the statement of the defendant in his application for a summary settlement to the effect that Hurdeo Bux was his partner, and with his deposition of 8th July 1859, in which he stated that the custom prevailing in his family was that if his cousins, meaning the plaintiff and Parbut Singh, who were his partners, should claim, they could get their shares divided, afford sufficient grounds to justify their Lordships in presuming that, up to the time of the quarrel in 1865, it was the intention of the defendant that the villages included in the summary settlement and sunnud should be held by him in trust for the joint family, and as a joint family estate subject to the law of the Mitacshara.

The suit was commenced long before the passing of Act I of 1869), *viz.*, on the 28th August 1865, and it follows from what has just been said that, if judgment had been given before the passing of the Act, it ought to have been held that the defendant was bound by the trust to be presumed as above mentioned. But in consequence of numerous delays and references, to which allusion has been made in the judgment of remand, the case was not decided by the Court of First Instance until after the passing of the Act. It, therefore, became necessary to determine whether Act I of 1869 operated so as to change the relative conditions of the parties, and to put an end to the trust upon which the defendant had previously held the estate.

Their Lordships are of opinion that it did not.

By s. 3 it was enacted that every talookdar with whom a summary settlement of the Government revenue was made between the 1st April 1858 and the 10th October 1859, or to whom, before the passing of the said Act, and subsequently to the 1st April 1858, a talookdary sunnud had been granted, should be deemed to have thereby acquired a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kubooleut executed by such talookdar when such settlement was made, subject to all the conditions affecting the talookdar contained in the orders passed by the Governor-General of India on the 10th and 19th October 1859, and republished in the First Schedule annexed to the said Act, and subject also to the conditions contained in the sunnud under which the estate was held.

The Commissioner very properly classified the villages in suit, and ruled that the issue directed was intended to apply to the whole of them.

The details are (*see* New Record, p. 3):—

1st. Villages comprised in the summary settlement	- 78
2nd. Villages granted in reward for services during the mutiny	- 20
3rd. Villages acquired from the profits of the estate after summary settlement and before the institution of the suit	- 15

It should be remarked that the 20 villages granted for loyal services have since been demarcated into 12. (*See New Record*, p. 5.)

The defendant, as well as the villages Nos. 1 and 2 in the detail, fall within the category of s. 3 of the Act.

That Section, it should be observed, does not state that the talookdar shall be deemed to *have*, but that he shall be deemed to *have acquired* by the summary settlement and sunnud a permanent heritable and transferable right in the estate. The right so acquired was subject to the provisions of ss. 11 and 15 of the Act, by the latter of which it was enacted that if any talookdar should *theretofore have transferred* or should thereafter transfer the whole or any portion of his estate to a person not being a talookdar or grantee, and if such person would not have succeeded *according to the provisions of the Act* to the estate if the transferor had died without having made the transfer and intestate, the transfer of and succession to the property so transferred should be regulated by the rules which would have governed the transfer of such property if the transferee had bought the same from a person not being a talookdar.

If, therefore, the defendant had, before the passing of Act I of 1869, and at any time after the date of the summary settlement and sunnud, and after he had thereby acquired the right which, according to the provisions of s. 3, he must be deemed to have acquired thereby, expressly declared that he held and would hold the estate in trust for the joint family as joint family estate governed by the rules of the Mitacshara, there can be no doubt that the estate would have been subject to the trust so declared, and that it would not have been converted by Act I of 1869 into an estate held by the defendant for his own sole use and benefit discharged from the trust. There can be no difference in this respect between an express trust and a trust implied or presumed from a fair and reasonable interpretation of the acts and declarations of the defendant.

Sections 13 and 16 of the Act provide for certain formalities as regards gifts or transfers to be made by talookdars of estates acquired or held in the manner mentioned by s. 3 of the Act; but no question can arise in the present case as to the effect of those Sections, for it has been held that the formalities thereby required are not requisite to give validity to gifts or transfers executed by a talookdar before the passing of the Act (*Hurpurshad v. Sheo Dyal*, 3 Law Reports, Indian Appeals, 278).*

Their Lordships have come to the conclusion that, under the circumstances of the case, there are no grounds for making any distinction as regards the rights of the parties between the 78 villages included in the summary settlement and the 20 villages, now consolidated into 12, which were granted by the sunnud for services during the mutiny, or those which were acquired from the profits of the estate. As regards those which were granted for services during the mutiny, the plaintiffs Hurdeo Bux and Parbut Singh were doubtless as loyal as the defendant Jowahir Singh, and rendered equally good services to the British Government. It is, however, stated by the Commissioner, and there seems to be no reason to doubt the correctness of his opinion, that he was fully convinced that the Government at the time they conferred the reward estate believed that they were conferring it on Jowahir Singh, the respondent, alone. He says (p. 61 *New Record*):—

"I do not think they had any remembrance of the admission in the A Statement of the summary settlement, a document that would not be before them at the time, and the respondent's name appeared alone as proprietor. But if he gave loyal support to Government, it was with the means of a talooka, in which the appellant and Parbut Singh had an actual, practical, existing common right at the time, and they had carried off the family and its effects to a place of safety, and returned in time to retake their fort, and at least quicken and molest the retreat of the rebel chief Feroz Shah, who was one of the sons of the King of

* 26 W. R. 55; ante p. 304.

Delhi, as deposed to by witnesses 8, 10, 11, and 12 for appellant, and witness 2 for Parbut Singh. I do not think that if the whole facts had then been before the Government, it would not have given the reward to the brotherhood all the same. In this matter I think the respondent was acting at the time as the representative of the family; and I do not see it anywhere shown that the common interest and the common management did not include these villages subsequent to their acquisition, and up to the rupture in 1865."

It appears from the evidence, as well as from the finding of the Commissioner, that the plaintiffs, Hurdeo Bux and Parbut Singh, were just as loyal as the defendant Jowahir Singh, and rendered loyal services to Government equally as valuable as those which were rendered by him; that after the rebels had defeated the defendant and he had retreated to Lucknow, Hurdeo Bux and Parbut Singh came to Bassadeh, drove the rebels away, and retook the fort; and that they also, with their followers, attacked the rebel Feroz Shah, one of the sons of the King of Delhi, after he had crossed the Sarain, took from him a gun, and hastened and molested his retreat.

These loyal acts, if not in the remembrance of the Government or of its officers, must have been known by the defendant, and it must also have been known to him that the loyal services which he rendered to the Government were rendered by means of the then joint family property, and that in accepting the reward from Government he acted as the representative of the family. It may therefore reasonably be presumed that the knowledge of these facts induced him to treat the reward villages granted by the sunnud in the same manner as the ancestral villages which were the subject of the summary settlement, and accordingly it appears that from the time of the sunnud to the time of the quarrel in 1865, the reward villages, like all the others, were treated as part of the joint family estate, and were subject to the common management. This part of the case is similar in many respects to the case of *Hurpurshad v. Sheo Dyal*, to which reference has already been made. (*See 4 Law Reports, Indian Appeals, 270.*)*

Upon the whole, then, their Lordships are of opinion that it is to be presumed from the acts and transactions of the defendant that there was a declaration of trust by him in favor of the joint family, and that up to the time of the quarrel in 1865 all the villages in suit were held by the defendant in trust for the family, as a joint family estate, governed by the rules of the Mitacshara; and they rejoice to find that a loyal subject of the Crown, who rendered good service to the Government in the time of the rebellion, has not been deprived of all his property by the act of confiscation, and through the want of knowledge or the absence of remembrance on the part of the officers of Government of the moral claim which he had upon the Government for the restoration of his property.

The plaint does not allege that the plaintiffs have been dispossessed of their rights, but merely that the defendant intends to dispossess them, and to put a stop to the profits enjoyed by them, and they simply pray that, after enquiry, proper orders may be passed that they be not deprived of their right.

Their Lordships must deal with the case as it stood at the time of the commencement of the suit.

At that time there does not appear to have been any complete separation or division of the family, and the plaintiffs do not pray for a partition of the estate. Hurdeo Bux was not entitled to any definite portion of the estate, but merely to the rights of a member of a joint Hindoo family. Their Lordships cannot, therefore, do more than humbly advise Her Majesty, which they will do, to allow the appeal and to reverse the judgments and decrees of both the Lower Courts, and to declare that the defendant holds the villages in suit in trust for the joint family, and as a joint family estate, governed by the rules of the Mitacshara, and to order and decree that the defendant do cause and allow the said villages, and the

proceeds thereof, to be managed, used, dealt with, and applied accordingly; and that he do pay the costs of the plaintiff Hurdeo Bux in both the Lower Courts out of the estate.

Further, their Lordships do order that the costs of the plaintiff, Hurdeo Bux, in this appeal be paid by the respondent out of the estate.

A question has been raised on the argument of this appeal, whether, by reason of an arrangement alleged to have been entered into by Hurdeo Bux and Parbut Singh, pending the suit, the latter is entitled to the benefit of this appeal or the former to recover Parbut Singh's share as well as his own.

It was also suggested that Parbut Singh had, after the arrangement with Hurdeo Bux, entered into an arrangement with the defendant.

Their Lordships have nothing to do with any agreement or arrangement which may have been made by any of the parties subsequently to the commencement of the suit, and they will humbly advise Her Majesty that the decree to be made in this appeal be declared to be made without prejudice to any question that may arise in respect of any agreement or arrangement, if any, which may have been made or entered into by or between any of the parties to the suit subsequent to the commencement thereof.

The 15th March 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Conditional Adoption—Evidence.

On Appeal from the High Court at Calcutta.

Mussumat Imrit Konwar and another

versus

Roop Narain Singh.

In this case, looking to the inconsistent statements made by the defendant (respondent) from time to time, the conflict in the evidence of the witnesses, the improbability of such a conditional adoption as that set up by the defendant without any writing in support of it (whereby the defendant was adopted upon condition that his adoptive father's widow should enjoy the property for life, and that his daughters, the plaintiffs, should take his self-acquired property after her death), their Lordships were of opinion that the defendant, who was about eighteen years of age at the time when the alleged adoption took place, and must therefore have had a recollection of the facts connected with the adoption if it had taken place, ought to have been called as a witness, and offered himself for cross-examination, and that in his absence the Subordinate Judge had good reasons for believing the evidence on the part of the plaintiffs instead of that on the part of the defendant, and that there were no sufficient grounds for the reversal of his judgment by the High Court.

Mr. C. W. Arathoon for Appellant.

Mr. Cowie, Q.C., and Mr. Doyne for Respondent.

Sir Barnes Peacock gave judgment as follows:—

The plaintiffs in this case, who are the appellants, are the daughters of Baboo Perdip Narain Singh, who died on the 1st May 1857 without male issue. They sued as his heiresses in reversion after the death of Mussumat Baneshur Konwar, his widow, who died on the 27th November 1873. The lands in respect of which the suit was brought are situate in the district of Tirhoot, in which the Kritima form of adoption is allowed. The defendant claimed as the adopted son of Perdip Narain under the Kritima form. In his written statement, after alleging the

adoption, he proceeded to state that Perdip Narain established him, the defendant, as the proprietor of his entire estate, and with his consent directed that Mussumat Baneshur Konwar should hold possession of the entire estate during her lifetime, and enjoy the profits thereof, with this limitation, that she should have no power to transfer or give away the property, and that after her demise the ancestral and moveable property should be put into possession of the defendant, and the self-acquired property should pass to his daughters, and that after this he gave some instructions as to the marriage of his daughters. The defendant was about eighteen years of age at the time of the alleged adoption. If he was not adopted, the plaintiffs are the undoubted heiresses by birth of Perdip Narain. They ought not to be disinherited except upon clear proof of the adoption.

The Subordinate Judge of Tirhoot, who in the first instance heard the case, disbelieved the evidence in support of the adoption, and decreed for the plaintiffs. The High Court, upon appeal, considered that the reasons given by the Subordinate Judge were unsatisfactory, and reversed his decision. The question for the determination of their Lordships is whether there are sufficient grounds for setting aside that reversal. The Subordinate Judge considered that the adoption as set up by the defendant was improbable and also inconsistent with the acts and conduct and statements of the defendant.

Perdip Narain was a cousin of Odit Narain, the father of the defendant. They had originally been joint in estate, and had held ancestral property, but they had some years previously to Perdip Narain's death separated. Perdip Narain had held his share of the ancestral estate, and was also in possession of self-acquired property. One of the grounds upon which the Subordinate Judge considered that the case of the defendant was inconsistent with his former statements was that in a petition of the defendant he had stated that the family had been re-united, and that on Perdip's death he, the defendant, had succeeded to the estate by survivorship, the deceased having left no son; that he came into possession of the estate, and was in fact in possession of it from the time of Perdip Narain's death, and that his widow was never in possession. The learned Judges of the High Court, after examining the petition referred to, considered that the Subordinate Judge was wrong in his construction of it, and that the defendant did not allege that the family had been re-united. Their Lordships are not prepared to say that the High Court were wrong in their construction of the petition. The learned Judges of the High Court made no remark as to the contradiction between the statement of the defendant in that petition and the allegation in his written statement that the widow held possession to the time of her death. The Subordinate Judge also relied upon the delay which, according to the defendant's allegation in his written statement, occurred between the death of Perdip Narain and the defendant's obtaining possession, he not having obtained possession upon the death of Perdip Narain, but only upon the death of the widow. The Subordinate Judge remarked that if the defendant had been the adopted son he would have taken possession on the death of the adopting father. The High Court in commenting upon that part of his judgment remarked that the delay was explained by the very nature of the adoption set up by the defendant, and the arrangement said to have been made by Perdip Narain at the time that the widow, notwithstanding the adoption, was to remain in possession of the whole property during her lifetime. In that respect their Lordships think the High Court were correct. There was no improbability in the case as set up by the defendant, arising from the fact of his not having acquired possession immediately upon the death of Perdip Narain.

The reasons above referred to, however, were only two of the grounds upon which the Subordinate Judge considered that the adoption set up by the defendant was improbable and inconsistent with former statements made by the defendant.

It appeared that a suit had been brought by one Mussumat Bibi Wasihan against Perdip Narain and Odit Narain. Odit Narain died on the 30th September 1854, and upon his death Mussumat Deo Soondur Konwar, his widow, presented a petition to the Court in which the suit was pending in appeal, by which she represented that her husband Odit had died, and that the defendant was his heir. She was quite correct in that respect, for the defendant was the son and heir of Odit Narain. She prayed that the defendant might be made a party in the appeal case. Thereupon the usual istaharnamas were published. Subsequently Perdip Narain died, and on the 4th June 1857 a petition was filed by the appellant in that suit, Bibi Wasihan, in which she stated that Perdip Narain, the second respondent, was dead, and that Roop Narain, the present defendant, was his heir. In consequence of that petition istaharnamas were again published. Afterwards, on the 31st July 1857, Baneshur Konwar, the widow of Perdip Narain, filed a petition to the effect that her husband died on the 22nd Bysack 1264, corresponding with the 1st May 1857, leaving her, the petitioner, and two minor daughters, and that Roop Narain Singh, the nephew, who was separate in mess, had no concern with the heirship of the deceased. After that, on the 24th October 1857, the defendant filed a petition to the effect that he was the kurtapoottra of and nephew in joint mess with Perdip Narain, and that Baneshur, his widow, could not be his heiress. A refutation of that statement was filed on behalf of the widow. Up to that point, therefore, the widow of Perdip claimed on behalf of herself and her daughters, and Roop Narain claimed as the heir by virtue of an unconditional adoption. There was then a conflict between the widow of Perdip Narain and the defendant as to whether the defendant was the heir by adoption or not. Nothing had been said by the defendant with reference to his having been adopted upon a condition or subject to an arrangement according to which the widow was to enjoy the whole of the property for her life. Such being the nature of the dispute between the widow and the defendant, a compromise was come to between them, and a petition was presented on behalf of each of them, admitting that the defendant had been adopted upon condition that the widow was to enjoy the property for her life without a power of alienation, and that after her death the daughters were to take the self-acquired property, and that the defendant was to succeed to the ancestral estate, and that the names of both should be inserted in the appeal in the place of Perdip Narain. That compromise was acted upon by the Court. It was stated by one of the plaintiff's witnesses that the compromise on the part of the widow was extorted from her. He said (Record, p. 48), "A compromise was made between Mussumat Baneshur and Bachoo (another name for Roop Narain); Jeo Lal Sing and other persons, naming them, including Baboo Dain Sing, were present. Baboo Dain Sing said to Baneshur, the widow, 'Do make compromise with Bachoo Sing on this condition, that during your life the property will remain in your possession, and after your death the property will come into the possession of Bachoo Sing.' Thereupon the Mussumat said, 'I do not agree to it.' Then they said, 'If you will not compromise in this way we will drive you out of the house.' Then the Mussumat, according to their instruction, made the compromise and acknowledged the kurtapoottra." Another witness, at page 52, line 10, said, "There was a dispute between Mussumat Baneshur Konwar and Bachoo Sing regarding the heirship. Bachoo declared himself as heir of Perdip Narain Singh, and Mussumat Baneshur Konwar called herself as heir. At last there was a compromise between the said Mussumat and Bachoo Sing. The compromise was effected in these terms,—that during her life the Mussumat shall remain in possession of the properties, and that after the death of the Mussumat the ancestral properties are to come into the possession of Bachoo Sing, and the purchased properties into the possession of the daughters of Perdip Narain Sing."

The Subordinate Judge found as a fact that the compromise was obtained

from the widow by extortion, and he must therefore have believed the witnesses for the plaintiffs. The High Court remarked upon that finding that the daughters never set up the case of extortion (see p. 19 of the Record). They said, "With regard to this solehnama (referring to the petition of the widow) the Subordinate Judge says that it was not Baneshur Konwar's free act and deed, and that she had no right by it to prejudice the rights of her daughters. The first point has been made the subject of much argument before us, but it was certainly never the plaintiff's case that their mother had been coerced into filing this solehnama. The plaint is absolutely silent on the subject of coercion, and all that the Subordinate Judge had to go upon so far was the statement of two of the plaintiff's witnesses to the effect that the relatives of Perdip urged Baneshur Konwar strongly to file the compromise, and threatened her in case of refusal." It is true that the daughters did not set up that the compromise had been obtained by extortion, but they said that the widow had repudiated it. They stated in their plaint, page 3, par. 2, that the solehnama, that is, the petition of compromise put in on behalf of the widow, was obviously in excess of her power, and is in every way illegal, and that the defendant could not by virtue thereof assert any right with respect to the whole or any part of the property, nor could such document be adduced in evidence as against them. They further stated that the widow herself, previously to and after the date of the solehnama, repudiated the pretension of the defendant, and that the defendant also, not being satisfied with the solehnama, raised objection against it, and that his right and the basis of his right as set forth in the solehnama were entirely false and groundless.

The defendant in his written statement stated that the allegation of the plaintiffs that the Mussumat filed the solehnama at the instigation of and in collusion with him, the defendant, was devoid of truth and incredible.

It is clear that the daughters could not be bound by a compromise made by the widow under any circumstances. Even if the compromise had been made by the widow voluntarily, it was not against her interest, for she was to remain in possession of the whole property for her life in the same manner as if the adoption had not been made. If, instead of coming to a compromise and making mutual concessions, Roop Narain had continued to assert his claim as heir by virtue of an unconditional adoption, as he had done up to the time of the compromise, and the widow had continued to assert that no adoption whatever had been made, the widow might have been examined as a witness in support of her assertion. It should be remarked that the adoption set up in the suit, and attempted to be proved by some of the defendant's witnesses, is not an absolute adoption as originally set up the defendant, but an adoption subject to a condition or arrangement to the same effect as that stated in the compromise. One of the grounds upon which the Subordinate Judge thought that the adoption set up by the defendant in the compromise and in his written statement was improbable was that there was no writing, and certainly it appears to their Lordships to be very improbable that Perdip Narain should have adopted the defendant upon the condition that the widow should enjoy the property for life, and that his daughters should take his self-acquired property after her death, without a single line in writing as evidence of the arrangement. Such a conditional adoption without a writing to support it would, like a nuncupative will, require very strong evidence to establish it.

In referring to the reason given by the Subordinate Judge, with reference to the improbability of the adoption, in consequence of the absence of any writing to support the condition or arrangement as to the possession of the property, the High Court were entirely silent.

In support of the allegation of the plaintiffs that both the widow and the defendant repudiated the compromise, it was proved that the widow on the 13th June 1862, long after the date of the compromise, applied for a mutation of

names, upon the ground that she was the widow and heiress of her deceased husband and in possession of the property.

Her application was not on the ground of a condition annexed to an adoption according to which she was to enjoy the property for life, but upon the ground that she was the widow and heiress. In support of that application she filed a varasutnamah dated the 30th May 1862, under the seal of the Kazi, upon which he declared upon the deposition of two witnesses that Perdip Narain left as his heirs only Mussumat Baneshur, his widow, and two minor daughters, and that the widow was in possession of the property left by her husband. Thereupon a petition of objection was filed on behalf of the defendant, in which an absolute adoption was again set up, without referring to any condition or arrangement by which the widow was to enjoy the property for life; and in that petition it was stated that the defendant had performed the funeral ceremonies, sradh, pind-dun, etc.; that the widow had never had possession of the estate, and that she got her maintenance and necessaries from him, and that she should get them during her life. The petition went on as follows: "The insertion of name depends upon possession, and the Mussumat aforesaid is not in possession of a single beegah or cottah of the disputed lands. Therefore, according to the orders prevalent in Court, the name of a person who is not in possession cannot be entered, in the milkeut and malgoozari column to which effect there are many orders of the Zillah and Sudder. Secondly, the claim of the petitioner cannot on any account be entertained on the basis of this varasutnamah, inasmuch as at the time of the roobookar I will produce a great deal of evidence to prove the non-possession of the Mussumat petitioner." That allegation, which the defendant made in 1862, is utterly at variance with the petition of compromise which he had previously filed, and with the allegation in his written statement in the present suit, paragraph 4, in which he says: "Mussumat Baneshur Konwar, in accordance with the expressed desire of the ancestor, held possession of the entire estate to the last day of her life."

Many witnesses were called on behalf of each of the parties to the suit. Some of those examined on the part of the defendant proved an unconditional adoption, corresponding with that set up by the defendant previously to the compromise; others an adoption subject to a condition or arrangement corresponding with that stated in the compromise. Several witnesses on behalf of the plaintiffs stated that no adoption was made. With respect to the plaintiffs' witnesses, the High Court said their evidence is purely negative; but it is to be remarked that if the evidence of Ram Narain Sing and of some of the other witnesses of the plaintiffs is to be believed, the adoption could not have taken place without their knowledge. There were other inconsistencies, as regards the raising of money for the payment of the expenses of the marriages of the daughters, the performance of the sradh, and other matters to which it is not necessary to refer minutely. The Subordinate Judge alluded to the fact of the defendant's not having offered himself as a witness, but the High Court made no remark upon that subject, confining themselves merely to criticising the reason which the learned Subordinate Judge gave for disbelieving the individual witnesses of the defendant. Looking to the inconsistent statements made by the defendant from time to time, the conflict in the evidence of the witnesses, the improbability of such a conditional adoption as that set up by the compromise and also by the defendant in his written statement without any writing in support of it, their Lordships are of opinion that the defendant ought to have been called as a witness and offered himself for cross-examination, and that in his absence the Subordinate Judge had good reasons for believing the evidence on the part of the plaintiffs instead of the witnesses examined on the part of the defendant. The defendant himself was about 18 years of age at the time when the alleged adoption took place, and must therefore have had a recollection of the facts connected with the adoption if it

had taken place. Looking at all the circumstances, their Lordships think that there were no sufficient grounds for reversing the judgment of the Subordinate Judge of Tirhoot, and consequently they will humbly advise Her Majesty to allow the appeal, and to reverse the decision of the High Court. The respondent must pay the costs of this appeal.

The 18th March 1879.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Hindoo Widow—Maintenance—Will (Construction of)—Charge on Inheritance—Limitation—Act XIV of 1859 s. 1 cl. 13—Common Law—Residence in Joint Family—Practice (Appeal)—Points not mentioned in Judgment.

On Appeal from the High Court at Bombay.

Narayanrao Ramchandra Pant

versus

Ramabai, Widow of Ramchandra Pant.

Where a testator, in giving the whole of his property to his eldest son, recognised the claims, by Hindoo law, of the younger sons and the widows to maintenance, and made specific provisions with regard to the younger sons (giving them the profits of particular villages), but made no specific arrangement for the widows (merely requiring that they should be maintained and treated with proper respect) : HELD that the will did not create a right which was a specific "charge on the inheritance of any estate" within the meaning of those words in cl. 13 s. 1 Act XIV of 1859.

By Common Law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow ; and a Statute of Limitation might do much harm if it should force widows to claim their strict rights and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable.

Where a will makes no condition that, to entitle a widow to maintenance, she should reside under the same roof and in joint family with the son, she is left in this respect in the ordinary position of a Hindoo widow, according to which separation from the ancestral home would not generally disentitle her to maintenance suitable to her rank and condition.

When an appellant comes to complain of the judgment of a Court upon a point which does not appear upon its judgment, it would be proper, and at least convenient, that some explanation should be given why the point does not so appear.

Mr. Benjamin, Q.C., and Mr. P. Myburgh for Appellant.

No one for Respondent.

Sir Montague Smith gave judgment as follows :—

This was a suit brought by Ramabai, the widow of Ramchandra Pant, against Narayanrao Ramchandra Pant, his eldest son, to recover arrears of maintenance. The claim states : "The liability to maintain me according to the dignity of my family rests, under the Hindoo law, with the defendant." Ramchandra Pant was subadar in the service of the Maharajah, the ex-Peishwa. He died on the 22nd July 1855, leaving two wives, and children by each. The defendant was the step-son of the widow Ramabai, the plaintiff. A great deal of litigation has taken place in this family, owing to disputes which arose immediately after Ramchandra Pant's death. He left a will which was disputed by his younger sons, and an action was brought, which ultimately came upon appeal to Her Majesty in Council. After considerable discussion of the evidence which had been given at great length, the will was established. Another suit was brought by the widows to recover some jewels which they alleged to be their property under the will of the testator,

in which the widows failed, it being decided that the jewels to which they might lay claim under the will were in their own possession. This antecedent litigation does not materially affect the question arising in the present suit, except so far as it shows the state of hostility in the family, and accounts for the withholding by the defendant of the maintenance to which the plaintiff was entitled. The present suit was brought on the 18th October 1871.

One point now raised is that the maintenance is barred by limitation; the other point is that the maintenance is payable under the will of Ramchandra Pant, and that it is a condition precedent to the right to obtain it that the widow should live under the same roof in joint family with the defendant. Those are the two principal points which have been raised. A third point is that there has been no demand and refusal of the maintenance.

The case has been tried in the Courts below upon several issues which it is not necessary to mention in detail, inasmuch as the three points just indicated are those which alone are relied upon at the Bar. The result of the suit in the Courts in India was that the Subordinate Judge awarded a sum of Rs. 300 per mensem to the plaintiff for maintenance, and gave her arrears for six years amounting to Rs. 21,000. The High Court reduced the monthly allowance to Rs. 200, and proportionately reduced the amount of arrears, giving the sum of Rs. 14,400.

To comprehend the argument on the points which alone remain for decision, it is necessary to refer to the will of Ramchandra Pant. It is stated in the report of the appeal to Her Majesty in the 9th Moore's Indian Appeals, page 101. Mr. Benjamin read the will from this report. It is thus stated: "The effect of it, according to the English translation as made in the Zillah Court, was to declare that the testator was seventy-five years of age, that his eldest son had two sons and one daughter, and that his younger sons were childless. It then proceeded to express his hopes that his wives and his sons would all live amicably together, and that all would look upon and consider his eldest son as the head of his family after his death. He then bequeathed the whole of his property, real and personal, to his eldest son, directing him to provide for both his wives and to pay them proper respect, and to provide also for his younger brothers and for the testator's dependents; and he declared that he had made these provisions with a view to prevent dissensions in the family, and to enable them to live in peace and harmony after his decease. If, however, the younger sons should not feel disposed to abide by these directions, and should insist on a separation from the family, then the eldest son was to receive the rents of two villages mentioned in the will, and pay over the proceeds to his younger brothers as such proceeds were from time to time received, and he was further to pay to each the sum of Rs. 25,000. The testator then gave Rs. 13,000 for the benefit of his granddaughter, the daughter of the appellant, on her marriage, and allotted Rs. 40,000 for what he calls the customary outlay in the first year after his death, including religious pilgrimages." The words of the will relating to the points in issue, according to one of the translations in the present Record, to which attention was called by the learned Counsel during the argument, were: "Nana, the eldest son, shall provide for both the mothers, treating them with great respect; and he shall regard each of his two younger brothers as a son, providing for them, and my old servants, in a manner befitting their several conditions in life."

The testator's property appears to have been self-acquired, and consisted of some villages and large sums of money in Government paper, and other personal property, and he refers in his will to an expected pension from the East India Company. It has been conceded at the Bar that whatever was given by the testator to his wives in his lifetime was not given in lieu of maintenance; in fact, all that was given to them were some jewels, no doubt of considerable value. Nor has any question been made at the Bar that if the plaintiff is entitled to succeed,

the amount awarded by the High Court is excessive. The only questions are those which have been already mentioned.

The first question arises upon the Statute of Limitations, and it is contended that this action is barred altogether, both for the maintenance and the arrears, by sub-section 13 of the 1st Section of Act No. XIV of 1859, which is in these terms: "To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property; and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate; the period of twelve years from the death of the persons from whom the property, alleged to be joint, is said to have descended, or on whose estate the maintenance is alleged to have been a charge." It was contended that under the will of the testator the maintenance is made by the will a charge upon the estate. The effect of the will is, no doubt, to give the whole property of the deceased to the eldest son, mainly because he appears to have had more confidence in his eldest son than in the younger ones. But whilst giving the estate to the eldest son he recognises the claims by Hindoo law of the younger brothers and the widows to maintenance. He makes specific provisions with regard to the younger brothers, giving them the profits of particular villages, but he makes no specific arrangement for the widows. He merely requires that they should be maintained and treated with proper respect. He creates no charge on any specific portion of his property, but imposes an obligation upon the defendant to make allowances for the support of the widows of a kind analogous to the maintenance to which widows by Hindoo common law are entitled, supposing probably that by his will he might have interfered with that law. It is to be observed that in the former suit brought by the widows they claimed under the will and to take the benefit of it.

Assuming this to be the proper construction of the will, their Lordships think that the Subordinate Judge was right in his conclusion that it did not create a right which was a specific "charge on the inheritance of any estate" within the meaning of those words in the 13th sub-section of the Statute.

The language of the Act is not very clear; and by two subsequent Statutes of Limitation the events from which the time of limitation is to run in the case of maintenance are wholly different. By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow; and a Statute of Limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable.

The only authority cited by the Subordinate Judge is the case of *Timmappa Bhat v. Parmeshriamma*, in the 5th Bombay Law Reports, 130, which sustains his judgment, though the facts are not altogether the same as the facts of the case now under appeal. No decision was cited at the Bar opposed to the construction which the Subordinate Judge has put upon the Act.

Their Lordships have observed with some surprise that no mention of this point, which is undoubtedly one of some importance, was made in the judgment of the High Court, and they think that when an appellant comes to complain of the judgment of a Court upon a point which does not appear upon their judgment, it would be proper, and at least convenient, that some explanation should be given why the point does not so appear. It may be that this point was disposed of in the course of the argument. In the absence of explanation the High Court must be taken to have agreed with the Subordinate Judge.

The second point made was that the plaintiff has disentitled herself to maintenance by separating from the son and living apart from him. It is argued that it was made a condition of the will, to entitle her to maintenance, that she should reside under the same roof and in joint family with him. Their Lordships, however, think that no such condition is to be found in the will, and that she was to

be left in this respect in the ordinary position of a Hindoo widow, in which case separation from the ancestral house would not generally disentitle her to maintenance suitable to her rank and condition.

It was then said that no action could be maintained because a demand and refusal had not been proved. There is no evidence that a specific demand was made for the maintenance, but the Subordinate Judge has found, and the High Court have not disagreed with him, that the maintenance was refused; and taking all the circumstances of this family into consideration, their Lordships do not doubt that there was a withholding of this maintenance by the son under circumstances which would amount to a refusal of it.

These observations dispose of all the points which have been raised at the Bar, and their Lordships think that this appeal fails, and they will humbly advise Her Majesty to affirm the decree of the Court below.

The 18th March 1879.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Act VIII of 1859 s. 32—Rejection of Plaint—Cause of Action—Devaraja Swamis Pagoda—Adhyapaka Mirass (Income of).

On Appeal from the High Court at Madras.

Tiru Krishnama Chariar and others

versus

Krishnasawmi Tata Chariar and others.

In this case the High Court approved of the rejection of the plaint under s. 32 Act VIII of 1859 as disclosing no cause of action either in the allegations respecting the "mirass of reciting prayers," and the exclusive right of recital in a stated form and order which the plaintiffs asked the Court to establish and to protect from infringement by the defendants; or in the allegation as to withholding payment of certain specified sums described as "the value of the incomes mentioned in Schedules B and C." The Privy Council took a different view of the plaint and the schedules, and reversed the judgment of the High Court, considering that the schedules were more than a mere list of cakes and offerings, to which a money value was assigned, and that they disclosed a claim, whether well or ill-founded, as of right to certain dues for services performed.

Mr. Mayne for Appellants.

No one for Respondents.

Sir Robert Collier gave judgment as follows:—

This is an appeal from a judgment of the High Court of Judicature at Madras rejecting a plaint under the 32nd Section of the Code of Civil Procedure as containing no cause of action, a proceeding equivalent to what in this country would be called judgment on demurrer. The only question before their Lordships is whether or not the plaint discloses any cause of action. Of course we have nothing to do with the question whether the cause of action, if any is stated, be well founded, or what may be the merits of the case. The declaration is by a large number of persons belonging to the Tenkalai sect, against other persons belonging to the Vadakalai sect. The substance of the plaint, which undoubtedly is not very clear, may be thus stated: It begins by declaring that the plaintiffs have the exclusive right to the Adhyapaka mirass of reciting certain religious texts, hymns, or chants in a certain pagoda and its dependencies, and deny the right of the defendants to recite them. Then comes an allegation which appears important: "The plaintiffs and the Brahmins of the plaintiffs' Tenkalai sect have

been for a long time past and up to this day discharging all the duties appertaining to the said Adhyapaka mirass right, and enjoying the incomes of the Adhyapakam, save those mentioned in Schedules B and C." The plaint goes on to allege that the defendants, holding the office of Dharmakarta of the pagoda, in combination with other persons in rivalry with the plaintiffs, recited the Vadakalai invocations, chants, and other religious prayers, the exclusive right to recite which was incident to the plaintiffs' Adhyapaka mirass; that thereupon a complaint was preferred to the Magistrate and a report made, and for a time the defendants ceased to recite the chant and prayers in question, but that they again wrongfully recited them, and injured the exclusive right of the plaintiffs and others to recite them; but there is no allegation that the plaintiffs did not themselves perform or were prevented from performing these rights. On the contrary, the allegation is that they did perform them. Section 6 goes on to say, "The defendants having withheld the payment to the plaintiffs, of some of the several incomes of the Adhyapaka Mirass due to the plaintiffs in the said Devaraja Swamis Pagoda, as well as in all the Sannidhis attached to it, the plaintiffs instituted suit No. 66 of 1865, on the file of the District Moonsiff's Court of Conjeveram, against the defendants, and this litigation went up as far as the High Court, and continued until March 1873, when a decision was passed in favor of the plaintiffs." The plaint further alleges (and this is the present cause of action), "The defendants have withheld the payment to the plaintiffs and the others of the Tenkalai sect of the amount of income mentioned in Schedule C for the six years from the date of the said suit No. 66 up to this day, to which the plaintiffs and the others of the Tenkalai sect are entitled, as also of the incomes which are mentioned in Schedule B, and which were being enjoyed by the plaintiffs and the others of the Tenkalai sect from the date of the said suit No. 66 until the final decree was passed by the High Court, save such as are now being enjoyed. They have also withheld from the plaintiffs, and the others of the Tenkalai sect, the honors mentioned in Schedule A from April 1873." There follows a prayer that the Court will pass a decree directing the defendants and others to abstain from reciting, and establishing the exclusive right of the plaintiffs, and also seeking to recover the value of various items stated in the schedules. Schedule C, which is to be found at the end of the schedule attached to the plaint, is in these terms: "Amount due for six years from October 1870 up to the current month at the annual rate of Rs. 57. 5. 9, as mentioned in the decree in the original suit No. 66 of 1865 on the file of the District Moonsiff's Court of Conjeveram, Rs. 344. 2. 6." On reference to the Record, this suit appears to have been brought by substantially the same plaintiffs (with some changes) against substantially the same defendants. The Moonsiff, before whom the case was originally tried, affirmed the claim of the plaintiffs to the Adhyapakam mirass, and decreed that the sum of Rs. 57. 5. 9., as wages for the duty performed, should be paid to them by the defendants, these "wages" being in fact the money value placed by the Court on certain payments in kind chiefly in the shape of food.

On appeal this decision of the Moonsiff was reversed by the District Judge, being the first Court of Appeal, on the ground that no suit would lie in respect of the matter complained of. His decision was reversed by the High Court of Madras, who remanded the case, observing, "The claim is for a specific pecuniary benefit to which plaintiffs declare themselves entitled on condition of reciting certain hymns. There can exist no doubt that the right to such benefits is a question which the Courts are bound to entertain, and cannot cease to be such a question because claimed on account of some service connected with religion. If to determine the right to such a pecuniary benefit it becomes necessary to determine incidentally the right to perform certain religious services, we know of no principle which would exonerate the Court from considering and deciding the point."

In pursuance of this judgment, which appears to their Lordships to be perfectly correct, the cause was again tried by the Court of first appeal which somewhat increased the amount that the Moonsiff had given. The High Court upon further appeal affirmed the judgment of the Moonsiff, re-establishing the amount by way of annual payment at Rs. 57. 5. 9. It therefore appears that the plaintiffs in the present suit, having recovered in the former suit up to the date of the commencement of that suit the sum of Rs. 57 for certain services performed, are now seeking to recover the amount of wages that have accrued due to them for six years since the date of that suit at the same annual amount in respect of the same services which they allege themselves to have continued to perform, their performance not having been prevented, although possibly to a certain extent interfered with by the defendants. So much with respect to Schedule C.

Schedule B relates to another class of payments, as they are described in the schedule, in kind; that is, in the shape of rice and other food which are described as due to the plaintiffs. The first item in the schedule is to this effect: "One Poli (circular cake made of wheat, flour, Bengal grain, sugar, and ghee) due to Adhyapakam at the close of the Tiruppavai." Most of the other items are of the same character. Their Lordships do not understand these articles as consisting of mere presents made by the devout, but as certain payments in kind of the same nature as those comprised in Schedule C, which are now claimed by the plaintiffs from the Dharmakartas of the temple, which the defendants are, in respect of services performed. At the close, however, of this schedule their Lordships observe a statement of an approximate sum claimed for presents made annually to the Adhyapakas by the adjoining villagers for the Tenkalai people. It may be that no action will lie for the recovery of this last item, or in respect of the honors mentioned in Schedule A, and alleged to have been withheld from the plaintiffs; but that circumstance would not justify the rejection of the whole plaint, if it discloses a good cause of action in respect of Schedule C and the greater part of Schedule B.

The judgment of the High Court, now appealed against, which rejects this plaint, is in these terms: "We think the plaint was properly rejected under the 32nd Section of the Code of Civil Procedure. The allegations respecting the 'Mirass of reciting prayers,' and the exclusive right of recital in a stated form and order which the plaintiffs ask the Court to establish and to protect from infringement by the defendants, do not disclose a cause of action; nor in our judgment does that portion of the plaint which alleges the withholding payment of certain specified sums which are described as 'the value of the incomes mentioned in Schedules B and C.' A reference to the Schedules discloses nothing more than a list of cakes and offerings to which a money value is assigned. Reading the plaint and schedules together they express no more than this, that presents and offerings usually given have been withheld. If, as now alleged, the plaintiffs intended to claim emoluments or legal dues of right receivable by them for services rendered, it is sufficient to say they have failed to do this."

Their Lordships are unable to concur in this judgment. For the reasons which have been stated they take a different view of the plaint and of the schedules which have been referred to. It appears to them that the schedules are more than a mere list of cakes and offerings to which a money value is assigned, that they disclose a claim, whether well founded or ill founded, as of right to certain dues for services performed: Schedule C to an annual payment for wages which has been assessed in the previous suit, and adjudicated upon as due to them. Schedule B to certain other payments in kind, presumably capable of a money value, which had been made to them up to the judgment in the former suit, but which had been since withheld.

This being so, the action falls within the principle of the judgment by which the former suit was remanded, and of other cases to which their Lordships'

attention has been called. They are therefore of opinion that the judgment should be reversed, and the case remanded for the purpose of trial, and that the appellant is entitled to the costs of this appeal; and they will humbly advise Her Majesty to this effect.

The 20th March 1879.

Present :

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

*Malgoozaree Rights—Settlement—Trust—Adverse Possession—Practice
(Special Appeal)—Jurisdiction.*

*On Appeal from the Court of the Judicial Commissioner,
Central Provinces.*

Asad Ali Beg and others

versus

Zaffer Ali Beg and others.

Where, on the death of a malgoozar, his widow and principal heiress according to the Mahomedan law was admitted to a settlement of the villages held by him in malgoozaree, and continued in possession for 19 years, when a regular settlement took place with her upon the ground that her long possession was adverse to the rights of the co-heirs: HELD that the widow could not be fixed with a trust for the whole family, except upon satisfactory evidence that she consented to the acceptance of that trust and to take the estate upon it, whereas there was no evidence of anything like an admitted or implied trust.

If, however, it had been clearly made out that she held under a trust, an enlargement, whatever it may have been, of her proprietary interest in the villages upon that regular settlement, would not have made her less a trustee, and she would have taken whatever additional interest she thus acquired subject to the original trust.

A Judge cannot be said to act strictly within his power upon a special appeal, if his judgment proceeds upon inferences drawn from the evidence, which are contrary to the inferences drawn by the two Courts below, and so far involves a review of their decision upon matters of fact.

Mr. Leith, Q.C., and Mr. Doyne for Appellants.

This is an appeal from an order or decree of the Judicial Commissioner of the Central Provinces of India, dated the 18th July 1876, which reversed the decrees of two Lower Courts. The facts are few and simple. It appears that in the year 1844 one Shere Ali Beg was killed by a tiger. He was the malgoozar of a considerable number of villages, of which those in dispute may be taken to be the residue. Upon his death the question who was entitled to succeed him as malgoozar of those villages arose; and after proceedings, to which it will be necessary again to refer, it was held that Hassan Beebee, his widow, was the sole person entitled to do so. A kubooleut was executed by her, she was put into possession and enjoyment of the malgoozaree right, whatever that at that period and in those provinces may have imported, and the decision of the Deputy Commissioner to the above effect was affirmed by Colonel Sleeman, then the Chief Commissioner. At the time of Shere Ali's death, the state of his family was such that if his estate had been administered according to the strict terms of Mahomedan law, his widow, being childless, would have been entitled to one-fourth, and the other three-fourths would have been equally divided between four half-brothers, Hyder Ali Beg, Zaffer Ali Beg, Ashruff Ali Beg, and Mahomed Ali Beg, all of whom, upon the evidence, may be taken to have survived him. The widow continued in the enjoyment of the rights given to her in the villages by the settlement of November 1844 up to the time of the regular settlement, which took place in

1863. On that occasion no other person made claim to the settlement of the property. The Settlement Officer, in his order of the 4th September 1863, says, "Hassan Beebee has now held for 19 years, and none has brought any claim in the interval against her, so that her present claim to the village rests on her possession for so long. She has no right as heir of Shere Ali Beg, for under Mahomedan law the estate ought to have gone to the cousins, etc., and the widow without sons has no right at all. But no relation has now put in a claim, and although it is discreditable to her that she should refuse to do anything for these adopted sons, yet by law they had no claim on her." And the order concludes with the words, "I bestow the proprietary rights on Hassan Beebee. She holds 27 other villages in Pergunnah Seoni." His statement of the Mahomedan law of succession is incorrect; but he obviously made the settlement upon the ground of her possessory title of 19 years, treating her possession during that time as adverse to the heirs of Shere Ali, whoever they might be. Hassan Beebee, on the 22nd November 1869, made a deed of gift in favor of the appellants on this Record of the ten villages claimed in this suit, having about the same time, sold another village to certain parties who are not before the Court, and made a wuqf or religious endowment of another. She died on the 8th December 1870. On the 26th August 1874 the present suit was commenced, the plaintiffs being Zaffer Ali Beg, the surviving half-brother of Shere Ali Beg, the representatives of two of his deceased half-brothers, and a stranger who had purchased an interest in the suit. There seems however to be no representative on the Record of the fourth half-brother Mahomed Ali. The title of the plaintiff is thus stated in the plaint: "Whereas the plaintiff, as half-brother, and Shujait Beg and another, as nephews of Shere Ali Beg, are heirs entitled to the property left by the deceased" (meaning Shere Ali). They are, therefore, suing upon a title which, if a good one, accrued to them originally, or to those whom they represent, upon the death of Shere Ali Beg. It is unnecessary to go through the voluminous proceedings which have been had in the cause before the different Commissioners and the Deputy Commissioners in detail. The sole issue with which their Lordships deem it necessary to deal is, whether the suit was barred by the Statute of Limitations; and as incidental to that question, whether the long possession of Hassan Beebee, the widow, was or was not adverse to the present claimants. The two Lower Courts have both found that it was adverse, a finding sufficient to dispose of the suit; but they have also tried other issues with which their Lordships do not propose to deal, as to the validity under Mahomedan law of the title of the defendants under the deed of gift. Their Lordships must express their regret that it was thought right by the Commissioner to remand the case on one occasion for the trial of those issues, which, if he was right in his view of the nature of the possession by the widow, were immaterial.

The case was finally taken by way of special appeal to the Judicial Commissioner, who by the order under appeal reversed the decisions of the Lower Courts, and made a decree in favor of the plaintiff. The grounds upon which he proceeded are stated in his judgment at pages 81 and 82 of the Record, and are to the following effect. After stating that immediately after the death of Shere Ali there was a discussion as to the succession, he goes on to lay down the following propositions: "That the half-brothers, cousins, and nephews having been dependent on Shere Ali Beg's bounty, the drift of their opinion was towards the propriety of waiving their rights of inheritance in favor of Shere Ali's widow. That while general agreement on this head obtained only after some dissent was overcome, such general agreement went no further than a temporary waiver in favor of the widow personally. That Shere Ali Beg's widow, Hassan Beebee, understood this, and had no further pretensions either at the time or during the next 15 years, i.e. until 1869; that even as a temporary waiver in favor of the widow personally it was scarcely absolute, being in a degree conditional on the widow supporting

the heirs. That there was no such renunciation of right of heirship as gave the widow Hassan Beebee the right to treat the property, while those of Shere Ali's heirs, by whose consent she held, lived, as absolutely as her own. That therefore Hassan Beebee's possession of the villages claimed, so far as they were the heritage of heirs of Shere Ali Beg other than herself, cannot be regarded otherwise than as permissive under those other heirs; and that a finding of adverse possession on the part of Hassan Beebee as against the plaintiff is specially unjustifiable, seeing that Zaffer Ali Beg, plaintiff No. 1, was a minor in 1844; that Hyder Ali Beg, father of plaintiff No. 3, was in 1844 clear for the inheritance following the usual course, and gave in his adhesion to the arrangement ultimately agreed to only after pressure; and that Ashrof Ali Beg, the father of plaintiff No. 2, distinctly reserved his right of heirship as enforceable after Hassan Beebee's death."

It is not very easy to put into definite terms what the Judicial Commissioner considered the legal effect of the supposed arrangement of 1844 upon which he proceeds. He may mean that the arrangement was either that the heirs according to Mahomedan law then waived their rights only to the extent of giving the widow a life estate, reserving their power to assert those rights immediately after her death, or that they agreed to substitute her as malgoozar upon certain trusts for the whole family, and with an obligation to maintain either the residuary heirs only, or them and others.

Two distinct points are raised by this appeal as to the propriety of the course of proceeding and of the decree passed by the Judicial Commissioner. It is said that he had no jurisdiction to make, on special appeal, a decree which involves, more or less, the finding of matters of fact; and it is also said that the decree, if he had power to make it, was erroneous. Their Lordships certainly feel that it would be difficult to affirm that what he did came strictly within his powers upon a special appeal, because his judgment proceeds upon inferences drawn from the evidence which are contrary to the inferences that had been drawn by the two Courts below, and so far involves a review of their decision upon matters of fact. They do not however propose to rest their decision upon this point of form, because they have come to the conclusion that the judgment is erroneous, and proceeds upon grounds that are not supported by the evidence in the cause.

The widow could not be fixed with a trust except upon satisfactory evidence that she consented to the acceptance of that trust, and to take the estate upon it. But what is the real effect of the proceedings upon which the Judicial Commissioner relies? It appears that upon the death of Shere Ali there were not only the half-brothers who would be co-heirs with the widow according to the strict Mahomedan law, but that he and his wife had during his lifetime adopted two sons, so far as a Mahomedan is capable of adopting a son; that they took a relative of each, whom they brought up in their house, and called their adopted sons. It also appears that besides his half-brothers, Shere Ali had sundry cousins, one of whom, Shah Ali, had been allowed to take a considerable part in the management of the villages. When, upon Shere Ali's death, the question arose who was to be the new malgoozar, there seems to have been a general examination before the Deputy Commissioner of the people constituting what may be called this clan. The adopted son, who was of age, was examined; the brothers were all examined; two of the cousins, Shah Ali and his brother, were examined, and the widow herself was examined. She seems to have distinctly claimed the right to engage for the villages on her own account, and in her own name. She makes no suggestion of a trust. The brothers seem all to have finally given up their claims, and agreed that the new engagement should be made with her, but some of them express a desire that she should allow them maintenance. They treat themselves, not as co-heirs having a distinct right as such, but as more or less dependents of Shere Ali who would have a claim to be maintained by her. No doubt Hyder Ali, one of the brothers (and upon him the Judicial Commissioner mainly relies),

on his first examination proposed that there should be a division of the villages; but he did not even then put forward the right of the co-heirs, according to the Mahomedan law, to have their shares in villages allotted to them. On the contrary, the division which he suggested as proper to be made was that the village of Somalwara should be settled with Asad Beg, one of the adopted sons; that another village should be settled with the other adopted son; that other villages should be apportioned among various parties, including himself and his co-heirs, but also including a nephew, Zadar Saheb, who did not possess the character of an heir; and that Shah Ali Beg, the cousin, should be malik, "as the most prudent man of us all." He added, "Shah Ali Beg as well as we all should be guided by or be dependent on the late Shere Ali Beg's widow." And he ended that examination by saying, "His widow is the malik; she can act as she likes." He afterwards retired from that contention, and consented that the settlement should be made with the widow. The person who really contested the right of the widow to take the settlement in her own name, and with the full powers of malgoozar, was Shah Ali Beg, who had no right of inheritance, in the strict sense of the term, in the estate. The result of the whole proceeding was that two roobocarries were passed by the then Settlement Officer, Captain Spence. In the first of them, after stating all the different contentions and suggestions that had been put forward by the different members of the clan, he says: "Separate proceedings have been instituted in regard to these claims, and final orders have issued thereon, after a full enquiry and attestation of the disputed property; and as nobody, save Hassan Beebee, the widow and principal heiress of Shere Ali Beg, deceased, would appear to possess the least title to inherit the property left by him, I am of opinion that the settlement should in fairness be made with her. It is hereby ordered, therefore, that the name of Shere Ali Beg be struck off the pottah (lease) and that of Hassan Beebee be substituted for the same; that the usual ikramnama or agreement be taken, and the dakhil, kharij perwana, or order, issue to the tehseeldar of Seone." She then executed a kubooleut and she was put in possession. In the other roobocarry to which he refers, and which seems to have been made on the petition of Shah Ali Beg, he expressly said: "Under the circumstances it is ordered that the claims put forward by all the claimants be thrown out, and that the settlement of the villages held in malgoozari by the late Shere Ali Beg be made with his widow Hassan Beebee." These two roobocarries were sent to the Chief Commissioner and were sanctioned and approved of by him on the 24th January 1845. It seems to their Lordships impossible to hold, whether the decision of the Commissioner was or was not just or right or according to law, that the effect of these proceedings was not to put the widow, rejecting all the other claims, into possession of all the rights in the villages which had been possessed by her deceased husband. All that subsequently takes place supports that view of the case. There is not the slightest evidence that she ever did maintain her husband's relations, or that they ever claimed as of right to be maintained by her. If she had subjected herself to the supposed obligation, she would have been bound to maintain, among others, the adopted sons. But there is direct evidence that on one occasion, notwithstanding the strong remonstrance of the Government officer, she took upon herself to turn them out of the house, and that she then claimed (and apparently successfully claimed) the right to deal with the property as she chose. Then came the regular settlement of 1863, in which, as has been already shown, the Settlement Officer held her entitled to a declaration of her proprietary rights upon the simple ground that for 19 years she had had possession of the estate. Their Lordships so far agree with the Judicial Commissioner that if it had been clearly made out by the previous proceedings that she held under a trust either for the present plaintiffs or for others, an enlargement, whatever it may have been, of her proprietary interest in the villages upon that regular settlement would not have made her less a trustee, and that she would have taken whatever

additional interest she thus acquired subject to the original trust. But they find nothing like an admitted or implied trust, and if anything like a trust could have been inferred from these proceedings it would have been one for a class including the adopted sons as well as for those persons who are now suing upon their original right as heirs under the Mahomedan law. Of an agreement whereby she was to take only a life interest in the villages, their Lordships can find no evidence.

It seems therefore to their Lordships that they must humbly advise Her Majesty to allow this appeal, to reverse the decision of the Judicial Commissioner, and in lieu thereof to order that the decisions of the Lower Courts be affirmed, and the special appeal to the Judicial Commissioner against them be dismissed with costs. The appellants here must also have their costs of this appeal.

The 21st March 1879.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Jurisdiction—Immoveable Property situate in different High Courts—Power to Transfer Suit—Application to Sue in formâ pauperis—Subsequent Payment of Stamp Fees—Rejection of Plaintiff—Limitation—Act VIII of 1859 s. 13—Act IX of 1871 s. 4.

On Appeal from the High Court at Allahabad.

Skinner
versus
Orde.

Their Lordships suggested the addition in Act VIII of 1859 s. 13, which authorized the High Court of the district in which a suit for immoveable property situate in the jurisdiction of different High Courts is brought, to allow the suit to be proceeded with in the district of another High Court, of an express power to the former High Court to transfer the suit to the other Court in the position in which it then stood,—*e.g.*, as in this case, with the finding that plaintiff was a pauper.

A petition to sue *in formâ pauperis* contains in itself all the particulars that Act VIII of 1859 requires in a plaintiff, and *plus* these a prayer that the plaintiff may be allowed to sue *in formâ pauperis*.

In this case the plaintiff, after filing a petition to sue *in formâ pauperis*, and pending an enquiry into his pauperism which was delayed by various orders of the Court, raised a loan and paid into Court the amount of stamp fees chargeable under the Court Fees Act, whereby he gave up so much of the prayer of his petition as asked to be allowed to sue as a pauper. **HELD**, that there was nothing in Act VIII requiring the rejection of the plaintiff under such circumstances, or preventing the petition from being considered as a plaintiff from the date that it was filed, according to the explanation in s. 4 of the Limitation Act IX of 1871.

*Mr. Mayne and Mr. C. W. Arathoon for Appellant.
Mr. Leith, Q.C., and Mr. Doyle for Respondent.*

Sir Montague Smith gave judgment as follows :—

The decision of this appeal is attended with considerable difficulty, since it presents a case which is not provided for by the Code of Civil Procedure. It becomes of importance to the parties, because the decision of the point of practice determines the question whether or no the Statute of Limitations is a bar to the claim of the plaintiff. The original petition was filed in the Court of the Subordinate Judge of Meerut on the 20th February 1873. The claim of the plaintiff was to a share of the property devised by the will of the late Colonel Skinner. His claim arose upon the death of his father, Major Skinner, which occurred on the 27th April 1861. The petition set out all the particulars required in a plaintiff, and prayed that the plaintiff might be allowed to sue *in formâ pauperis*. The claim embraced landed property which was situate partly within the jurisdiction

of the High Court of the North-Western Provinces and partly within the jurisdiction of the High Court of the Punjaub. The Judge of Meerut apparently of his own motion, rejected the petition, on the ground that the question of the plaintiff's pauperism could be more conveniently tried in the Punjaub. The plaintiff thereupon filed it in the Court of the Deputy Commissioner of Delhi, and on the 14th April 1873 an order was made by that Court, after examining witnesses, admitting the plaintiff's suit *in formâ pauperis*. Before proceeding further with the suit the Deputy Commissioner applied to the High Court of the Punjaub for authority to proceed under Clause 13 of the Code of Civil Procedure. That Clause enacts: "If the districts within the limits of which the property is situate are subject to different Sudder Courts, the application shall be submitted to the Sudder Court to which the district in which the suit is brought is subject, and the Sudder Court to which such application is made may, with the concurrence of the Sudder Court to which the other district is subject, give authority to proceed with the same." On the 29th May 1873, the High Court of the Punjaub, presumably not without having consulted the High Court of Allahabad, directed that "the plaint should be returned to the plaintiff, with instructions that he should present it to some Court in the North-Western Provinces." Accordingly the plaintiff took the proceedings back to the Court of Meerut from which he had been originally driven, and on the 19th July 1873 an order of the Subordinate Judge of Meerut was made: "That the case be brought on the file, and numbered." Their Lordships think it must be assumed that this order was complied with, and that the plaint was brought upon the file, and was numbered.

The first question which arises is, whether the finding of the Deputy Commissioner of Delhi that the plaintiff was a pauper can be imported into the suit when it found its way upon the file of the Court at Meerut, and that depends upon the construction to be given to Clauses 11, 12, and 13 of the Code of Civil Procedure. Undoubtedly, when a suit is in the position in which the present suit stood in the Court at Delhi, it would be convenient and proper when an application had been made by the Judge of the Delhi Court to the High Court of the Punjaub, and that Court is required, before it acts, to consult the Judges of the High Court in the jurisdiction to which the plaint is to go, that those two Courts having consulted together should have power to direct that the cause should be transferred in its then state to the Court to which they think it right and expedient that it should go. But the legislation stops short of enacting that it should be so transferred. What it enacts is that the Judge shall apply to the High Court to which he is subject for authority to proceed, and the Court to which such application is made may, with the concurrence of the other High Court, give authority to proceed. There is no express power to transfer. Their Lordships having come to the conclusion to decide the case in favor of the appellant upon another ground, do not desire unnecessarily to express an opinion upon this first point. There being a grave doubt, at the least, whether the two Courts have power to make the transfer, they think it would be a proper addition to be made to this clause, that this power should be conferred upon them.

The other question which has been raised is as to the effect of the proceedings in the Court of Meerut, and whether the judgment of the High Court affirming that of the Subordinate Judge of Meerut is correct in holding that the suit is to be considered as instituted when the plaintiff paid the amount of the stamps into Court, and that the petition was converted into a plaint from that time only.

In order to explain the view their Lordships have taken of this point it will be necessary to refer to some of the proceedings. The order of the 19th July 1873 directing the case to be put on the file and numbered has been already adverted to. When that was done the defendants put in written statements objecting that the plaintiff ought to establish his position as a pauper in the Meerut Court, treating what had taken place at Delhi as irrelevant, and upon those statements, on the

10th November 1873, the Subordinate Judge of Meerut directed that the case could not be heard, and rejected the plaint. There was an appeal to the High Court from that decision, and on the 10th July 1874 the High Court held that the time of the abortive proceedings at Delhi should be deducted from the period of limitation, and "remanded the suit" to the Subordinate Judge, directing him to proceed with it. That being so, proceedings were taken by him with a view to an enquiry into the pauperism of the plaintiff. Issues were framed, and a day was fixed for the trial of those issues; the day so fixed was the 27th November 1874. On that day the plaintiff presented a petition praying for leave to deposit the amount of the stamps, alleging that he had succeeded in negotiating a loan for a sum of money sufficient to cover the amount of the institution stamps. It appears that on the same day, having obtained the permission of the Subordinate Judge, the plaintiff paid the proper stamps into Court. That having been done, the defendants raised two objections; first, that the suit ought not to proceed, because the plaintiff had fraudulently applied to be made a pauper when he had property; and secondly, that the suit should be regarded as instituted on the day the Court fee was paid, which was beyond the period of limitation. The Subordinate Judge went into evidence on the first issue, and found that there had been no fraud on the part of the plaintiff in filing a petition to be allowed to sue as a pauper, and therefore it must now be taken that that petition was filed *bond fide*, and in good faith. On the other point the Judge held in effect that he saw no reason why, upon payment of the fee, the suit should not be deemed to be instituted on the day "which the pauper admittance would have carried," and added, "The Court then would allow the case to proceed on its present basis, but at the same time would suggest to the defendant the advisability of appealing to the High Court to determine whether by the substitution of the institution fee the case is to be deemed a plaint and deemed to be filed on the day on which the application to sue *in formâ pauperis* was originally submitted." The Judge then directed that the application should be numbered and registered and be deemed the plaint in the suit, and that a day be fixed for the settlement of issues. This was the first opinion of the Subordinate Judge, but he appears afterwards to have resiled from it, and to have framed issues, two of them raising the questions which are now before their Lordships for decision; first, "Can an 'application' to be allowed to sue *in formâ pauperis* be converted into a 'suit' as between parties at any subsequent date by filing the institution fee, and in the latter instance, from what date should the institution of suit be calculated;" the second, "Is the suit barred by efflux of time." Three other issues were settled as to the merits of the case, and the Judge, after settling these issues, examined witnesses. On the 6th July 1875 he gave judgment. Having referred to the dates of the application to sue *in formâ pauperis*, and to some of the other dates of the proceedings, he says, "The granting of the application then constitutes an essential ingredient to further progress, as an ordinary suit with the privilege of limitation counting from the day the petition to sue *in formâ pauperis* was presented, and not from the date when it was registered under s. 308. But it will be seen that prior to the application to sue *in formâ pauperis* was granted, and whilst the question was still under enquiry and investigation, the plaintiff has converted the matter into a regular suit, the consequence of which is that he has by his own act given up the advantages or disadvantages (as the case might be) of the position he may have become possessed of. By such act the pauper application died a natural death, and by the conversion the regular suit came into operation on its own individual and inherent basis from date of such conversion, and as a consequence, in computing limitation, the computation must be made from date of such conversion, which places the plaintiff out of Court." No doubt, if the Judge is right, the plaintiff would be barred by the Statute of Limitations, and the plaint would be properly rejected. There was an appeal from that

decision to the High Court, which affirmed it. The following passage of their judgment gives the view of the High Court on the question: "But there is no provision in the law which allows the application presented under s. 299 of the Code to be deemed the plaint in the suit when such application has been in effect revoked and superseded by the payment of the fees chargeable under the Court Fees Act. In such a case we conceive that the date of the presentation of the plaint and institution of the suit must be taken to be the date of the payment of the fees." The High Court does not decide that the plaint ought to be rejected altogether. It seems to consider that the petition should be retained as a plaint, but that it should be taken to be converted into a plaint only from the day when those fees were paid..

Now a petition to sue *in formâ pauperis* contains all that a plaint is required to do. By s. 300, "The petition shall contain the particulars required by s. 26 of this Act in regard to plaints, and shall have annexed to it a schedule of any moveable or immovable property belonging to the petitioner with the estimated value thereof, and shall be subscribed and verified in the manner hereinbefore prescribed for the subscription and verification of plaints." Therefore it contains in itself all the particulars the Statute requires in a plaint, and *plus* these a prayer that the plaintiff may be allowed to sue *in formâ pauperis*.

The Act provides what shall happen if the prayer of the petition be granted, by s. 308. It also provides by s. 310 what shall be the effect of a rejection of the petition. But this case is one which the Statute has not in terms provided for. The intention of the Statute evidently was that unless the petition was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one. Then what are the facts in this case? The petition is filed, and proceedings are taken to enquire into the pauperism, which are delayed by various orders of the Court, after the plaintiff had been already bandied about from one Court to another until a very considerable period of time has elapsed. Then, pending that enquiry, the plaintiff by paying the amount of stamp fees into Court admits that he is no longer desirous to sue as a pauper, and gives up so much of the prayer of his petition as asks to be allowed so to sue, but no more. The defendant, so far from being a sufferer by that change, is benefited, as both parties will go on with the litigation on equal terms. Is there then anything in the Act which requires that in such a state of things the petition of plaint shall be rejected altogether, and the plaintiff be compelled to commence *de novo*? Their Lordships do not see their way to the middle course followed by the Court in holding that the petition was converted into a plaint from the date of the payment of the fees. To be logical they should have rejected it altogether. The petition of plaint was placed upon the file and numbered on the 19th July 1873, and this is the plaint that is allowed to go on. Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it.

This case, which is not provided for by the Act, approaches more nearly to the state of things contemplated by s. 308 than that contemplated by s. 310. There are no negative words in the Act requiring the rejection of the plaint under circumstances like the present, nor anything in its enactments which would oblige their Lordships to say that this petition, which contains all the requisites which the Statute requires for a plaint, should not, when the money has been paid for the fees, be considered as a plaint from the date that it was filed. It is obvious that very great injustice might be done if this were not to be the practice. There could hardly be a stronger instance of the mischief which might arise than what

would have happened in this case. Their Lordships of course say nothing about the merits of the case. The claim may be utterly untenable, but on the assumption that the claim is a good one, nothing more unjust to the plaintiff could have happened than that he should have been deprived, by having done an act which is in itself meritorious, of the benefit which he would have had if he had been found to be a pauper. He was a pauper when his petition was filed. Supposing there had been any fraud found by the Judge, the considerations which would determine the judgment would then have been different.

Their Lordships have only to advert to the Statute of Limitations, Act IX of 1871. Their Lordships think that their decision is in no way inconsistent with this Act. The explanation in Clause 4 is this: "A suit is instituted in ordinary cases when the plaint is presented to the proper officer; in the case of a pauper when his application for leave to sue as a pauper is filed." In their view the petition to sue as a pauper became a plaint, and under this Statute the suit must be deemed to be instituted when that application was filed.

In the result their Lordships will humbly advise Her Majesty to reverse both the decisions below, and to remand the case for trial on the merits. The respondents must pay the costs of the appeal.

The 22nd March 1879.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Alluvial Land—Adverse Possession—Limitation.

On Appeal from the High Court at Calcutta.

No. 52 of 1874.

Maharajah Radha Proshad Singh

versus

Baboo Umbica Persad Singh and another, heirs of Baboo Santbilash Singh,
deceased.

The right of the original proprietor to reclaim land which has been diluviated and has re-appeared, is subject to the claim of another landed proprietor who, after the first re-appearance of that land, has obtained adverse possession of it, and has retained such possession for more than the period of limitation, namely, 12 years.

Case of *Lopez v. Mudden Mohun Thakoor* distinguished.

Mr. Leith, Q.C., and Mr. Doyne for Appellant.

Mr. Graham for Respondents.

This is one of nine suits brought by Maharajah Radha Proshad Singh against different defendants, for the purpose of recovering certain land of an alluvial nature. Inasmuch as two of these suits have already been before this Board, and this Board in its judgment has gone somewhat fully into the general nature of the case which is common to all the suits, and has adjudicated thereon, it is not necessary to give judgment in the present case at any length. It seems enough to say that the evidence was common to all the suits, and according to that evidence it appears that the River Ganges now runs in what may be called its ancient channel, which at the date of the perpetual settlement formed the southern boundary of Mouzah Nowruna, belonging to the plaintiff; that at a subsequent period it deviated from its course, and has run in different channels further and further to the south until it reached a southernmost channel about

six miles from its present channel: and that the consequence of these deviations of the Ganges has been that a large quantity of land has been diluviated, and has from time to time reappeared. The case of the Maharajah has, in substance, been this, that he was entitled to the land which he claimed in the different suits by accretion and by adverse possession. The case of the defendants has been in substance that they were entitled to the lands as re-formations upon sites originally belonging to them, and which they were able to identify. The Subordinate Judge in India determined the suits, or most of them, in favor of the Maharajah, upon the ground that he had made out his title to the land claimed as far south as the channel of the River Ganges in the year 1844. That was very far south, although short of the southernmost limit of the land in dispute. The High Court reversed these decisions of the Subordinate Judge, and dismissed all the plaintiff's suits, on the ground that the defendants were entitled to the lands in dispute, because they were re-formations upon original sites belonging to them under the authority of the well-known case of *Lopez v. Mudden Mohun Thakoor*.^{*} Two of these cases came before their Lordships upon appeal,[†] and their Lordships, although maintaining the law as laid down in the case of *Lopez v. Mudden Mohun Thakoor*,^{*} which is undoubtedly correct, held that the right of the original proprietor to reclaim land which has been diluviated, and has reappeared, is subject to the claim of another landed proprietor, who, after the first reappearance of that land, has obtained adverse possession of it, and has retained such possession for more than the period prescribed by limitation, namely, 12 years. Applying that principle, their Lordships came to the conclusion that the Maharajah had in fact held adverse possession for the requisite period of so much of the land in dispute as lay north of the northern bank of the Ganges as it ran in the year 1839. They found that by a thakbust map and proceedings at that time, the then channel of the Ganges was laid down, and that all above the northern bank of that channel was in fact measured into the Mouzah Nowruna of the Maharajah by the Government officers, and that from that time he held possession adverse to the defendants. The river, after 1839, went further south until it reached the channel of 1844, which was the limit assigned by the Subordinate Judge to the land which the plaintiff was entitled to recover; and it subsequently went still further south to its most southern point. In the year 1857, by a sudden rebound, it again took a channel very much to the north above the greater part of the lands in dispute in the actions, and finally, three or four years afterwards, returned to its original channel. Their Lordships, after considering the whole evidence which, as before observed, was taken in all the cases, came to the conclusion that the Maharajah had had adverse possession of all that was above the northern bank of the river in 1839, from that time to 1857, and had therefore established a title to that portion of the land in dispute, but to no more. It was upon that principle that the two appeals were then decided.

In the present case the suit is brought to recover a piece of land called Husso Sonki, which, it would appear, is situated partly above and partly below this line of 1839. The appellant, although he brought his suit for the whole, now claims only so much of it as was above the northern bank of the river in 1839, and admits that he cannot extend his claim to any part that is below that line. Mr. Graham, for the defendant, has endeavored to distinguish this case on various grounds, principally of fact, from the other cases which were dealt with by their Lordships; but in their Lordships' opinion he has failed to do so. It appears to them, therefore, that the principle laid down in the former case is applicable to the present, and that the Maharajah is entitled to recover so much of the land now claimed and in dispute as lies above the northern bank of the channel of 1839.

In the judgment which their Lordships gave upon the last occasion they

^{*} 14 W. R. P.C. 11; 2 Suth. P. C. R. 336.

[†] See *ante* p. 485.

assumed a certain map of the Ameen, which was numbered 7. 2., and was made in the year 1872 in a great measure from the thakbust proceedings of 1839 which have been referred to, to be correct. But their attention has now been called—it was not called before—to a statement of the Ameen in which he admits a certain incorrectness in his measurements, especially with reference to the situation of the river in 1839. Their Lordships, therefore, have thought it better and safer in this case to take the thakbust map of 1839. That being so, their Lordships have come to the conclusion that the decree of the High Court should be reversed, and that it should be declared that the plaintiff is entitled to recover, and ordered that he do recover so much, if any, of the land claimed by him in this suit as was demarcated by the thakbust map and proceedings of 1839, as then lying to the north of the northern bank of the River Ganges; the amount, if any, of such land to be ascertained by proceedings in execution, together with the mesne profits of such land (if any). The costs of the cause in India to follow the event according to the rules of the Courts in India. Each party must bear his costs of this appeal.

Their Lordships will humbly advise Her Majesty to the above effect.

Maharajah Radha Proshad Singh v. Shaik Himmud Ali and others.

This case is No. 53 of 1874, and relates to another mouzah called Kazee Chuck, which is also situated on both sides of the line which has been referred to, although apparently the greater part of it would lie on the north of that line. Their Lordships are of opinion that a judgment similar to that just given with respect to Husso Sonki should be given in this case, and will humbly advise Her Majesty accordingly.

Maharajah Radha Proshad Singh v. Meer Muddud Ali and others.

This case is No. 51 of 1874. It relates to a portion of land called Rasoolpore, which manifestly lies at a considerable distance to the north of the line which has been laid down. With respect to this it appears to their Lordships there can be no question. They will therefore in this case humbly advise Her Majesty that the decision of the High Court be reversed, and that of the Subordinate Judge be affirmed, and that the plaintiff have the costs of this appeal and all the costs in India. The costs in India include of course the costs incurred in the High Court.

27th March 1879.

Present :

Sir James W. Colville, Sir Robert J. Phillimore, and Sir Montague E. Smith.

Mahomedan Law of Inheritance—Rule of Willa—Act V of 1843—Emancipated Slave-girl (Heirs of).

On Appeal from the High Court at Bombay.

Sayad Mir Ujmdin Khan Valad Mir Kamrudin Khan

versus

Zia-ul-Nissa Begum and another.

(Two Consolidated Appeals.)

Act V of 1843, which was intended to remove all the disabilities arising out of the *status* of slavery, was held to prevent the application of the Willa rule of Mahomedan law, whereby the natural heirs of the emancipated were excluded by the heirs of the emancipator, and consequently to entitle the grand-daughters of a slave-girl (who, after giving birth to their mother, was emancipated by her master on the day previous to the celebration of a *nikah* marriage, by which she became his wife) to succeed to their grandmother as her natural heirs, as they would have done but for that Act.

Mr. Scoble, Q.C., and Mr. Doyme for Appellant.
Mr. Leith, Q.C., and Mr. Mayne for Respondents.

Sir James Colvile delivered the following judgment:—

The question in this appeal regards the succession to one Amir-ul-Nissa Begum, who died in 1857. The short history of the case is this: Afzaluddin, who was the last recognised Nawab of Surat, died on the 8th August 1842. He left two wives, Amir-ul-Nissa Begum and Padsha Begum. He also left a daughter, Bakhtiar-ul-Nissa Begum, whom we may take for the purpose of this decision to have been born on the 13th March 1821, some four years before the marriage of Afzaluddin with Amir-ul-Nissa Begum. Bakhtiar-ul-Nissa Begum had been married in her father's lifetime to Mir Jafir Aly, and the issue of that marriage was two daughters, the respondents. Immediately after the death of the Nawab in 1842 there arose considerable discussion regarding the right of succession to him, and there was a contest before one of the Government officers, Mr. Elliott, on that subject. No final decision, however, appears to have been come to until after the passing of Act XVIII of 1848, which placed the administration of the estate of the late Nawab at the disposal of the Governor of Bombay in Council, leaving to them to determine who were entitled to succeed. Their course of action under that Act was to refer the matters in dispute in the first instance to Mr. Frere, the then agent in Surat. A question as to the status of Amir-ul-Nissa Begum was raised before him, it being alleged that she had been a purchased slave of Afzaluddin, that while she was in that state the daughter, Bakhtiar-ul-Nissa Begum, was born, and that four years after the birth of Bakhtiar-ul-Nissa the Nawab, having shortly before the ceremony emancipated her, had married her. This case was then put forward in order to meet the question raised whether, according to Mahomedan law, Bakhtiar-ul-Nissa Begum could take any share in her father's estate. As the daughter of a concubine who was a slave-girl she would have been entitled to do so, whereas as the illegitimate daughter of the Nawab by a free woman she might not be. She, therefore, and her husband, who acted for her, were then interested in making out that Amir-ul-Nissa Begum had been a slave, whilst the residuaries, who are now represented by the plaintiff and appellant, were interested in maintaining the contrary. Mr. Frere, without deciding anything as to the status of Amir-ul-Nissa Begum, but proceeding very much upon the special power that belonged to the Nawab, and the acts of recognition on his part of Bakhtiar-ul-Nissa Begum as his daughter, and Amir-ul-Nissa as his wife, reported that the succession was to be divided as follows, *viz.*: that one sixteenth was to go to Amir-ul-Nissa Begum; another sixteenth, making up the eighth to which the widows are entitled under Mahomedan law, was to go to Padsha Begum, the other widow; that Bakhtiar-ul-Nissa Begum was to take the share to which she would be entitled as legitimate daughter, namely, eight sixteenths, or one-half; and that the remaining six sixteenths were to be divided between Mir Moinooddin Khan and his brother, Mir Kamrooddin, two distant relatives of the Nawab, who filled the character of residuaries according to Mahomedan law. It is, of course, impossible to go behind the finding of Mr. Frere, which was adopted and confirmed by the Governor in Council, and must be assumed to have determined once and for all the succession of Afzaluddin. Bakhtiar-ul-Nissa Begum died in 1845 in her mother's lifetime. Amir-ul-Nissa Begum did not die until 1857, and it is conceded that, but for the question that has been raised in this suit, the respondents, her two granddaughters, would be her only ascertainable heirs. Kamrooddin also died in the lifetime of Amir-ul-Nissa Begum.

In this state of things, and a good many years after the death of Amir-ul-Nissa Begum, the present suits were instituted by one Fatma-ul-Nissa Begum, who claimed to be the sister and heiress of Moinooddin, who, though he had survived Amir-ul-Nissa Begum, was then dead; and the title put forward was that

according to the law of Willa, which has been very ably and clearly expounded at the Bar, the person entitled to succeed and take the property of which Amir-ul-Nissa Begum died possessed, or to which she was entitled, was Moinooddin, as the male heir of Afzaluddin, who was the emancipator of Amir-ul-Nissa Begum, to the disherison of her own natural heirs.

A number of issues were settled in the suit, with many of which it is unnecessary to deal. The principal one, and that upon which both the Courts below have decided against the plaintiff in the suit, and in favor of the respondents, was that by Act V of 1843 this right, which was the foundation of the claim of Moinooddin, or of his representative Fatma, was taken away, and it is to that question that their Lordships propose on the present occasion to address themselves. In order to try that question they must, of course, assume that the *status* of Amir-ul-Nissa Begum was that which the plaintiff represented it to have been, namely, that having been originally a Rajpoot girl who had been converted to Mahomedanism, she was brought into the zenana of the Nawab as his purchased slave; that she was the mother, whilst still a slave, of Bakhtiar-ul-Nissa by him; and that on the day previous to the celebration of the nikah marriage, by which she became his wife, he had emancipated her. It must also be assumed that the Willa rule of the Mahomedan law is such as Mr. Scoble has shown it to be upon the authorities which he cited. The question now to be decided is, whether the Act in question prevents the application of that rule of law, and entitles those parties who, but for it, would have succeeded to their grandmother, as her natural heirs, to take the inheritance. Each of the Courts below has adopted a view of the operation of the Act favorable to the respondents, though not precisely upon the same grounds. The Subordinate Judge says: "This Act was passed to declare and amend the law regarding the condition of slavery within the territories of the East India Company: and s. 3 runs as follows:—'No person who may have acquired property by his own industry or by inheritance shall be dispossessed of such property, or prevented from taking possession thereof, on the ground that such person or that the person from whom the property may have been derived was a slave.' Now, in the present case, the plaintiff alleges that had Amir-ul-Nissa been a free woman the defendants would have been her heirs, but because she was a slave her property goes to her master's relatives. The section appears to me clearly to apply to such a contention." He then discusses Mr. Baillie's view of the effect of the Statute, as expressed in Book IV of his Digest of Mahomedan Law, and refers to the absence of any discussion on the subject before Mr. Freré, when, indeed, the question had not arisen, and ends by saying: "I think, then, that the plea that Amir-ul-Nissa's property must go to her husband's relations instead of to her own grandchildren because, though subsequently emancipated and married, she was originally a slave, is one which the Court cannot entertain, and that the claim is on this ground inadmissible."

The High Court say on this subject: "We think that Act V of 1843 deprived the plaintiff of any right to bring this suit. Amir-ul-Nissa died in 1857 when that Act was in full force. We think that the effect of that Act was to prevent the enforcement of any rights which would, if that Act had not been passed, have arisen out of the status of slavery. The right claimed by the plaintiff rests solely upon the alleged fact that Amir-ul-Nissa had been at one time the slave of the late Nawab. He is said by the plaintiff to have enfranchised Amir-ul-Nissa; and on the authority of 1 Baillie's Digest, 386, 387, and 3 Hidaya, 444, 445, it is contended that he, as her emancipator, or, he being dead, his nearest male relative, or in default of him, that male relative's heir, would be her heir, and that neither her daughter nor the defendants who are that daughter's daughters are so. That right, if it ever existed, is, in our opinion, one arising out of an alleged property of the late Nawab in Amir-ul-Nissa's person and services before he enfranchised her, and as such is one of the rights which every Civil Court in British India is prohibited

by s. 2 of Act V of 1843 from enforcing. We are not prepared to say whether this case would not also come within the prohibition in s. 3 of the same enactment."

The High Court then proceeded mainly upon the 2nd Section, and the Subordinate Judge upon the 3rd Section, of the Act. In their Lordships' opinion, both Sections point to the conclusion that it was the general intention of the Legislature in passing this Act to relieve all persons then subject thereto from all the disabilities arising out of the status of slavery; and without saying whether the 2nd Section of the Act is sufficient of itself to dispose of the claim in this suit, they have come to the conclusion that the 3rd Section at least has that effect.

The Section runs thus: "And it is hereby declared and enacted, that no person who may have acquired property by 'inheritance' shall be dispossessed of such property, or prevented from taking possession thereof, on the ground that such person from whom the property may have been derived was a slave." Various arguments have been addressed to their Lordships as to the non-applicability of this enactment to the present case. It was first said that to apply it to this case would be to give a retrospective effect to the Act, in violation of the well-known rule of construction. Their Lordships cannot accede to that argument. The Act was in force at the time of the death of Amir-ul-Nissa; and the question who is entitled to succeed to her property is determinable by the law as it stood when the succession opened. Their Lordships cannot recognise any vested interest said to have been acquired previous to the passing of the Act by the unascertained persons who might at her death be the then residuary heirs of her husband, or admit that her husband, by the act of emancipation, acquired a vested right which the Statute could not, except by express and retrospective words, take away. One of his residuary heirs died before the widow, and it is not contended that any interest vested in him. The whole right, if any, which can be asserted under the Willa rule of law is treated as having been in Moinooddin when Amir-ul-Nissa died. If he, too, had died in her lifetime, the right could not have been asserted by his sister and heiress, the plaintiff in the suits. It would have been in some more distant male relative of the Nawab.

It was further contended that the respondents cannot claim the benefit of the Statute, inasmuch as they are not persons "who may have acquired property by inheritance," and that the words are to be construed by the Mahomedan law, which gives the property to a preferable class of heirs, *viz.*, the heirs of the husband, the emancipator. This argument seems to their Lordships to reduce the clause to a nullity. They conceive that the words must be taken to include any persons who would have acquired a title to property by right of inheritance, but for some obstacle arising out of the status of slavery.

It was argued by Mr. Doyne that in all probability the Legislature had not its mind directed to this somewhat obscure branch of Mahomedan law, and that the Section must be taken to apply only to cases in which the person from whom the property is inherited was at the time of his death a slave; but, if the third Section were to be taken subject to the old Mahomedan law, the master in such a case would be entitled to take the property of the slave; and the son of the slave, or the other natural heirs of the slave, could not be said to be persons "who may have acquired property by inheritance." The clause upon this construction of it would have no meaning or operation.

Their Lordships cannot accede to the general proposition of Mr. Doyne that the operation of the Statute, or of this particular Section in it, is to be confined to the property of persons who at the time of their death were slaves. They are of opinion that in construing this remedial Statute they ought to give to it the widest operation which its language will permit. They have only to see that the particular case is within the mischief to be remedied, and falls within the language of the enactment. They find it impossible to say that this is not the case in the present instance.

They have already intimated their opinion that the general scope and object of the Statute was to remove all the disabilities arising out of the status of slavery. The rule of Willa, whereby the natural heirs of the emancipated were excluded by the heirs of the emancipator of the emancipated, was not less such a disability than the rule of law whereby the natural heirs of the unemancipated slave were excluded by his master or his heirs. As to the language of the Act, the question which arises upon the first words of the Section has been already dealt with; but a further argument has been founded upon the words "that the person from whom the property may be derived *was a slave*." The words are not "was a slave at the time of his or her death," and the term may well be taken to apply to any person who had at any time been a slave. Putting this interpretation upon the Statute, their Lordships think that it is sufficient to dispose of this appeal without going into any of the other questions raised either of law or of fact, and they will therefore humbly advise Her Majesty to affirm the decision under appeal, and to dismiss this appeal with costs.

The 28th March 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Oudh Talookdars—Sub-Settlement—Birt Tenures—Usufructuary Mortgage—
Redemption—Sale under Power (Effect of).*

On Appeal from the Court of the Judicial Commissioner of Oudh.

Rajah Kishendatt Ram

versus

Rajah Mumtaz Ali Khan.

Without affirming the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor so as to enhance the value of the mortgaged property and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms, it was held in this case that the mortgagor was entitled to redeem the estate upon paying the purchase money of certain *birt* tenures of which the mortgagee claimed a sub-settlement, *plus* the original mortgage money.

The effect of a sale of a mortgaged estate under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrances, and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hands free from all the incumbrances. There seems to be no reason why the second mortgagee, who might certainly have bought the equity of redemption from the mortgagor, should not equally with a stranger, purchase the estate when sold under a power of sale created by the mortgagor.

Mr. Leith, Q.C., and Mr. Doyne for Appellant.

Mr. Cowie, Q.C., and Mr. Graham for Respondent.

Sir James Colville delivered judgment as follows :—

The facts of this case, though some of them were originally contested, are now hardly in dispute, and may be shortly stated.

On the 22nd May 1846, Raja Umrao Ali Khan, described as the Zemindar of Ilaka Utraoli (the father of the respondent), executed in favor of Pande Ramdutt Ram (who is now represented by his brother the appellant) the instrument of mortgage which is at p. 2 of the record. The nature of the interest so mortgaged, or intended to be mortgaged, will be afterwards considered. At present it is sufficient to state that the deed purported to be a usufructuary mortgage of the

villages specified in the schedule to it, redeemable on the repayment, at a certain season of the year, of Rs. 36,000, the principal sum secured; the mortgagee entering into possession, and taking, until redemption, the rents and profits of the mortgaged property, in lieu of interest. Of those villages, two, viz., Panipur and Mubarakpur, have in some way ceased to belong to the estate; the others have, at p. 129 of the record, been conveniently divided into seven separate classes or groups.

Immediately after the execution of the deed, the mortgagee attempted to enter into the actual receipt of the collections from the lands comprised in the mortgage, but was encountered by the opposition of a number of persons, who claimed to hold all or most of those villages under various birt tenures, the effect of which was to make each of them the zemindar of the villages comprised in his tenure, rendering only some small dues and payments to the Raja of Utraola. The resistance of the birtias seems to have been in a great measure successful; and it must now be taken to have been found in the suit that the birts were valid and subsisting sub-tenures at the date of the mortgage; and that the rights of the birtias in the different villages comprised in the 1st, 3rd, 4th, and 6th of the seven classes or groups above referred to were purchased by the mortgagee some time in or before the year 1849. The birt right (if any) in the villages comprised in the remaining three groups remained in the original birtias or their representatives. Thus stood the rights of the parties at the time of the annexation of Oudh.

At the summary settlement, posterior to Lord Canning's proclamation, the mortgagee appears to have been allowed to engage for all the villages contained in the seven groups, and thenceforward to have held them as a talook, subject of course to the right of any subordinate zemindar, or other sub-tenant, to a sub-settlement.

In December 1870, and in the course of the regular settlement of the province, the respondent, as the son and representative of the original mortgagor, asserted by the present proceedings his right to redeem. That right, though at first disputed, is now admitted, and the only questions that remain open between the parties are what are the nature and extent of the redeemable interest, and on what terms is the right of redemption to be exercised. These questions have received three different solutions in the course of the voluminous proceedings that have been had in the cause.

Captain Forbes, the Settlement Officer, in his proceeding of the 5th November 1873, found that at the time the mortgage deed was executed, the mortgagor's right and interest in the property mortgaged was limited to the annual levy of a village tax, called "bhent," and of certain market dues, to the occasional levy of a cess known as "Sharakatana," and to a reversionary right in all lapsed birt estates, the title in which had been derived from the mortgagor's family; that the taxes thus levied were of the nature of feudal or manorial tribute, and though necessarily fluctuating in amount, may be held to be represented by a sum equivalent, as nearly as possible, on an average to 10 per cent. of the rental taken as the standard for assessment of the Government demand, and that the right and interest thus defined was all that the Rajah of Utraola was competent to convey, and all that was conveyed under the mortgage deed.

This proceeding being under a remand, Captain Forbes was not competent to determine the case judicially; but, from the above finding, it may be inferred that, in his opinion, all that the mortgagor was entitled to redeem was the superior title as above described, subject to the birt interests whether vested in the mortgagee or others.

The Commissioner, by his final judgment of the 20th June 1874, decided that what was conveyed by the mortgage and was then redeemable by the mortgagor was, as between him and the mortgagee, the full and unrestricted pro-

prietary title in the estates covered by the deed of mortgage. He treated the acquisition of the birts by the mortgagee as made on behalf of the mortgagor, and apparently proposed to allow the former nothing for what he had expended on such acquisitions.

This judgment was on appeal varied by the Judicial Commissioner, whose order of the 9th February 1875, was in the following terms :—

“The right of redeeming the mortgage on the estate of Itwa Khera, executed in 1253 Fusli by Umrao Ali Khan, ancestor of plaintiff, in favor of defendant, is decreed in favor of plaintiff on payment of Rs. 36,000, and if the plaintiff at the time of redemption pays to defendant the further sum of Rs. 3,139, he will be entitled to re-enter on the estate with all the rights and privileges now enjoyed by the defendant, but if he fail to pay the further sum of Rs. 3,139 at the time of redeeming the mortgage, defendant will be entitled to retain the rights and interests of the birtia zemindars purchased by him in the estates of Khera Dih, Bankata Ganeshpur, Sanapar and Itwa, and will retain these rights as an absolute under-proprietary tenure in subordination to plaintiff, paying to the plaintiff a rent equivalent to the Government demand for the time being, with an addition of 10 per cent.”

Against this order the present appeal is preferred. There is no cross appeal, and therefore the contention between the parties is narrowed to this, can the mortgagor, upon paying the purchase money of the birts, *plus* the original mortgage money, redeem the estate as it is now enjoyed by the mortgagee; or is the latter entitled in any case to retain the rights and interests of the birtia zemindars purchased by him as an absolute under-proprietary tenure in subordination to the talookdar, and to have a sub-settlement on that basis.

The issue thus evolved from this lengthy litigation is a narrow, but a nice and somewhat difficult one.

The appellant originally insisted that what was mortgaged was the mere right to receive a malikhana allowance; and he still insists that the mortgage must be taken to have been made subject to the birts; that those birts, though held in some sense under the Rajah of Utraola, were distinct estates; that the plaintiff is not entitled to redeem more than his ancestor mortgaged, and that the appellant or his brother was, notwithstanding the relation of mortgagor and mortgagee, entitled to purchase, and must be deemed to have purchased, the birts bought by him in his own right, and for his own benefit.

Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms.

It may well be that when the estate mortgaged is a zemindary in Lower Bengal, out of which a putnee tenure has been granted, or one within the ambit of which there is an ancient mokurruree istemrari tenure, a mortgagee of the zemindary, though in possession, might purchase with his own funds and keep alive for his own benefit that putnee or mokurruree. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase, which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit. In such cases also the putnee, if the putneedar failed to fulfil his obligations, would not be resumable by the zemindar, and the zemindary would always have been held subject to the mokurruree.

Their Lordships nevertheless have come to the conclusion, though not without some doubt and difficulty, that the decision of the Judicial Commissioner was, in the peculiar circumstances of this case, correct, and ought to be affirmed.

The first point to be considered is what is the true construction of the original

contract, and what were the intentions and understanding of the parties to it. The deed was not in terms made subject to recognized birts, for it contains no reference to them. On the face of it it is a mortgage of the ilaka or ilakas, consisting of the 35 villages, one piece of land, and one jote, "including all the internal and external rights which had descended to the mortgagor from his ancestors." And it is expressed to be upon the following conditions, viz.:—"That the said Pande is allowed to take possession of the said villages, and enter into engagement with the Government for the payment of revenue. I (the mortgagor) shall have nothing to do with the profits of the estate, or to stop the injuries which may be done to it. I shall be entitled to redeem the estate when I pay the said sum (the Rs. 36,000) in one lump to the Pande in the month of Bysack, when there are no crops standing on the ground." "If any one appears to lay claim to the said estate, it will be my duty to defend the suit, with which the Pande shall have nothing to do." The last stipulation obviously points to a possible claim by title paramount to the whole zemindary, and is in the nature of a covenant for title. The other stipulations plainly indicate that the mortgagee, until redemption, was to be the zemindar *de facto* of the estate, with all the rights, privileges, and powers of a zemindar, as between him and the sub-tenants; that he was to take the profits of it, and defend it against the injuries done to it; and, further, that it was in the contemplation of both parties that he might take possession of the villages, and receive the collections from them. This construction is consistent with the decisions of all the Courts that have dealt with the case. All have negatived the original contention of the defendant, that the plaintiff had no other right than that of redeeming a malikhana allowance, and have held that the subject of the mortgage was the talookdary interest, with all its incidents, whatever that might include.

The next point to be considered is what was the nature of the birt tenure, and what the relations between the birtias and the superior zemindar. Upon this point their Lordships were referred by Mr. Doyne to the Settlement Circular of the 29th January 1861, being an official paper issued by the then Chief Commissioner of Oudh by way of instructions relative to the regular settlement of the province then about to be made.

The material paragraphs of the paper are the 18th to the 25th, both inclusive.

The 18th says that birts were given for whole mouzahs, or patches of lands in mouzahs, and proposes in the first instance to deal with the latter. The 19th says, "These tenures, when granted by the talookdar for money received, will be maintained as representing the proprietary rights of the birtias, who by purchase have acquired the position of intermediate holders, and as constituting the portion of profits left them by the talookdar." And then, after distinguishing between birts given by talookdars, and those given by mere thekedars, and treating the latter as not entitled to be maintained, it says, "Birts given by the original zemindars before the village was incorporated in the talooka will be upheld, unless the talookdar resumed them prior to 1262-63." The 21st paragraph says, "Birts of entire mouzahs are very common in Gondah and Gorakpore. They originated in purchases from needy talookdars, and sometimes in clearing leases of jungle land. In the Utraula and Batui pergunnahs of the Gondah districts, the birtias had been in many instances admitted to direct engagements with the Native Government for years previous to the annexation, and, of course, were settled with, and should have been so at the late summary settlement, on the principle that we are not bound to restore to the talookdars what they had lost before our rule commenced." The 22nd paragraph says, "In other instances the birtias held under the talookdar on the terms of their birt pottahs. These generally were, that 10 per cent., or dyhak, as it was called, on the amount of the pottahs, should be returned to them; that, while they held on their pottahs, the entire control of the village rested with them; and, if they threw them up rather

than accept enhanced terms, they were entitled to 10 per cent. on the collections. Sometimes the birtia's proprietary profits were shown in holding a portion of the area 'nankar.' The 23rd paragraph says, "In other instances, the birtias had been stripped of every vestige of proprietary right, for embarrassed talookdars would sell the birt of a village several times over, and nothing was more common than to see several claimants to the birt of a village, each with his pottah in correct form." The 24th paragraph says, "Where the birtia has lost possession, there is no more to be said. We are not to restore it to him, but the Chief Commissioner is clearly of opinion that the birtias who were found in direct engagement with the State at annexation, or who have uninterruptedly held whole villages on the terms of their pottahs under the talookdars, must be maintained in the full enjoyment of their rights in subordination to the talookdars. It is no argument that the talookdar may not realize more than 10 per cent. above the Government demand. Such birt tenures must be considered an intermediate interest between the talookdar and the ryot, and, as such, entitled to be maintained." The 25th paragraph says, "The meaning of the term 'birt' is a 'cession.' It is the purchase of the proprietary rights subordinate to the talookdars on certain conditions as to payment of rent, which were held to be binding, though undoubtedly often violated by superior power. In Gorakhpore the birtias were generally admitted to direct engagements, though charged with a malikhana of 20 per cent. to the talookdar. Here he must deal with the superior party."

The result of what has been cited seems to be that, under the nuwabi, these birt tenures were presumably carved out of the talookdar's or superior zemindar's estate; that they were held under him upon terms varying according to the terms of the particular pottah or contract, and possibly according to the custom of a particular district; that they did not necessarily entitle the holders of them to engage directly with the Government for the revenue; that when such direct engagements took place malikhana was payable to the talookdar; that they were sometimes resumable, and when resumed would fall into the parent estate; and that in all cases the relation of superior lord and tenant subsisted between the zemindar and the birtias, a relation which, in an unsettled state of society like that of Oudh under the nuwabi, would probably involve more or less of power in the former over the latter, and, in dealings between them, give to the zemindar advantages which would not be possessed by a stranger. On the other hand, it is clear that birts still subsisting are tenures which would entitle their holders to sub-settlement under "The Oudh Sub-settlement Act of 1866."

The question, however, remains, what was the effect as between the mortgagor and the mortgagee of the purchases by the latter of the birts in question? To determine this it is desirable to consider, somewhat more in detail, what has been his course of action.

Upon the evidence in the cause it would seem that, in and after the year 1254 F. (probably the first settlement after the execution of the mortgage), the mortgagee was permitted to engage for the whole estate, although some at least of the birtias had, in former years, been allowed to engage, for the particular villages comprised in their tenures, directly with the Government, and that he continued so to do up to the time of annexation. The first summary settlement after that event seems, however, in accordance with the policy that then prevailed, to have been made with some at least of the birtias, including even those of Itwa, who are now said to have previously parted with all their birt interests.

It has also been proved that, immediately after the execution of the mortgage, the mortgagee attempted to enter into the direct receipt of the collections of all the villages by force of his talookdary title, and was only prevented from doing so by the resistance of the birtias, and the interposition, with or without jurisdiction, of the officer called the nazim. Here, then, the talookdar, *de facto*, was in open conflict with tenants of the estate claiming to be birtias. There is no proof of

any regular trial and determination, by a civil court, of the disputed right. The nazim may have taken action merely as a matter of policy, and to prevent disturbance. Then follow the purchases in 1256 F. and 1257 F., and the execution of the deeds by virtue of which the birtias, for very inconsiderable sums, conveyed their interests in the birts in question nominally to Pande Ram Dutt Ram. There is, however, no evidence of the negotiations which led to these contracts; nothing which shows upon what basis they proceeded; how far, in making the purchases, the Pande was acting in the character, and using the powers, of talookdar, or how far, in doing so, he was compromising alleged rights which might otherwise have been successfully asserted for the benefit of the estate. The apparent inadequacy of the consideration money affords a strong argument for supposing that the transactions may have been in the nature of compromises, which the powers of talookdar were exerted to effect on favorable terms.

Again, what followed on the purchases? Had they been made by or on behalf of a talookdar holding under an absolute, as distinguished from a mortgage, title, the tenures would, as a matter of course, have merged in the talook. The mortgagee seems, until the institution of these proceedings, to have treated them as so merged. He is not shown to have taken any steps to keep them alive, as distinct sub-tenures, for his own benefit. On the contrary, at the time of the first summary settlement after annexation, he never sought to engage for these villages as birtia, and on the summary settlement after Lord Canning's proclamation, he did in fact engage for them as talookdar, and as parcel of the talook. His conduct is not surprising. He probably did not contemplate redemption (in this very suit he disputed the right to redeem), and he therefore not unnaturally dealt with the birts as merged in the talook, thereby enhancing the value of the mortgaged estate, of which he expected to become absolute proprietor.

Again, had the mortgagor redeemed before these purchases he would have resumed his position as talookdar, with the means of dealing on favorable terms with birtias who have proved to have been willing to part with their interests for very inconsiderable sums. The mortgagee, taking advantage of his position of talookdar *de facto*, has so acquired the birts and allowed them to merge in the talooka. To allow him now to revive these birts for his own benefit, with the certainty of tenure and increased value which the regular settlement will give them, would obviously alter the position of the mortgagor for the worse, by reducing the redeemable estate *pro tanto* to a mere right to malikhana, and possibly rendering the talooka no longer worth redemption.

Their Lordships are therefore of opinion that the Judicial Commissioner had strong grounds for applying the principle which, he explains by his subsequent Minutes of the 26th January and the 9th February 1875, he intended to affirm in his order of remand of the 26th March 1873. In his final judgment he says that his intention in sending the case back to the Commissioner's Court was to ascertain whether the defendant could prove that he had increased the value of the estate by buying up certain incumbrances, and, if so, whether he had any claim on the plaintiff in respect of his expenditure on this account.

There was some discussion at the bar on the English decisions upon similar questions between mortgagor and mortgagee. If the principle invoked depended upon any technical rule of English law, it would of course be inapplicable to a case determinable, like this, on the broad principles of equity and good conscience. It is only applicable because it is agreeable to general equity and good conscience. And, again, if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions, although those decisions are undoubtedly valuable, in so far as they recognize the general equity of the principle, and show how it has been applied by the Courts of this country. It is therefore desirable shortly to notice the arguments on this point. It seems to their Lordships that, although some of the earlier cases may have been qualified

by more recent decisions, the general principle is still recognized by English law to this extent, *viz.*, that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. The law laid down in *Rakestraw v. Brewer*, 2 P. W. 511, as to the renewal of a term obtained by the mortgagee of the expired term, being, "as coming from the same root," subject to the same equity, has never been impeached. The English case which in its circumstances comes nearest to the present is that of *Doe v. Pott and others*, 2 Doug. 709, in which the principle was enforced against a mortgagor. It was there held that if the lord of a manor mortgage it in fee, and afterwards, pending the security, purchase and take surrenders to himself in fee of copyholds held of the manor, they shall enure to the mortgagee's benefit, and the lord cannot lessen the security by alienating them. It is difficult to see why, as in the case of a renewable lease, the same equity should not attach to the mortgagee, particularly if by reason of his position as mortgagee in possession he has had peculiar facilities for obtaining the surrenders. Some stress was laid upon the case of *Shaw v. Bunney*, 33 Beav. 494, in which Lord Romilly, Master of the Rolls, held that a second mortgagee was entitled, equally with a stranger, to purchase for his own benefit the mortgaged estate when sold under a power of sale contained in the first mortgage. An opinion to the same effect had previously been expressed by Vice-Chancellor Kindersley, in *Parkinson v. Hanbury*, 1 De Gex and Smale, though he decided that case against the second mortgagee on the ground of his having had actual notice of an irregularity in the sale. These authorities, however, do not seem to their Lordships to touch the present case. The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hands free from all the incumbrances. There seems to be no reason why the second mortgagee, who might certainly have bought the equity of redemption from the mortgagor, should not, equally with a stranger, purchase the estate when sold under a power of sale created by the mortgagor. Upon the whole, then, their Lordships are of opinion that the decision of the Judicial Commissioner is equitable and correct, and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

The 7th May 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Partition (Butwarra)—Order of Collector—Reg. XIX of 1814, s. 13—Execution
Sale—Proof of Judgment.*

On Appeal from the High Court at Calcutta.

Hurro Soondari Debia Chowdhrani

versus

Kesub Chunder Acharjya Chowdhry.

The plaintiff was held to have derived no title from a *butwarra* without proving the order of partition drawn out by the Collector in pursuance of s. 13 Reg. XIX of 1814, by analogy to the rule in England that, if a man claims property under a title derived from a sale in execution of a judgment to which he is a party, it is not sufficient to prove the writ of execution, but he must prove the judgment in order that the Court may see that the writ of execution was warranted by the judgment.

Mr. Doyne and Mr. Chalmers for Appellant.

Mr. John Cutler for Respondent.

This is a suit brought by Hurro Soondari Debia, the widow of the late Anund Chunder Acharjya, against Ishan Chunder Acharjya and Kesub Chunder Acharjya, the sons of the late Ram Chunder, by which she seeks to recover certain portions of three villages called respectively Byara, Kismut Kandania, and Bhatipara.

Anund Chunder and Ram Chunder were brothers, and were entitled jointly to an estate consisting of a portion of Pergunnah Alapsing. Proceedings were taken under Reg. XIX of 1814 of the Bengal Code for a partition of the estate. For this purpose it was divided into three dehas, or circles, called Koomria, Kandania, and Dhanikhola. An Ameen was deputed to make the partition, and according to the goshwara or abstract statement prepared by him which is set out in the Supplementary Record, each party was to receive certain villages in each of the three circles; but in order to make equality of partition the three villages which were the subject of the suit, *viz.*, Byara, Kismut Kandania, and Bhatipara, were proposed to be divided in unequal portions between the two parties.

Village Byara was in circle Koomria, Kismut Kandania in circle Kandania, and village Bhatipara in circle Dhanikhola.

The goshwara, so far as it related to the villages in question, was divided into several columns; the first contained the name of the village, the second the extent of the share to be allotted, the tenth the assessed jumma of the share allotted, and the intermediate columns the description of the lands included in the share allotted, such as unculturable waste land, culturable waste land, assessed land in cultivation, etc.

It appears that the three circles were intended to be divided in such a manner that each party was to receive villages and portions of villages, of which the assessed jumma of those included in circle Koomria was stated to be Rs. 10,735 odd, and of those included in circle Kandania Rs. 3,118 odd, and of those included in circle Dhanikhola Rs. 3,059 odd. (See Supplemental Record, pages 4 and 5, and 38 and 39.)

Those amounts were inclusive of the amounts which in the goshwara were stated to be the assessed jummas of the portions of the three villages intended to be allotted to the respective parties. For instance, the sum of Rs. 305 odd, stated to be the assessed jumma of the share of village Byara proposed to be allotted to the plaintiff, was included in the Rs. 10,735, the assessed jumma of the whole of her share of circle Koomria, in which the village was situate, whilst the sum of Rs. 371 odd, stated to be the assessed jumma of the defendant's share of the same village, was included in the sum of Rs. 10,735, the assessed jumma of his share of that circle.

It should be remarked that although the portion of the village proposed by the Ameen to be allotted to the plaintiff was greater than that proposed to be allotted to the defendant, the former being 2. 14. 2. 2. and the latter 2. 12. 0. 1., the assessed jumma of the proposed share of the defendant was greater than that of the plaintiff. This is accounted for by the fact that the share of the plaintiff contained more unculturable waste land than the share of the defendant, whilst the quantity of assessed land in cultivation in the plaintiff's share bore the proportion to the assessed land in cultivation in the defendant's share of 79 to 100.

In England if a man claims property under a title derived through a sale in execution of a judgment to which he is a party, it is not sufficient to prove the

writ of execution, but he must prove the judgment in order that the Court may see that the writ of execution was warranted by the judgment. So here the plaintiff ought to have proved the order of partition drawn out by the Collector in pursuance of s. 13 of the Regulation. But no such order was produced or put in evidence, and there is nothing except the istahar of the Deputy Collector to show that the partition of the villages was ever completed. The plaintiff in her plaint alleges that the butwarra was approved by the Sudder Board of Revenue, but there was no evidence to that effect. It is evident from the goshwara that the shares of the three villages were intended to be divided by metes and bounds, otherwise the Ameen could not have stated the quantity of unculturable waste and of assessed land in cultivation, and of the other description of lands intended to be included in each of the shares. The plaintiff states in her plaint that the shares of the villages were not definitely demarcated, but remained undivided and joint. She relies upon the istahar of the Deputy Collector of the 4th October 1861 (Record, p. 75), directed to the Nazir of the Collectorate, directing him to require the ryots to pay their rents to the plaintiff and to the opposite party according to the shares stated in the schedule thereto, in which the shares were stated as in the second column of the Ameen's goshwara, instead of in the tenth column thereof, thus fixing the shares according to the quantity instead of the quality and value thereof, which were the basis of the partition. For instance, the plaintiff's share of the Byara was stated to be 2. 14. 2. 2., and the defendant's 2. 12. 0. 1., which gave the plaintiff a larger share in quantity without referring to the quality of the land or to the fact that in the goshwara the assessed rent of the plaintiff's share was less than that of the defendant's share. It is clear therefore that if the butwarra was completed according to the Ameen's report the istahar was not warranted by it.

The plaintiff's case was that in the year 1861 she was put into possession according to the share stated in the schedule to the istahar, and that she was dispossessed by the defendants in 1865 of so much of the villages as was in excess of a one-half share thereof.

It was remarked by Mr. Cutler, and it appears to their Lordships that the remark is entitled to considerable weight, that from 1865 the plaintiff did nothing until 1873, when she presented a petition, which is to be found at page 121 of the Record, in which she stated: "There was no division of the lands and rent thereof; and as the lands and rent of the villages given in the schedule have not been demarcated and divided, there is great inconvenience in cultivation, habitation, and collections," etc.; and therefore she prayed that a butwarra might be made, dividing the villages according to metes and bounds, and to have a regular partition made of them. The Collector ordered, "That a perwannah be issued to the Ameen to measure all the lands of the villages mentioned in the partition and according to the quantity of the lands and the number of dehas, first to separate the lands in the petitioner's share, and then to prepare a saham of the shares of the proprietors of the mehals, the subject of partition;" in fact he ordered that there should be a regular partition of the villages. That order was made by the Collector on the 6th September 1873. Nothing appears to have been done upon it, but on the 20th September 1873 the plaintiff commenced her suit, seeking to recover the proportions of the three villages according to the second column in the Ameen's goshwara, as ordered by the istahar. The Judge of the first Court acted upon the istahar, and held that the plaintiff was entitled to recover the rents of the three villages according to the proportions given in the second column of the Ameen's goshwara; but the High Court considered that the Subordinate Judge had misunderstood the butwarra and the Ameen's report, and they considered that it was intended to divide the villages, not according to the proportions mentioned in the second column, that is to say, according to the quantity of the land, but according to the value thereof as ascertained in the column

defining the fixed jumma thereof. They say, "It is admitted on all hands that the butwarra effected no separate definition of lands in those villages in which each shareholder had a division of interests. In Mouzah Byara, for example, the saham paper records that the total amount of rent paying lands appertaining to defendant's share is 116 puras odd, of which 4 puras odd are unculturable or fallow, and the balance, 111 puras odd, are paddy lands, and that the gross rental is Rs. 371. 2. 9. On the other hand, the total amount of rent paying lands appertaining to plaintiff's share in this village is 127 puras odd, of which 41 puras odd are unculturable or fallow, and the balance, 86 puras odd, paddy lands, while the gross rental is Rs. 305. 6. 0. There is thus the anomaly presented of the larger gross area of land falling to the plaintiff's share, carrying with it a smaller rental than the lesser area assigned to the defendant's share. The same divergences between area and rental exist in respect of the other two villages of Kandania and Bhatipara. It is thus at once apparent that the specification of shares which appears in the second column of the saham paper has reference not to the proportion of the rent due to and realizable by each shareholder, but to the total quantity of the land held by him in each village; and the fact that the rental is not in proportion to the total area is evidently attributable to the character of the lands apportioned."

It appears to their Lordships that the High Court were right in that view of the butwarra, and that the plaintiff is not entitled to recover according to the quantity of the land, but that if she was entitled to recover at all, it ought to be in proportion to the rents specified in the last column. It appears to their Lordships that the plaintiff had to make out her title. No order of the Collector for the butwarra was proved. The Ameen had no power to make it, and it never was completed as regards the three villages in question, which according to the Ameen's report must have been intended to be divided by metes and bounds. The plaintiff derived no title from the butwarra to recover the land in the proportions claimed, nor is it equitable that she should do so.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and the appellant must pay the costs of this appeal.

The 8th May 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Registration (of Lease)—Pottahs and Mochulkas—Cultivating Tenants—Intermediate Holders—Act. XX of 1866, ss. 2 and 17—Madras Act VIII of 1865 ss. 3, 8, 9, 10, and 11.

On Appeal from the High Court at Madras.

Ramasawmi Chetti

versus

The Collector of Madura and Agent to the Court of Wards on behalf of
Bhaskarasawmi Setupati, Zemindar of Ramnad, a Minor.

The pottahs or mochulkas, as defined in s. 3 of the Madras Act VIII of 1865, which are excluded from the operation of the Registration Act XX of 1866 by ss. 2 and 17, refer only to leases executed by tenants who are cultivating the land and their immediate landlords, and not to leases granted by zemindars to intermediate holders.

Seemle.—The operation of the proviso to s. 11 of the Madras Act was not intended to be confined to cases in which suits are brought under ss. 8, 9, and 10, but to apply to all pottahs which come within s. 3.

Mr. Mayne for Appellant.

Mr. Cowie, Q.C., and Mr. Graham for Respondent.

Sir Montague Smith delivered judgment as follows :—

This was a suit brought by the Collector of Madura, acting for the Court of Wards on behalf of the minor zemindar of Ramnad, against the defendant to recover possession of the village of Selugai, and also to set aside a lease of that village, granted by the late zemindar of Ramnad, the minor's father, in the year 1870. The learned Counsel on the part of the appellant, the defendant below, has not sought to impeach the judgments of the Courts below so far as they set aside the lease of 1870, but his contention has been directed to establish a former pottah which had been granted by the late zemindar to the appellant's father in the year 1867. It does not appear that the question which has been argued at the Bar was the subject of decision in the High Court. The judgment of the District Judge of Madura proceeded upon the footing that the document of 1867 was inadmissible in evidence. It is an unregistered document made before the birth of the present plaintiff. The District Judge also held that the lease of 1870 which was registered did not bind the minor plaintiff, inasmuch as it was granted after his birth, and upon considerations which did not support it against his inchoate title. Their Lordships feel regret and some surprise that the Judges of the High Court have given no reasons for their judgment; none have been reported to their Lordships.

The sole question which is now before their Lordships is whether the document of 1867, in consequence of its not having been registered, is admissible in evidence and affects the estate; the point for decision being whether it is a document that falls within the General Registration Act No. XX of 1866.

The argument having turned entirely upon the effect of this Registration Act, which refers to a Madras Act, and upon the construction of those two Acts as applicable to the instrument, it is unnecessary to go into the previous history of the case. It is sufficient to say that the late zemindar of Ramnad was adopted by the widow of a former zemindar; that his adoption was disputed, and great litigation was the consequence of that dispute. The case ultimately came before this tribunal upon appeal, and a decision was given, in May 1868, in favor of the adoption.* Considerable expenses were necessarily incurred, and the defendant's father Arnachellum Chetti, and his partners, who appear to have been merchants and bankers, made very large advances to the zemindar and his agents for carrying on the legal proceedings. In 1867, when the document in question was granted, the advances amounted to about a lac and a half of rupees; and at the end of the litigation the further advances and accumulated interest amounted to very nearly four lacs of rupees. The merchants who advanced the money took security for their advances, and in the end they received the whole of their money with compound interest, and several large sums by way of presents in addition to the interest.

The document on which the question arises is dated the 15th April 1867, and professed to be a lease from the late zemindar to Arnachellum Chettiar. Its terms are these: "In consideration of the assistance you have rendered to this samastanam (zemindary), you requested that the Kasba (chief) village of Selugai, in Selugai division in Raja-Singamangalam Firka, should be leased to you for forty years, fixing a favorable poruppu." "The aforesaid Selugai village"—describing it—"has been accordingly leased to you for forty years from this Fusli 1276 up to Fusli 1315, fixing the poruppu at Rs. 400 per annum." It may be stated, in passing, that it is found that the value of this village was Rs. 1,700 per annum, so that it was obviously a favorable lease, which was intended to confer a valuable interest on the lessee. "You shall, therefore, raise the required crop and enjoy;

and, agreeably to the kararnama (agreement) you have given, you shall continue to pay the fixed poruppu according to the instalments of kist year after year."

This lease was not registered. It is the document upon which the defendant now relies to resist the claim to the possession of the village made on the part of the minor zemindar; for, as has been already stated, it is not now contended that the judgments below with regard to the lease of 1870 can be impeached.

It is necessary to refer shortly to Act No. XX of 1866, though the main question arises upon the Madras Act VIII of 1865, to which reference is made in it. By s. 17 of Act No. XX "leases of immovable property for any term exceeding one year" are required to be registered. The interpretation clause, (clause 2) says of the word "lease," "'Lease' includes a counterpart, a kubooleut, an undertaking to cultivate or occupy, and an agreement to lease, but not a pottah or mochulka as respectively defined in s. 3 of Act No. VIII of 1865 of the Governor of Fort St. George in Council executed in the Madras Presidency." It is contended on the part of the defendant that this document is a pottah as defined in s. 3 of this Act.

The preamble of the Madras Act is as follows:—"Whereas it is expedient to consolidate and simplify various laws which have been passed relative to landholders and their tenants, and to provide a uniform process for the recovery of rent." Section 3 seems to be confined to the relation of tenants who are cultivating the land and their immediate landlords. The whole Act may not be confined to that class, but the intention appears to be by s. 3 and the Sections which specifically refer to it to regulate the relation of landlords and tenants of that description. This s. 3, which is the one under which this document must be brought, if it is to escape the obligation of registration, is as follows: "Zemindars, shrotriendars, inamdars, and persons farming lands from the above persons, or farming the land revenue under Government, shall enter into written agreements with their tenants, the engagements of the landholders being termed pottah, and those of the tenants being termed mochulka." It is said that this description embraces all cases where there is a landlord and a tenant. If that were the construction of s. 3 as applied to the Registration Act, the consequence would be that in Madras all leases would be excluded from the beneficial operation of that Act. However large the premiums that may have been given on such leases, however small the rent, if there be a rent at all, according to the contention on the part of the appellant, the lease would fall within s. 3, and therefore need not be registered. One class of those who are described as landlords as distinguished from tenants are persons farming lands from zemindars and others who are previously mentioned; but if the wide construction were to prevail, every lease from a zemindar to any such person intermediate between the zemindar and the ryots, would be a lease which need not be registered; and the mischief against which the Registration Act was intended to provide a remedy would exist in the case of all the valuable leases which are granted by zemindars to intermediate holders.

The reference in the Registration Act is to a "pottah or mochulka as respectively defined in s. 3." This Section of the Madras Act does not strictly contain a definition, but a description only. It appears to provide for what shall be done where there is an existing relation of landlord and tenant, and requires that the landlord shall in that case enter into a written engagement with his tenant. Following the provisions of the Act, the remedies which are given in ss. 8 and 9 can only be available where the relation of landlord and tenant, or a holding of some sort, already subsists, upon the basis of which the landlord or the tenant, as the case may be, may come into Court and claim to have a lease granted. Section 8 is, "When any of the landholders specified in s. 3 shall for three months after demand refuse to grant such a pottah as his tenant was entitled to receive, it shall be lawful for the latter to proceed by filing a summary

suit before the Collector, who shall try the case and direct a proper pottah to be granted." Under s. 9 the landlord may in like manner compel the tenant to accept a proper pottah. These provisions are made upon the assumption that there is an existing relation which would warrant the application by either party for a written pottah. It cannot, of course, be contended that in this case the zemindar was bound to grant the lease of 1867, or any lease to Arnachellum Chetti. The other provisions of the Act are consistent with this construction of s. 3. Sections 5, 10, 11, and 12 refer specifically to the class of landlords described in s. 3; whilst s. 13 refers to other classes, showing that s. 3 was not intended to apply to all cases of persons holding under others, but to a particular class of landlords and tenants only.

A further question was raised in the first instance before the District Judge, *viz.*, whether supposing the document of 1867 to be a pottah within the meaning of the Madras Act VIII of 1865, the proviso which is found at the end of s. 11 would not nullify its effect as regards the respondent, the "successor" of the grantor? There seems to be ground for the contention that this proviso is not limited to cases where suits are brought under ss. 8, 9, 10, although the commencement of s. 11 refers to such suits. The commencement is: "In the decision of suits involving disputes regarding rates of rent which may be brought before Collectors under ss. 8, 9, and 10, the following rules shall be observed," and then come four rules. Three of them appear to apply to such suits, but it may be doubtful whether clause 4, which relates to waste lands, is so confined. Then the proviso referred to is, "Provided also, no pottahs which may have been granted by any such landholder at rates lower than the rates payable upon such lands, or upon neighbouring lands of similar quality and description, shall be binding upon his successor, unless such pottah shall have been *bond fide* granted for the erection of dwelling houses, factories, or other permanent buildings, or for the other purposes mentioned in the proviso." It is difficult to suppose that the operation of this proviso was intended to be confined to cases in which suits are brought under ss. 8 or 9; and it may be that it was intended to apply to all pottahs which come within s. 3. If so, the appellant, assuming the respondent to be a successor within the meaning of the proviso, would be placed in the difficulty which induced his advocates at the first hearing before the District Judge of Madura to take the opposite view from that which his Counsel has taken to-day, and to contend that this document was not a pottah within the meaning of the Madras Act, a view which was upheld by the Judge. It is not however necessary to decide this point.

On the whole, therefore, their Lordships are of opinion that this appeal fails, and they will humbly advise Her Majesty to affirm the decrees of the Court below, with costs.

The 20th May 1879.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Oudh Talookdars—Sub-Settlement—Letter of Promise—Construction.

On Appeal from the Court of the Judicial Commissioner of Oudh.

Kishna Nund Misr

versus

The Superintendent of Encumbered Estates, Mehdowna.

The letter of the late Maharajah Sir Maun Singh, a talookdar of Oudh, set out in the judgment of the Privy Council, was held to contain a promise for a sub-settlement, which was binding not only upon the Maharajah, but upon his successor also.

Mr. Leith, Q. C., Mr. C. W. Arathoon, and Mr. F. Lincoln for Appellant.
No one for Respondent.

Their Lordships are of opinion in this case that the decisions of the Commissioner and of the Judicial Commissioner ought to be reversed, and the decision of the Settlement Officer affirmed. It appears that the late Maharajah, Sir Maun Singh, caused a notice of ejectment to be served upon the plaintiff, and that the plaintiff presented a petition to the Maharajah on that subject. On the 20th August 1868 the Maharajah wrote to the plaintiff stating :—"I have received your petition and become acquainted with the particulars contained in it; but I have heard that you have filed an objection to notice of ejectment. Now, I don't want to oust you. I wish that the case may be decided, and that there may be incurred no loss in consequence of the increase, which will be made by Government. Such a provision has been recorded in the settlement papers. You may rest assured of this, if you have filed an objection I will do nothing for you until you have withdrawn it. You should come to me, and then I will myself decide the amount you should pay, and maintain you in possession as heretofore." Their Lordships are of opinion that the evidence which was adduced before the Settlement Officer was sufficient to show that the plaintiff was entitled to a subordinate interest under the talookdar, and that the letter shows that some provision was made in the settlement papers respecting it. The Settlement Officer held that the plaintiff appellant was entitled to a sub-settlement for life. But upon appeal that decision was reversed by the Commissioner. In his judgment the Commissioner said, "It is with regret that I come to this conclusion, as the treatment of Kishna Nund"—that is the plaintiff—"will be hard should he be deprived of the leases; but I cannot find a distinct promise of a lease for life which I can enforce against the Maharajah's successor, and I therefore decree this appeal." It appears to their Lordships that the words of the Maharajah were as binding on his successor as they were upon himself, and that the evidence which was adduced before the Settlement Officer was sufficient to show that there was a sub-tenure which was binding not only on the Maharajah but upon his successor. The Judicial Commissioner, as their Lordships understand his judgment, would have affirmed the decision of the Settlement Officer, if he had not considered that the plaintiff was concluded by the judgment passed in the suit brought by his son. Their Lordships are of opinion that the decision in that suit was not *res judicata* as against the plaintiff, and consequently that that defence to the plaintiff's claim fails. The original documents were not produced as they ought to have been by the plaintiff, and their Lordships are unable, in the absence of those documents, to say that the evidence was sufficient to prove that the plaintiff had a subordinate interest extending beyond his life. Under these circumstances they think that the decision of the Settlement Officer was correct, and that it ought to be affirmed.

Their Lordships will therefore humbly advise Her Majesty that the decisions of the Commissioner and of the Judicial Commissioner be reversed, and the decision of the Settlement Officer affirmed, with the costs of the suit in the lower Appellate Courts. The appellant will have the costs of this appeal.

The 21st May 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Enhanced Rent—Evidence.

On Appeal from the High Court at Calcutta.

Rani Surut Soondari Debya

versus

Prangobind Mozoomdar and others.

In this suit for enhanced rent, the plaintiff started upon the foundation of an enhanced rent which had been found by a decree so recently as two or three years before the commencement of the present suit, and which established a *prima facie* case of the rent properly payable by the defendant; and the Subordinate Judge decreed in favor of plaintiff the payment of one year's rent. The High Court reversed his decree, peremptorily dismissing from its consideration the whole of the evidence on the part of the plaintiff. The Privy Council held that the decree of the High Court could not stand, there being no sufficient reason for disturbing the judgment of the Subordinate Judge.

Mr. Doyne for Appellant.

No one for Respondent.

This was a suit brought in the Court of the Subordinate Judge of Mymensing by Rani Surut Soondari Debya, who is the zemindar of a 10-annas share of a pergunnah called Pookhooria, against the respondents who are the talookdars of a dependent talook which has the name of Gopalpore, and consists of eight mouzaha. The suit was brought to recover rent for a year from the 12th April 1871 to the 11th April 1872, at the enhanced rate of Rs. 8,124 and a fraction. The plaint refers to a decree in previous proceedings, by which the talook was declared to be held at an enhanceable rent; but instead of relying simply upon the amount of rent which was found to be the enhanced rent in that former suit, takes the form of a plaint for a fresh enhancement. It also refers to a previous notice which more distinctly refers to the former suit than does the plaint, and more directly bases the claim upon the decree in that suit. The Subordinate Judge entered into an original enquiry as to the rates payable for adjacent lands, and the judgment of the High Court upon the appeal from him turned entirely upon the effect of the evidence taken upon that enquiry, without reference—and it may be said without due reference—to the previous suits.

The previous litigation had extended over a long period of years, and cannot be regarded by their Lordships without extreme regret. It is to be regretted that to settle a question of rent between the zemindar and the talookdar the lengthy proceedings found in this Record should have taken place, and that one of the former suits should have endured for a period of upwards of twenty years.

The history of the case is found in the previous litigation. It appears that at one time this talook was held at a rent of Rs. 1,662. A suit was brought by Rani Bhoobunmoyi, who was the mother of the then zemindar of the pergunnah, to enhance that rent, in which a decree was made on the 9th February 1821. It appears from the proceedings in that suit that a ruftnamah or deed of compromise was put in, by which the rent was agreed to be raised from Rs. 1662 by Rs. 400, and a decree was given for the enhanced rent of Rs. 2,000. It seems that the pergunnah, or the share of the pergunnah which embraced the villages in question, was sold at a Government sale and purchased by the Government. During the time it was in the hands of the Government there was again a successful suit to enhance the rent, so that, if the case had rested there, the decree in 1821 and this subsequent suit would afford clear evidence that this talook was

not held at a fixed and unvaried rent. It seems that after the decree passed in its favor, the Government parted with the pergunnah, which came again into the family of the plaintiff's ancestors. We find it in the possession of Rajah Horendro Narain Roy, who is the plaintiff in the most important of the former suits to which reference will now be made.

Rajah Horendro Narain Roy commenced this suit in 1849 against the predecessor of the defendants to enhance the rent, and the defendant in that suit contended that the talook was not liable to enhancement. He also set up the deed of compromise which had been come to by the widow zemindar in the former suit. After two decrees of the Principal Sudder Ameen adverse to the plaintiff, and two remands on appeal, a decree was passed by the Principal Sudder Ameen on the 13th November 1856, by which it was determined that the talook was subject to enhancement, and that the deed of compromise was not binding upon the plaintiff; that the lady who made it had only a limited estate, and could not bind her successors. There was an appeal from the decree to the Zillah Judge, who affirmed it; and upon further appeal to the Sudder Dewanny Adawlut, that Court passed a decree on the 25th March 1862, dismissing the appeal, and by that decree the liability of the talook to enhancement was finally established. There was great delay in making the measurements, in consequence of some dispute apparently about the measuring rod, which it is stated lasted for a considerable time. The report of the Ameen was not made until the 26th September 1867. The Ameen appears to have taken evidence and gone minutely into the rates; the various qualities of land and the values are set out in his report, and he fixes the rent which was properly payable by the talookdar at the sum of Rs. 8,124.

The rent which had been claimed in the notice served prior to the suit of 1849 was a sum of Rs. 3,200. The Judge of Mymensing, upon cross-appeals, held that he could give judgment for the rent recoverable in the suit only at that rate, but that for the future the rent would be payable according to the rates found by the Ameen. His decree is to be found at page 121 of the Record, and is of the date of the 20th August 1869. It is as follows:—"That the cross-appeal be dismissed; that this (plaintiff's appeal) be admitted; that the orders of the Lower Court be modified; that the appellant do get, in her share of that property, the rent of Rs. 3,200 a year, with interest at 12 per cent. up to the day of payment of the rent of the time prior to the institution of the suit. The appellant shall be entitled to demand rent from the 1st Bysack 1276," that is, from 1869, "at the rate of rent fixed by the Ameen, after deduction of 15 per cent., being the judgment debtor's profit and collection charges; that unless barred by some law, the appellant shall be entitled to recover rent at Rs. 3,200 by means of suits."

Their Lordships understand this decree to determine that the plaintiff was entitled to the rent for one year, which he had claimed as due prior to the commencement of the suit, at the rate of Rs. 3,200 a year; that in the interval between the commencement of the suit in 1849 and the decree in 1869 the rent was payable at the same rate of Rs. 3,200; and that from 1869 the rent would be payable at the rates fixed by the Ameen. The Judge thought he could not give the intermediate rent between 1849 and 1869 in the present suit, and that the plaintiff must sue for that rent in some new proceeding, subject to the liability to be barred by limitation, if that bar could be effectually set up. The reason of the Judge for that part of his decree which relates to the rent from 1869 is thus stated in his judgment: "The judgment-debtor has by his own act allowed this case to drag very slowly along, and when the measurement and assessment was not made until 1867, or 17 or 18 years after the decree, it is but fair that the decree-holder should get the assessment fixed at what is a fair rental in 1867, and not be compelled again to come to the Courts to fix the rental at current rates because he is decreed what was a fair rate when this suit was instituted."

The nature of the plaint in the present suit has been already commented

upon. It is evidently founded in some measure upon the decree of 1869, though not resting solely upon it, but claiming a right generally to have the rent enhanced. That the defendant, however, was perfectly alive to the importance of the decree of 1869, and of the Ameen's report upon which it is based, is plain from his answer, which in paragraph 8 states as follows :—"The plaintiff in the plaint has stated that the amount mentioned by the Ameen in his report in the former case was the amount of the assets of our mokurruree talook, but that statement is unfounded. In fact the amount mentioned in the said report of the Ameen is considerably greater than the assets in the mofussil ; and indeed the said report of the Ameen was rejected in the former case. Hence this suit for enhancement of rent on the basis of a rejected report is in every respect worthy of dismissal." There seems to be no ground whatever for the allegation that the Ameen's report had been rejected ; but the allegation shows that the defendant understood that the plaint was in a great measure at least based upon the judgment which was founded upon the Ameen's report.

The course that the proceedings in the present suit took was this : issues were settled, and without going through them it may be stated that they were such as would be usually framed in a suit for enhancement of rent. The Subordinate Judge took evidence as to the rates in the neighbouring villages, and several witnesses were examined on both sides with reference to them. It was then prayed (by which side does not very clearly appear) that the lands should be remeasured, it being suggested that there had been changes since the report of the Ameen in the suit of 1849. Accordingly a new measurement was directed, and an order given to an Ameen to proceed with it, having regard to the altered state of the lands and their culturable and rent-paying condition. The order also contained a direction that the Ameen should enquire into the prevailing rates, but pending his enquiry that part of the order was rescinded. The Ameen made his report upon the measurements, finding that there was a much less amount of land which would bear rent than existed at the time of the report of the former Ameen. The decrease of the culturable land must have been considerable, and after the adjustment of the rates by the Judge to the new measurements, the rent of Rs. 8,124, declared to be the proper rent by the decree of 1869, was reduced by him to Rs. 5,062, and his decree was given for one year's rent at that rate. His decree is : "That the suit be decreed ; that the plaintiff obtain from the defendants Rs. 5,062 : 15 : 6, being the rent of her 10-annas share, together with interest from this day to the date of realisation at the rate of 12 per cent. per annum."

The defendant appealed to the High Court, and that Court has given a judgment which passes by the previous litigation and the decree of the 20th August 1869. Having looked at the evidence as to the rates which had been given before the Subordinate Judge, the High Court came to the conclusion that that evidence was wholly insufficient by reason of what they considered its unsatisfactory character to establish a case for enhanced rent. It does not seem to have been present to the minds of the Judges that the plaintiff was starting upon the foundation of an enhanced rent which had been found so recently as 1869, two or three years before the commencement of this suit, and which established a *prima facie* case of the rent properly payable by the talookdar. Their Lordships cannot think, even if the case had been rested altogether on a new enquiry into the prevailing rates, that the Judges of the High Court would have been right in peremptorily dismissing from their consideration the whole of the evidence on the part of the plaintiff as of no weight. The evidence was of that kind which would be naturally given in cases of this description. But in the present suit it was supported by what had been found as the proper rent in 1869.

Their Lordships think that the decree of the High Court cannot stand, and they see no sufficient reason for disturbing that of the Subordinate Judge, which is confined to decreeing in favor of the plaintiff the payment of one year's rent.

In the result therefore their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and in lieu thereof to direct that the decree of the Subordinate Judge be affirmed, and that the appeal of the defendant to the High Court be dismissed with costs. The appellant will have the costs of this appeal.

The 27th May 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Hindoo Law—Partition—Alienations—Judgment—Declaratory Decree.

On Appeal from the High Court at Madras.

Chidambaram Chettiar and others

versus

Gouri Nachiar and another.

Where it was not very clear whether or not a formal order or decree upon a judgment was drawn up, but by that judgment there was a clear adjudication that the property in question was partible, and that the plaintiff was entitled to a moiety of the property left by his father at his death, subject to the incumbrances and alienations of his father and his elder brother, which were valid under the Hindoo law : HELD that this judgment must be taken to be equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from the date of that judgment if they had not previously become so ; and that being so, though the actual division of the property was not complete, the case fell within the principle of *Appovier v. Rama Subba Aiyar*, and that there was no ground for the contention that, upon the death of the plaintiff, his interest passed to his elder brother, and not to his own representatives in the course of succession to separate estate as ascertained in the suit.

Mr. Cowie, Q.C., and Mr. Mayne for Appellants.

Mr. Leith, Q.C., and Mr. Bowring for Respondents.

Sir James Colville delivered the following judgment :—

This appeal arises out of a suit brought by the younger son of one Gouri Vallabha Tevar, the late zemindar of a dependent zemindary carved out of the great Sivaganga estate, against his elder brother and against a number of persons who claimed to be either incumbrancers upon or absolute owners of different villages comprised in the zemindary under titles derived from either the father or the elder brother of the plaintiff. The general nature of the suit was for a partition between the brothers, and for the recovery of the plaintiff's share freed from the interests claimed by the other defendants, except to the extent to which the alienations were valid against him under Hindoo law. The litigation has now been reduced to the question whether and upon what terms the plaintiff's representatives are entitled to recover his moiety of the village Pattanam from the third defendant, Ramasami Chetti, and his moiety of the village Minnittangudi from the fourth defendant, Ramanadhan Chetti. These two defendants are the present appellants.

The facts were very clearly and candidly stated by Mr. Cowie in his opening, and it is unnecessary to recapitulate them, because it is admitted that the decree impeached must stand, unless the appellants can succeed upon one ground. That ground is, that the plaintiff having died on the 28th March 1872 without issue, the suit which was then pending ought to have been dismissed, inasmuch as the proceedings for a partition had not then gone so far as to effect that severance of

interest between the brothers which would prevent the share of the younger from going over to the elder by right of survivorship. The following is the history of the proceedings in the suit, so far as they relate to this question:—In August 1871 the first of the issues settled in the cause, *viz.*, “whether the property sued for constituted a zemindary, and, if so, whether it is partible or impartible, and whether it is liable to all the incidents of private property,” was tried separately, and was determined by the Civil Judge in a judgment of the 24th of that month, which will be hereafter considered. He afterwards tried the other issues in the cause, and disposed of them by his judgment and decree of the 2nd April 1872. On that occasion the point now relied upon was first raised by a petition which bore date the day before, but was not filed in Court until the 2nd April of that year. On that petition the Judge made the following order:—“The case has been heard; oral judgment pronounced at the close of the hearing except in regard to details; and this day the Court delivered its written judgment; petition dismissed.” The present appellants appealed against the decree of the 2nd April 1872, and the second of their grounds of appeal is the following:—“The plaintiff died after the suit was brought, but before the decree was written or signed or judgment delivered, and that under these circumstances the suit ought to have been dismissed, as no partition could be made.”

On the 6th January 1873 the High Court, before disposing of the appeal, remanded the cause to the Civil Judge, with directions to try whether the partition was complete when the plaintiff died, and when it became so; and also another issue. In his finding upon the first issue, dated the 14th April 1873, the Judge said: “I am of opinion that the partition was complete, *i.e.*, that the brothers became divided in interest, at least on the 24th August 1871 if not before. I regard that order as equivalent to a decree for dissolution of partnership and for an account. The shares were ascertained, and all that remained to be done was to see what charges, if any, on any particular properties, were good as against plaintiff. This was a question between the plaintiff and the alienees alone, and first defendant had nothing to do with it.” The present appellants appealed against that finding, but the High Court, in its judgment of the 5th January 1874 expressed its concurrence in it.

Their Lordships have to determine whether that finding was not substantially right. In doing this they dismiss from consideration, as of no weight, the suggestion that in the month of February 1872, and before the written judgment of the 2nd April of that year was delivered, there had been an oral judgment which would have effected a partition, or at least a severance of interest, between the brothers, had there been no such severance previously. They proceed to consider the effect of the proceedings of the 24th August 1871 on the separate trial of the first issue. The Judge then found that upon the evidence it was quite clear that the estate was in its nature partible, that the facts were incontestible, and stated that the defendants’ vakeels had given in their adhesion to the finding of the Court upon that issue. The judgment then proceeded as follows:—“That being so, it is also not disputed that plaintiff is entitled to a moiety of the property left by his father at his death, whatever that moiety may be, subject to all charges then subsisting, and to such charges as have been incurred subsequently, as are of such a character as are recognised under Hindoo law to be valid charges upon the estate; but to enable the Court to arrive at a correct conclusion it is necessary to appoint a Commissioner with power to investigate the accounts, and the result will be submitted for this Court’s consideration.” It then states the points which are to be referred to the Commissioners, all of which had reference to the different mortgages or alienations relied upon by the defendants, other than the plaintiff’s brother, and to the question of how far the mortgages had been discharged by the usufruct of the mortgage property. It then adds: “In accordance with these observations an order will be prepared.” No formal order or decree drawn up

upon that judgment is to be found in the Record, but their Lordships are by no means satisfied that there may not have been one. At all events, they are of opinion that by this judgment there was a clear adjudication that the property was partible, and that the rights of the two brothers were that each should have a moiety, and that the only object of the subsequent proceedings in the suit was to ascertain how far the share of the second brother, which had thus been declared to be a moiety of each village, was affected by the incumbrances and alienations of his father and his elder brother. That this was the clear understanding and intention of the Judge, their Lordships think, appears from the 11th and 19th paragraphs of the judgment of the 2nd April 1872. In the former he says: "The Court, in its proceedings of the 24th August 1871, held that the estate in question was partible and subject to all the incidents annexed to property among Hindoos, and that the plaintiff was entitled to a moiety of the property left by his father at his death, whatever that moiety might be, subject to all charges then subsisting and to such charges as have been incurred subsequently as are of such a character as are recognised under Hindoo law to be valid charges upon the estate." In paragraph 19 he says: "This suit has now come before me in another form, and the points I have to determine are the conditions under which plaintiff is entitled to recover a moiety of his ancestral property." He does not in any part of this judgment deal with the question whether the brothers are to be declared separate or whether the property is partible. He treats all that as decided by the former proceedings, and deals only with the question of the plaintiff's right to recover his moiety of each village freed from the incumbrances thereon, or some part of them. It is to be observed that there was no appeal against the judgment of the 24th August 1871, or its finding on the first issue; and that the first defendant, the elder brother, seems to have thenceforward acquiesced in the decision. For these reasons their Lordships are of opinion that the judgment of the 24th August 1871 must be taken to be equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties, and making the brothers separate in estate from that date, if they had not previously become so. If that be so, the case, though the actual division of the property was not complete, falls within the principle of *Appovier v. Rama Subba Aiyar*, 11 Moore, I. A. 75,* and there is no ground for the contention that upon the death of the plaintiff his interest passed to his elder brother, and not to his own representatives in the course of succession to separate estate as ascertained in the suit.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

The 11th June 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, and Sir Robert P. Collier.

*Easement—Right of Water—Encroachment on Bed of Khal—Removal of Wall—
Proof of Damnum, or Injuria.*

On Appeal from the High Court at Calcutta.

Kali Kishen Tagore

versus

Judoo Lal Mullick.

There may be, where a right is interfered with, *injuria sine damno* sufficient to found an action; but no action can be maintained where there is neither *damnum* nor *injuria*.

So where a riparian proprietor encroached on the bed of a khal in the possession of the Government, and built a wall on it, it was held that the plaintiff, not having all the rights of a riparian proprietor, could not maintain a suit for the removal of the wall on the other side, on the ground of the obstruction of his navigation and of danger to his property, without at least proving that there had been any interference with the flow of the water, or of such injury to his right as would support an action.

Mr. Leith, Q.C., and Mr. Doyne for Appellant.
No one for Respondent.

Sir Robert Collier gave judgment as follows:—

In this case the plaintiff and defendant were proprietors of land and gardens on opposite sides of a khal in which the tide in the River Hooghly flowed and re-flowed, and by which the surface water of certain lands was carried in a direction from the east to the west into the Hooghly. The plaintiff was the proprietor on the north side, the defendant on the south side, just at the mouth of the khal. It seems that it is a tidal creek which is daily subject to the flow of the river; that for the protection of the banks on each side of the khal walls had been erected, one at each side of the khal, and that the defendant, upon the wall on his side becoming somewhat dilapidated, constructed a fresh one, and employed a skilled person to do so, who to some degree altered the direction of the wall. A portion of it he built further in towards the defendant's land than it had been before, and another small portion he built a little further out. We have the precise extent to which it was built further out, which was five feet, making what may be called, in one sense, an encroachment, consisting of a triangle whose altitude was five feet, and whose base was about double that length. The plaintiff, it appears, first applied to Mr. Whitfield, the Government Engineer, desiring Mr. Whitfield to interfere, on the ground that the defendant's wall was an obstruction to the public navigation in the khal which belonged to the Government. Mr. Whitfield declined, however, to interfere, on many grounds, one of which was that the khal was not navigable, and another that there was, in his opinion, no obstruction.

The plaintiff thereupon brought this action. It is stated to be a suit "for possession of land by demolishing a brick-built retaining wall." He goes on to aver:—"By the said act of the defendant, injury having accrued to the retaining wall of my garden, and inconvenience having been caused to the passage of boats to my screw-house through the said khal, and apprehensions being created as to the screw-house falling down eventually, a cause of action has arisen. Therefore my prayer is that a decree be given directing the removal of everything built by the defendant that stands on the disputed land mentioned below, and awarding me possession of the land and khal in question." His case was that he was entitled to the *solum* on which the defendant had built his wall; that his navigation was obstructed, and that there was a danger of his screw-house falling down. It is true that he subsequently presented a petition in which he prayed that if he was not entitled to possession of the disputed land, still, if it was found that the retaining wall ought to be removed, there should be a decree granting that remedy. The petition was, however, rejected.

The case came before two Subordinate Courts. The Court of the Moonsiff found that the plaintiff had no right to the bed of the khal or any part of it, but that the defendant had a right *ad medium filum*. • He further found that the khal was not navigable, and that no injury had been caused to the plaintiff, and that the flow of the water had not been in any way sensibly obstructed.

On appeal to the Subordinate Judge, he affirmed the findings, with an exception which constitutes the chief difference between the decrees, that neither the plaintiff nor the defendant had any right to the bed of the khal, which, it would appear, is vested in the Government in right of their zemindary of the twenty-four pergunnahs. The finding of the Subordinate Judge is in these terms:—"The

conclusion, therefore, at which I arrive is that the defendant has in fact committed an encroachment, though not upon the plaintiff's property; but that it is not established that damage to the plaintiff's property must necessarily result from the encroachment. Plaintiff therefore is not entitled to have the wall removed."

The case came on special appeal before the High Court; and the High Court, having remanded the case for the purpose of ascertaining the precise extent of the encroachment, considered themselves bound to reverse the decisions of both the Courts, and to order the removal of a portion of the defendant's wall, apparently on the authority of the case of *Bickett v. Morris et Ux.*, which is reported at page 47 in the 1st Law Reports, Scotch Appeals, House of Lords. The effect of that case may be stated thus: A riparian proprietor on one side of a stream complained of the riparian proprietor on the other side, who had built into the *solum* of the stream beyond a line which had been agreed upon between the parties, and had thereby obstructed and changed the flow of the water so that the plaintiff's right to have the water flow in its accustomed manner was injured. It was held that such an obstruction was such an injury to the plaintiff's rights as enabled him to support the action without proof of actual damage immediate or even probable. The *ratio decidendi* is illustrated by the remark of the Lord Chancellor. "It was asked in argument whether a proprietor on the banks of a river might not build a boat-house upon it? Undoubtedly this would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course; but if the erection produced this effect, the answer would be that, essential as it might be to his full enjoyment of the use of the river, it could not be permitted."

Their Lordships observe that in a subsequent case in the House of Lords of *Oer Erving v. Colquhoun*, reported in the 2nd Law Reports, Appeal Cases, p. 839, not in itself having much bearing on the present, inasmuch as it related to the obstruction of a navigable stream, Lord Blackburn explains the previous case in this manner: "The defender had without any right built an encroachment on his side of the river which necessarily caused more water to flow on the pursuer's side, and though that encroachment was small, it was such as in a small stream to make a sensible alteration in the flow. That was an injury to the proprietary right of the pursuer, but he was not able to qualify present damage."

Their Lordships are of opinion that the case of *Bickett v. Morris* does not govern the present. In the first place, the plaintiff does not state his cause of action in the manner in which it was stated in *Bickett v. Morris*. The plaintiff does not state that he, as a riparian proprietor, was entitled to the flow of the water as it had been accustomed to flow, and that that flow was seriously and sensibly diverted so as to be an injury to his rights; but he puts his case on the ground that he is the owner of the soil on which the wall was built, an issue which is found against him. It is true that he sought to enlarge his claim, and avail himself of any ground he might have for obtaining the removal of this wall; but their Lordships do not find that he has either claimed or proved such an easement as that which has been described in the case of *Bickett v. Morris*, and which was there interfered with, or that any issue was raised as to such a right of easement. It appears that the plaintiff, at all events, has not all the rights of a riparian proprietor, or he would have been entitled to the bed of the stream *ad medium filum*. It may be that this khal being in possession of the Government, the Government may be able to do what they like with it; and if the plaintiff would have no right to complain, as against them, of any interference with the flow, it does not seem clear what right he could have against a riparian proprietor on the other side. But further it has not been found in this case,—indeed the evidence on the whole points in the other direction,—that the defendant, by what he has done, has, to use the words of Lord Blackburn, sensibly altered the flow of the water. Without establishing this the plaintiff has failed to show any such injury to his right as would support an action. All that has been found is that the defendant encroached

on the bed of the khal, which is the soil of the Government, without causing any sensible injury to the plaintiff. There may be, where a right is interfered with, *injuria sine damno* sufficient to found an action; but no action can be maintained where there is neither *damnum* nor *injuria*.

Under these circumstances their Lordships are of opinion that the High Court was wrong in reversing the decision of the Lower Courts and ordering, as they did, the wall to be removed; and their Lordships are of opinion that the decision of the Subordinate Judge was right.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court be reversed; that the judgment of the Subordinate Judge be affirmed, and that the appellant have the costs of the appeal in the High Court and also the costs of this appeal.

The 13th June 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, and Sir Robert P. Collier.

Execution Sale—Benamie Purchase for Judgment Debtor—Possession by Purchaser at subsequent Sale.

On Appeal from the High Court at Calcutta.

Ram Chunder Bysack

versus

Dinonath Surma Sirkar.

Plaintiff was held not entitled to recover, his vendor having been found to have purchased *benamie* for the original judgment debtor at a sale which did not take place until the 1st June 1863 in execution of a decree of the 31st May 1843, and to have allowed the defendant, who claimed as purchaser under a subsequent sale in execution on the 7th June 1865, to be put into actual possession, and to remain in possession for nine years, without contesting his right to the property.

Mr. Cowie, Q.C., and Mr. Doyne for Appellant.

Mr. C. W. Arathoon for Respondent.

This is a suit which was commenced on the 8th January 1874 by the plaintiff, who seeks to recover possession of a 12 annas share in certain mouzahs which he claims to be his property, and out of which he says he was wrongfully ousted.

It is necessary for him to make out his title, and the way in which he attempts to make it out is under a sale in execution of a decree of the 31st May 1843 of the Principal Sudder Ameen of Fureedpore. The sale under the execution did not take place until the 1st June 1863, when one Anund Lochun Nundi, the defendant No. 3, became the ostensible purchaser of the property. The plaintiff, however, says that Fakiruddin, *alias* Azimuddin, was the real purchaser, and that he, the plaintiff, subsequently purchased the property from Fakiruddin.

Two objections are made to the title of Fakiruddin as the purchaser of the property. First, it is said that the Principal Sudder Ameen of Fureedpore, who issued the execution under which the sale took place, had no jurisdiction to issue it, inasmuch as the district of Dacca was divided between two Principal Sudder Ameen, and that the property, or a great portion of it, was situate, not within the jurisdiction of the Principal Sudder Ameen of Fureedpore, but within that of the Principal Sudder Ameen of Dacca. The first objection, therefore, was that the execution was entirely void for want of jurisdiction on the part of the Judge

who issued it. The next objection was that, assuming the execution to have been valid, the purchase under it by Fakiruddin was a fictitious purchase for the benefit of the judgment debtor, Gorib Hossein, who was the representative of the original debtor, Mahomed Joki Chowdhry. The first defendant claimed as a purchaser under a sale in execution against the said Gorib Hossein on the 7th June 1865, subsequent to the execution under which Fakiruddin purchased, and he, the first defendant, had been put into possession under his purchase.

Their Lordships will, in the first place, deal with the question of fictitious purchase, because, if the purchase was fictitious, the defendant Fakiruddin obtained no title under it, and the property remained the property of Gorib Hossein, whether the Principal Sudder Ameen had jurisdiction or not. The Judge of the first Court, at page 198 of the Record, deals with the question of jurisdiction. The fourth issue which was raised in the case was whether the purchase by Fakiruddin was benamee for Gorib Hossein or not. The Judge of the first Court did not come to an express finding or declaration with reference to that issue. The whole of his argument, however, tends to show that in his judgment that issue ought to be found in favor of the first defendant. He says: "The first sale, the defendant argues, was collusive and fictitious. His pleader shows that Gorib Hossein was indebted to some. In execution of a money decree, the claim, which was upwards of Rs. 2,000—the valuable property which, according to plaintiff's estimate of the value, is worth more than Rs. 10,000—was sold for Rs. 500; but still the decree-holder, who had a claim for upwards of Rs. 2,000, did not purchase it, and allowed the servant of defendant, who was a friend to Gorib Hossein, the judgment-debtor, to bid for it. Again, defendant No. 2 purchased it for a nominal price of Rs. 500, but did not proceed to take possession of the properties till the same properties were advertised for sale in execution of another decree. These facts the defendant takes as the evidence of collusion, and he pleads, therefore, that Gorib Hossein, in order to give color, went on ostensibly to object to the confirmation of the sale, but his endeavor was in reality to create a title in favor of defendant No. 3 fictitiously, and himself to retain and enjoy possession of the property to the prejudice of his other just creditors. The first auction sale is dated 1st June 1863, the date of advertisement of the second sale is 31st March 1865, and the second sale took place on the 2nd June 1865; but the debtor, Gorib Hossein, continued to be in possession of the property, and continued to discharge the public revenue on account of the estate down to the second auction. The first auction purchaser, after a lapse of two years, and after the second sale, applied to the Principal Sudder Ameen of Fureedpore for delivery of possession of the property. The date of delivery is Assar 1272 B.S., and the date of dispossession by the defendant is Bhadro of the same year, that is, a month after the delivery. These circumstances go to a great extent to speak in favor of the defendant's argument. It is certain that the judgment-debtor was in possession down to the second sale, and the attempt of defendant No. 2 (plaintiff's vendor) to take symbolical possession after the second sale does not sufficiently prove that he was in actual possession of the property. Under the circumstances I am clearly of opinion that the defendant No. 1, who by virtue of a legal title entered into possession of the property, is entitled to oppose any, or to dispute the title of any who may come to take possession from him. The question therefore comes, whether the first auction sale was a valid sale, and whether the first auction purchaser acquired a valid title." The High Court, in dealing with that portion of the judgment, say, at p. 208: "Now, as to the question of benamee, it seems to us that there was no evidence to rebut the ordinary presumption in favor of the ostensible purchaser." The ostensible purchaser really was not Fakiruddin, but Anund Lochun Nundi. He was the person in whose name the property was purchased. "The delay which has been relied upon is only a delay of about six or seven months, because it appears that the purchaser was kept at bay by the

judgment-debtor, who disputed the sale, appealed against the order rejecting his application, and continued those proceedings down to August 1864." The High Court treat those proceedings as real and *bond fide*, whereas the Judge of the Lower Court stated that the defendant contended that they were not *bond fide* for the purpose of getting rid of the sale, but fictitious proceedings taken for the purpose of giving strength to the case that the purchase made by Fakiruddin had been made for his own benefit, and not for the benefit of the judgment-debtor. The High Court make no remark with reference to the question whether those proceedings were fictitious or not. They then go on: "It then appears that the papers were sent down to the Principal Sudder Ameen with a view to further proceedings in execution being taken on the 24th September 1864, and the purchaser made a petition to be put into possession on the 26th May 1865. Therefore the delay which had to be accounted for was only a delay of a few months, and that is a circumstance quite insufficient of itself to get rid of the rights of the plaintiff under his purchase. That being so, and the onus on that part of the case being entirely on the defendants, and the defendants not having discharged themselves of it, as far as that plea goes, the judgment must be in favor of the plaintiff."

The substance of that decision is simply this, that the mere delay in taking possession on the part of Fakiruddin, or of Anund Lochun Nundi, was not of itself a sufficient badge of fraud to induce the Court to come to the conclusion that the purchase by Fakiruddin was benamee for the benefit of the judgment-debtor. They say: "That being so, and the onus on that part of the case being entirely on the defendants, and the defendants not having discharged themselves of it, as far as that plea goes, the judgment must be in favor of the plaintiff."

But there was evidence in the cause beyond that which was adduced as to the delay. There was the evidence of several witnesses. First, that of a tenant, at page 185 of the Record, to which Mr. Cowie has called their Lordships' attention, the evidence of Loknath Banerjee. He says: "I am a tenant of the disputed mehal and hold lands therein. Formerly I used to pay rents to Mahomed Joki Chowdhry" (that is the judgment debtor); "at present I pay rents to the defendant," meaning the defendant No. 1. He does not say that possession was ever given, as far as his portion of the property was concerned, to Fakiruddin. He paid originally to the judgment-debtor, and subsequently to the defendant No. 1, who was the purchaser under the second execution.

Then again, at page 190 of the Record, there is some very strong evidence, that of the defendant's witnesses, to which the High Court did not allude at all. It is true it was not alluded to by the first Court. The Judge of that Court thought the delay sufficient of itself. But when the High Court thought that the delay was not sufficient, they ought, as it appears to their Lordships, to have referred to the evidence to see whether they believed or disbelieved the witnesses on the part of the defendant to prove that the sale was a fictitious one. Bharut Chunder Dey, the defendant's witness No. 1, at page 190, says: "In the month of Jeyt of 1270 B.E. the disputed property was sold by auction at Fureedpore on account of the debt of Gorib Hossein. Anund Lochun Nundi purchased it. Gorib Hossein paid the consideration money. I and Daguram Dutt and three sirdars went to Fureedpore with the money. In the auction sale a bid of Rs. 500 was made, and the bargain having been struck in our name, we made over Rs. 500 to Anund. Anund made the said auction purchase for Gorib Hossein. Ajim Chowdhry,"—that is the *alias* of Fakiruddin—"in a letter to Anund Nundi, requested him to make the auction purchase on behalf of Gorib Hossein. We took with us Rs. 3,003 for the auction purchase,"—that was sufficient to cover the amount of the debt for which the sale was about to take place,—“and we paid Rs. 500. Gorib Hossein's superintendent gave us the said money. Knowing that the disputed property might be worth Rs. 10,000 or Rs. 12,000, we went to purchase it."

There was other evidence corroborating this witness's testimony, to which it is not necessary to refer further. There was no witness to contradict the evidence of those witnesses. Anund Lochun Nundi was not called. Fakiruddin was not called. If the evidence of the witnesses who stated that the money with which the estate was purchased in the name of Anund Lochun Nundi was sent by the judgment-debtor was not true, why did not Fakiruddin or Anund Lochun Chunder, or both of them, come forward and state that the evidence was false, and that Anund Lochun Nundi purchased the estate for Fakiruddin with money which Fakiruddin had supplied? But no evidence of the kind was given. The witnesses for the defendant No. 1 were uncontradicted, and there is nothing on the face of the proceedings to lead their Lordships to believe that the evidence of those witnesses was untrustworthy and ought to be rejected as the evidence of witnesses who had perjured themselves.

But, beyond this, when the estate was sold to the defendant No. 1, and when the defendant No. 1 was put into possession of it, one would suppose that Fakiruddin, though he was only in ostensible possession of the property, would have made an application to the Court, under s. 246 of the Code of Civil Procedure, stating, "You have attached and are about to sell under an execution property which I have already purchased under a previous execution; do not sell this property, it is mine, and not that of the judgment-debtor," and then the Judge in a summary way would have decided whether or not the property had been purchased by Fakiruddin or not. But no such application was made.

It was suggested that probably Fakiruddin and Anund Lochun Nundi did not know that the property was attached and about to be sold under the second execution. Assume for the present purpose that they did not, one would suppose that as soon as they did know it, that is to say, as soon as the defendant No. 1 was put into actual possession of the property, and had got the ryots to attorn to him, Fakiruddin, if his case had been a genuine one, would have brought an action at once to turn him out and to contest his right to the property by virtue of the sale under the second execution. But he lay by, and no action was brought by Fakiruddin or by Anund Lochun Nundi for nearly nine years after the defendant had been put into actual possession of the property under his purchase, and then Fakiruddin commenced a suit in the Moonsiff's Court. The Moonsiff had not jurisdiction to try cases to the extent of the value of the property. An objection was taken to his jurisdiction, and then Fakiruddin sold the property to the plaintiff after the defendant No. 1 had been in possession for nine years, and when there was a dispute and an action pending respecting the title.

That suit was afterwards dismissed, and the plaintiff brought the present action in 1874.

Under these circumstances there is sufficient evidence to satisfy their Lordships that the purchase by Fakiruddin, if indeed he did purchase in the name of Anund Lochun Nundi, was a purchase benamee for the original judgment-debtor, who furnished and supplied the money for that purpose.

Under these circumstances their Lordships think that the plaintiff is not entitled to recover. It is not necessary, therefore, to decide whether the Principal Sudder Ameen had jurisdiction to issue the execution under which the plaintiff's vendor purchased the estate, but their Lordships wish it to be distinctly understood that they throw no doubt whatever upon the decision of the High Court by which it was held that the Principal Sudder Ameen had jurisdiction to issue the execution.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the High Court be reversed, the decree of the first Court affirmed, and the suit of the plaintiff dismissed with costs in both the Lower Courts. The appellant must pay the costs of this appeal.

The 14th June 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Adoption (by Widow)—Alienations before Adoption—Agreement with Natural
Father of Adopted Son—Ratification by Son.*

On Appeal from the High Court at Madras.

Ramasawmi Aiyan and others
versus
Vencataramaiyan, *alias* Chidambaraiyan.

In a suit brought on behalf of the respondent as heir of his adoptive father, by virtue of an adoption by his widow after his death, to set aside various dispositions of the property made by the widow before the adoption, the defence was that the respondent had been adopted upon the faith of an express written agreement by his father, subsequently ratified by himself when he came of age, that none of the transactions were to be disputed : HELD that the agreement of the natural father was not void, but was, at the least, capable of ratification when his son became of age ; and that the son had so ratified it.

This was an appeal from a decree of the High Court of Madras of the 24th January 1877, reversing a decision of the District Court of Trichinopoly.

Mr. Leith, Q.C., and Mr. Mayne for Appellants.
Mr. Cowie, Q.C., and Mr. Graham for Respondent.

The suit was brought in December 1873 on behalf of the respondent as heir of one Rangasawmi, by virtue of an adoption made by his widow after his death, to set aside various dispositions of the property made by the widow before the adoption. The appellants were the widow and the various persons who claimed under the disputed transactions. Neither the adoption nor the transactions were denied ; but the defence set up was that the respondent had been adopted in 1862 upon the faith of an express written agreement by his father, subsequently ratified by himself when he came of age, that none of the transactions were to be disputed. The local Court dismissed the suit, but the High Court reversed that decision.

Sir Robert Collier delivered judgment as follows :—

The facts of this case material to its decision are as follows :—

Rangasawmi Aiyan was the youngest of three brothers of a joint Hindoo family. The eldest brother died in the year 1858, leaving a widow named Thyammul. On his death the two remaining brothers made a partition of the property to which they were entitled. The second brother died in 1860, leaving a widow named Lakshmi Ammal. Rangasawmi had a wife, the daughter of Ramasawmi, who was his cousin, and was the brother of Thyammul. Rangasawmi, having no children, on the 19th January 1861 executed the following document :—

“ Agreement executed on the 19th January 1861 by me, Rangasamiayan, son of Subbaiyan, residing at Minakshipuram, in the Trichinopoly talook, while in the possession of sound mind, in favor of Ramasamiayan, son of Anantakrishnaiyan, residing at Kulumani in the said talook, to wit :—

“ In the villages of Minakshipuram aforesaid, Gouripuram, Tiruppulatturai, Analai, Rangachchipuram, Elumanur, Antamallur, Ammangudi, Kulumani, Mulangudi, Tachchagudi, and Kottattai, I hold some property. Besides, in respect of the moveable and immoveable property standing in the names of Lakshmi Ammal, the widow of Visvanadhaiyan, my elder brother, and others, I brought a suit in No. 5 of 1860 on the file of the Civil Court, which is now pending in appeal before the Sudder Court in No. of 1860. My present state of health is, however

too bad to permit me to manage and take care of the said (last-mentioned) property, as well as the said (first-mentioned) house, ground, houses, cattle, etc. Besides, I have no issue, and have consequently adopted your son Krishnasami this day according to law. You shall, therefore, yourself manage the affairs of all the moveable and immoveable property, etc., except three cheis of land constituting two shares in the village of Kulumani, which I have given away to my elder sister, Tangammal, as manjakani (land granted for expenses), pay the Government revenue, etc., assessed thereon, render the necessary assistance in the interests of the said suit, and maintain my adopted son aforesaid. Besides, you should deliver up to the two persons aforesaid, so soon as my said adopted son attained his age, all the said moveable and immoveable property, and all the other property save such as might have been legitimately expended till then. Furthermore, you should administer the charity of distributing boiled rice, etc., at my house in the village of Minakshipuram, and by applying therefor the incomes derivable from the wet and dry lands of that village left after paying the expenses, Government revenue, etc., keep an account of the receipts and disbursements in that matter, and you should get Krishnasawmi, my adopted son aforesaid, after he attained his age, and Lokambal my wife, these two to administer these charities in perpetuity, and in a manner allowing no scope for any shortcomings.

"You should, also, while thus acting, and until my son attained his age, look after the duties of the office of manager, which I hold in my name with respect to the Tirupulatturai pagoda.

"To this effect, I, Rangasawmi Aiyan, execute the agreement in favor of Ramasawmi Aiyan."

In pursuance of this instrument the child therein mentioned was adopted, and Ramasawmi undertook the management of the estate.

On the 9th February 1861 Rangasawmi executed the following document, which is termed in the record a mookhtarnamah :—

"Mookhtarnamah (general power of attorney) executed on the 9th February 1861 by Rangasawmi Aiyan, son of Subbaiyan, residing at Minakshipuram, in the Trichinopoly talook, in favor of Ramasawmi Aiyan, son of Anantakrishnaiyan, residing in the village of Kulumani, in the said talook, to wit :—At present the state of my health is not satisfactory, and I have no issue. Besides, for the management of my own immoveable property which I am in the enjoyment of, for the conduct of the suit which I brought in No. 5 of 1860 on the file of the Civil Court against Lakshmi Ammal, the widow of Visvanadhaiyan, my elder brother, touching certain property, and which I have now brought on appeal in No. 25 of the same year, on the file of the Sudder Court, and for the looking after of my adopted son, Krishnasawmi, minor, my wife, and myself, I have no friend to look up to but yourself. You should therefore look after us as mentioned above, and hold all my property according to your pleasure, and manage the same. If the said Sudder Appeal No. 25 should also terminate against me, you should take upon yourself and manage the dry and wet land forming the eleven pangus (shares) in the village of Minakshipuram, the four pangus (shares) in Analai, one pangu (share) in Tirupulatturai, and one pangu (share) in Tachchangudi, one house-ground in Kulumani, out of the property in my possession, and, without concern in the profit or loss therefrom arising, make the same over to my adopted son after he attained his majority. Besides, as I have consented to Tayammal, the widow of my elder brother, Venkataramaiyan, making an adoption, which she is attempting to do in accordance with the authority given by my elder brother aforesaid, you should get my wife to give up out of our property to the said ammal (lady) the one-third share of my elder brother aforesaid, a dwelling-house, one Machchupatti house-ground, cattle, ploughs, etc., all in a group, with liberty to alienate the same by sale, and to appropriate the same according to her own pleasure. The remaining lands you should get my wife to dispose of by sale, etc.,

in satisfaction of the debts contracted by me for the family expenses and for the costs of the said suit, and clear off my debts in full. You are at liberty yourself to demand and recover the sundry debts due to me. All prior documents of any kind whatsoever referring to the above subject shall become null. I have thus with my full consent executed to you this mookhtarnamah (general power of attorney)."

The High Court of Madras, of whose judgment some notes, obviously very imperfect, are to be found in the Record, appear to have treated this document, which was not registered, as open to much suspicion. It may be, but inasmuch as it has been found to be genuine by the Lower Court, before which some of the attesting witnesses were called, while no evidence directly impeaching it was produced, their Lordships find no sufficient grounds for disbelieving its execution, or setting it aside as invalid.

Rangasawmi died in 1861, not long after the execution of this document, but the precise date of his death does not appear.

On the 10th June 1862 the widow of Rangasawmi, Lokambal, assuming to act under the directions of the mookhtarnamah, executed a release to Thyammal of what may be described in general terms as one-third of the family property.

On the 23rd June 1862 Lokambal, assuming to act under the same authority, executed three deeds of sale to one Vamanaiyan of what may be described in general terms as another one-third of the property for advances alleged to have been made to her for the payment of her husband's debts.

It appears that the property conveyed to Thyammal found its way, after some interval, into the hands of her brother, Ramasawmi, and that by the last three deeds Lokambal in effect conveyed the property to which they refer to Ramasawmi, her father, who admits the sale to the nominal purchaser to have been benamee for him, alleging that he paid the consideration money, and that it was appropriated to the payment of the debts of Rangasawmi. Almost immediately after the execution of these deeds the adopted son died.

Thereupon the widow proceeded to make a new adoption under authority from her husband (as is now conceded), and with this object entered into the following agreement with one Mutturamaiyan for the adoption of his son, who is the plaintiff in this suit.

"Agreement executed on the 23rd Ani of Dundhubbi, corresponding to the 5th July 1862, by Mutturamaiyan, son of Venkaiyan, residing at Dikshasamudram, otherwise known as Mullakudi, in the Trivadi talook, in the Combaconum district, in favor of Lokambal Ammal, the widow of Rangasawmi Aiyar, residing at Minakshiammalpuram, in the Trichinopoly talook, in the Trichinopoly district, and Ramasawmi Aiyar, the authorized agent of the said Rangasawmi Aiyar, to wit:—

"After entering into a partition, the said Rangasawmi Aiyar adopted Krishnasawmi, a minor, and died some time afterwards; and, some time after this, Krishnasawmi also died. Thereupon, with a view to the fulfilment of the said Rangasawmi Aiyar's wish to make an adoption, I gave my son, Chidambaram, *alias* Venkataraman, in adoption to the said Lokambal Ammal according to law with my full consent. Excluding the sales of property made to third parties in satisfaction of the debts contracted by the said Rangasawmi Aiyar, and the absolute disposition of property made in favor of Thyammal, the widow of Venkataramaiyan, his elder brother, for her share, all of which took place so far back as during the lifetime of the said minor, Krishnasawmi, the said Lokambal Ammal is now possessed and in the enjoyment of eleven pungus (shares) of wet land and the wet and dry samudayams appertaining thereto in Minakshiammalpuram aforesaid, setting aside the house-ground of Muttulinga Medeliar and the patti manai lying to the west of it, of one pungu (share) of wet lands and the samudayams thereto

appertaining in Tiruppilatturai, setting aside the house-ground of Pannai Seturaiyar, of one of the house-grounds which fell to his share in the agraharam of the village of Kulumani, of one pungu (share) in the village of Tachchangudi, and of four pungus (shares) in the village of Analai, with the samudayams thereto appertaining. Beyond this property which is in her possession, the said ammal (lady) has no property. Agreeing, therefore, to my begotton son, Chidambaram, *alias* Venkataraman, who is the minor adopted son above mentioned, being put in possession of the said property which now remains, after he attained his majority, I have, with my full consent, given my said son in adoption. I have therefore executed to you this agreement to show that you alone, who are henceforth entitled to all sorts of rights until the adopted son aforesaid should attain his age, and competent to solemnize his wedding and other auspicious ceremonies, should look after the said adopted son and the said property; that, whether or not there is more property, neither I nor my begotten son, who is the adopted son above mentioned, have any sort of claim or title to the same, or to their enjoyment.

“(Signed)

MUTTURAMAIIYAN.”

It is in evidence that Mutturamaiyan was informed that two-thirds of the property had been alienated, and was shown the mookhtarnamah and the four deeds which have been referred to. Thus, if not distinctly informed of the true nature of the transactions, he was at the least put upon enquiry respecting them. It is not alleged, much less proved, that any fraud was practised upon him, and on his being called as a witness by both parties no question was put to him suggesting that he had been induced to make this agreement by any misrepresentation or concealment. Their Lordships, therefore, feel themselves bound to assume that the father consented to give his son in adoption on the understanding that he would inherit only about one-third of the late Rangasawmi's property, being aware, or not caring to enquire, how the remaining two-thirds had been disposed of. The legal effect of this proceeding will be dealt with hereafter. The plaintiff, shortly after he became of age, which time is found by both Courts to have been in 1869, executed a lease (dated 4th October 1869) to Naganadien, a son of Ramasawmi, of all, or almost all, the lands to which he was entitled, for thirteen years, at a “swaunbogam” rent of Rs. 150 per annum, the lessee further undertaking to maintain the plaintiff and his adoptive mother.

This lease, which put him entirely in the power of Ramasawmi's son, or, in other words, of Ramasawmi himself, and which he certainly ought not to have been induced or even allowed to execute, he some time afterwards very naturally desired to set aside, and, his adoptive family insisting on maintaining it, he left his adoptive mother's house, married, and went to live at the house of his wife's father. Although he returned once or more to his adoptive mother's house, it was when he was living in the house of his wife's father and surrounded by her relations that he executed, on the 19th August 1871, the agreement, on the validity of which the case chiefly depends.

This agreement is as follows:—

“Agreement executed on the 19th August 1871, corresponding to the 5th Avani of Prajotpatti, to Lokambal Ammal, the widow of Rangasawmi Aiyar, cultivator, residing in the village of Minakshipuram, in the Trichinopoly talook, by Chidambaram, *alias* Venkataramaiyan, the adopted son of the said lady, cultivator, residing at the said place, to wit:—

“Out of the wet and dry lands, topes, house-grounds, purchases, and other landed property which came to the share of your said husband on partition as his own property in the villages of Minakshipuram, Gouripuram, Analai, Rangachchipuram, Tiruppilatturai, Andanallur, Ammangudi, Kulumani, Mulangudi, Tachchangudi, and Kottattai, the following being excluded, *i.e.*, the landed property

which, by virtue of a mookhtarnamah granted by your said husband in the name of your father, Ramasawmi Aiyan, on the 4th February 1861, before ever I was adopted by you, and of an agreement granted in conformity therewith to you and your father, Ramasawmi Aiyan, by my natural father, Ramuvaiyan, on the 5th July 1862, you gave away on the 10th and 23rd June 1862, in obedience to the orders of your said husband, Rangasawmi Aiyan, deceased, partly under an agreement to Thyammal, the widow of his elder brother, Venkataramaiyan, with power to sell, and partly under deeds of absolute sale, in favor of Kulumani Vamanaiyan in satisfaction of the debts contracted by your husband, Rangasawmi Aiyan, and which your father, Ramasawmi Aiyan, had cleared with his own funds; there still remain eight pangus in the village of Minakshipuram, after deducting the three pangus lost owing to the railway, out of the eleven pangus had there, four pangus in Analai, one pangu in Tiruppilatturai, one pangu in Tachchangudi, and 30 feet of a house-ground to the east of Chelamaiyan's house-ground in the northern row in the Suryavastu Agraharam of Kulumani, which you have continued to hold in full right. These I, having attained my majority, got from you, and took charge of the said property just as they were in accordance with the above said arrangements; and in 1869 I leased the said lands to Naganadhaiyan for a swaunbhogam ready money rent, and got the registry transferred accordingly. Of these lands I gave your father, Ramasawmi Aiyan, six pangus in the village of Minakshipuram, measuring acres 10 and dec. 8, and one pangu in the village of Tachchangudi, measuring acres 3 and dec. 35; in all measuring acres 13 and dec. 43 of land, together with the dry and wet lands and all other samudayams thereto appertaining, and a house-ground in the village of Kulumani, as per the descriptive statement of lands contained in the additional paper hereto annexed, and got in exchange acres 14 and dec. 30 of land, comprised in the $5\frac{2}{3}$ pangus purchased by the said Ramasawmi Aiyan from the said Thyammal and Vamanaiyan under a deed and an agreement, i.e., $2\frac{1}{3}$ pangus in the village of Analai, and $2\frac{2}{3}$ pangus in the village of Rangachchipuram, including Pudutiruttukattalai, together with the wet and dry lands and all other samudayams appertaining thereto, as also 32 feet of a house-ground where Pannai Setuvaiyan resides, and which belongs to the said Ramasawmi Aiyan, in the Suryavasaka Agraharam of the village of Tiruppilatturai, and 24 feet of a house-ground purchased under a deed by the said Ramasawmi Aiyan from Manamettu Chetti in the western row of the Agraharam, running north to south, in the Garudavasakam of the said village, as per the descriptive statement of lands contained in the additional paper hereto annexed. Notwithstanding all this, I have given you for your maintenance for life, in consideration of your feeling it disagreeable to live with me, the $2\frac{2}{3}$ pangus which I got in exchange as aforesaid in the said village of Rangachchipuram, and 2 of the pangus in the village of Minakshipuram, making in all $4\frac{2}{3}$ pangus, together with the wet and dry lands and all other samudayams thereto appertaining. You shall therefore enjoy the said lands for your life, paying the Government revenue assessed thereon, and defraying the expenses of your maintenance, vows, and other ceremonies with the aid of the incomes thereof. The said lands should revert to me upon your death. You should not subject the said lands which have been allowed to you to hypothecation, mortgage, or sale, or otherwise encumber or alienate them. For myself, I agree that, inasmuch as the lands which I enjoy were derived from you, I shall not, without your written consent, subject them to hypothecation or sale, or otherwise encumber or alienate them. As regards any property other than what has come to you and me under this document, and the landed property passed by you under sale and agreement in obedience to the orders of your husband, I have no claim, interest, or title. As regards the two pangus I am entitled to enjoy by reversion on your death in the village of Minakshipuram, I shall take the share of Mettupadugai dry land appertaining thereto out of the tract lying to the west of the Mattupadai (cattle pass). Thus I have executed this agreement.

"The lands, etc., of the village of Elumanur are included in the deed of sale you executed in favor of the said Vamanaiyan.

"(Signed) CHIDAMBARAM, *alias* Venkataramaiyan."

A schedule is appended, specifying in detail the properties to which the mother and son are respectively entitled.

In the year 1873 the plaintiff instituted a suit against the present defendants, which was by a lamentable miscarriage of justice dismissed on the ground that he declared himself to be 17 years old, and ought until he was 18 to have sued by his guardian.

Whereupon he instituted the present suit by his guardian, at first *in forma pauperis*, but was not allowed to retain that character in his appeal to the High Court.

The suit is against Lokambal Ramasawmi Naganadha (the son of Ramasawmi, and the lessee under the deed of October 1869), Thyammal and Manaiyan *alias* Vailialingaian, who was made a defendant at his own request.

The plaint, which is informal and obscure, in substance seeks to set aside all the alienations of the adoptive father's property which have been described, and claims all the property; from the whole of which, even so much as the defendants admit the plaintiff to have been entitled to, he declares himself to have been ousted. The defendants maintain the genuineness and validity of the transactions which have been described, insist on the deed of 19th August 1871 being binding on the plaintiff as a family settlement, and deny his dispossession of so much as he was entitled to under it.

The Subordinate Judge dismissed the suit, on the ground that the agreement of August 1871, which he treats as a final adjustment of the family disputes, was executed by the plaintiff two years after he became of age, was not obtained by fraud or coercion, and was consequently binding on him.

This judgment was reversed by the High Court, on grounds which do not very distinctly appear. That Court appears to have considered the agreement of the plaintiff's natural father at his adoption to have been void in law in as far as it relinquished on behalf of the plaintiff his right to any part of the property which had been his adoptive father's, that he was entitled to set aside the alienations made before his adoption as having been fraudulent and void against him, and that the agreement of August 1871 was not binding on him, having been executed by him without a full explanation having been given to him of his rights. They appear also to have treated his allegation, of which he himself gave some evidence, of his dispossession from the whole of the property as established, and decree to him all the property claimed in the schedule to his plaint, that is, all his adoptive father's property, together with (as is asserted by the appellants) more property which he claimed by a supplemental schedule which he was allowed to file. The present appeal is from this judgment.

Some of the circumstances of this case are peculiar. The first adopted son became his father's heir; on the death of that son after that of his father, the widow became the heir, not of her late husband but of the adopted son. Whether by the act of adopting another son she in point of law divested herself of that estate in favor of the second son may be a question of some nicety, on which their Lordships give no opinion. How far the natural father can by agreement before the adoption renounce all or part of his son's rights, so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty; although the case of *Chitko Raghunath Rajadiksh and others v. Janaki*, in the 11th volume of the Bombay High Court Reports, p. 199, certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father

which has been set out was not void, but was, at the least, capable of ratification when his son became of age. The main question in the cause is therefore reduced to this, whether the son did or did not validly ratify it. Unquestionably the manner in which Ramasawmi contrived to get into his hands two thirds of the property of Rangasawmi, partly through his daughter and partly through his sister, raises a very strong suspicion, to say the least, of unfair dealing against him; and if it had been shown that the instrument of 1871 had been executed by the plaintiff under his influence (as probably the lease of October 1869 was), it would be properly set aside. It must be borne in mind, however, that the plaintiff when he executed it had been of age two years, that he was sufficiently alive to his rights to be aware that the lease of 1869 was injurious to him, and to desire to set it aside, that he was residing with his wife's family, strangers it would appear to that of his adoptive mother, and that before executing the instrument he consulted members of his wife's family, upon whose advice he acted. It may be further observed that in a subsequent suit the plaintiff, about 12 months after, stated that he enjoyed the property of his adoptive father under this agreement.

Such being the evidence, and the Subordinate Judge, who had the advantage of hearing the witnesses, having found in favor of the validity of this document, their Lordships have come to the conclusion that there are no sufficient grounds for setting it aside.

The main question being thus disposed of, two subsidiary questions remain to be noticed.

It was the plaintiff's case, supported by some evidence, that he had never been allowed to take possession of any part of his adoptive father's property, while there was evidence on the other side that he had taken and kept possession of so much of it as he was entitled to under the deed of 19th August 1871. There is no issue and no express finding on this question in the Court below, but it may be assumed that the Judge adopted the contention of the defendants. The judgment of the High Court, however, assumes the plaintiff to have been wholly dispossessed, and that by all the defendants. Under these circumstances it seems to their Lordships that the case cannot be satisfactorily disposed of without a re-trial of this question, if, indeed, it has been tried at all, and that an express finding should be come to whether the plaintiff has been dispossessed, or kept out of possession, of all or any of the property to which he was entitled by the last-mentioned deed, and, if so, by which of the defendants.

It further appears that compensation money was paid to Lokambal by the Railway Department for lands taken from the one-third portion of the lands of Rangasawmi to which, under the deed of adoption of 5th July 1862 the plaintiff was entitled; the sum is stated by the plaintiff to be Rs. 2,500, by the defendant to be Rs. 1,700.

Their Lordships do not consider that, by the deed of 19th August 1871, the main object of which seems to have been to ratify the disposition which had been made of the specified properties mentioned in it as "having been excluded," and to assign to the widow a specific portion of the remaining land in lieu of maintenance, the plaintiff can be taken to have relinquished his claim to this money. An issue on this question was framed in the Court below, but it is not alluded to in the judgment. Their Lordships are of opinion that the question should be tried to how much of this sum the plaintiff is entitled; it will, of course, be open to the defendants to prove that the money received has been properly expended on the land, as they have alleged it to have been in their answer. On the legal effect of the plaintiff's covenant against alienation their Lordships do not think it necessary to give an opinion.

In accordance with the views which they have expressed, their Lordships will humbly advise Her Majesty that the judgments and decrees of both the

Lower Courts be reversed, and that it be declared that the parties are bound by the deed of 19th August 1871. That the High Court be directed to remand the case to the District Court of Trichinopoly for the trial of the following issues, viz. :—

1. Whether the plaintiff has been ousted or kept out of possession of all or any of the lands to which he was entitled under the said deed ; if so, by which of the defendants.

2. To how much, if any, of the said compensation money paid by the Railway Department he is entitled.

That the said District Court do return the findings on those issues to the High Court in accordance with the direction of the Code of Civil Procedure, and that the High Court do thereupon finally determine the case.

That each party do bear his own costs of this appeal, and that all the costs of the parties in the Lower Courts do abide the event of the final decision of the suit.

The 25th June 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Alluvial Land—Reg. XI of 1825, s. 4 cl. 1—Temporary Settlements—Usage—
River Gunduck.*

On Appeal from the High Court at Calcutta.

Rughoobur Dyal Sahoo and others

versus

The Maharajah Kishen Pertab Sahi.

In the absence of proof of a clear and distinct usage, the Privy Council were of opinion that there was no sufficient evidence to justify the finding of the High Court that the settlements made with the plaintiffs, though temporary, were made on the basis that the river Gunduck was the boundary line not only of the two Zillahs Sarun and Tirhoot, but of the estates appertaining to those districts ; but that the land in dispute was settled with the plaintiff's ancestors as the proprietors of alluvion, and had become an increment to their estate by gradual accretion under cl. 1 s. 4 Reg. XI of 1825.

There is no obligation on the part of the Government to assess permanently land which becomes an increment to an estate by gradual accession under the above clause. Nor does a temporary assessment reduce to a temporary estate, or to an estate of a limited and temporary character, the interest of the holder in the accretion, which was permanent, as being an increment to an estate which was permanent ; but it merely fixes the period during which the increment should be subject to the revenue assessed, so that the Government at the expiration of the settlement might be at liberty to raise it according to the value of the land.

This was an appeal from a judgment of the High Court of Calcutta of the 1st May 1876, reversing a decree of the Subordinate Judge of Sarun in the Bengal Presidency.

Mr. Doyne for Appellants.

Mr. Leith, Q.C., Mr. Cowie, Q.C., and Mr. C. W. Arathoon for Respondent.

The proceedings in India which had given rise to the appeal were in pursuance of an order of remand to try certain issues recommended by the Judicial Committee in August 1873. The remanded issues were decided by the local Court at Sarun in favor of the appellants, but that decree was reversed by the High Court. The litigation had lasted nearly twenty years in all. The

appellants are zemindars in Tirhoot, and the respondent is the Maharajah of Hutwah ; and the question was as to the title to certain alluvial land which had formed between the two estates.

Sir Barnes Peacock delivered the judgment of the Judicial Committee as follows :—

The facts of this case are very clearly stated in the judgment of their Lordships upon the remand in the year 1873.* It is clear that in 1837 a settlement of the lands in dispute was made with the predecessors of the plaintiff. That settlement was made at a revenue of Rs. 842 3 annas. In 1847 the settlement was renewed, and the predecessors of the plaintiff continued in possession of the lands from 1837, when the settlement was first made with them, down to the expiration of the settlement of 1847. Prior to the renewal of that settlement in 1857 the River Gunduck, which was to the south of the plaintiff's zemindary and to the north of the defendant's, had so completely changed its course that the lands in dispute, which were formerly on the north side of the river, were capable of being identified on the south side of it.

A question arose as to the renewal of the settlement of 1847, and the lands being then on the south side of the river, which was the acknowledged boundary between the districts of Sarun and Tirhoot, were then in the district of Sarun. Mr. Lantour, who was the Collector of Tirhoot, and who had formerly settled the lands when they were on the north side of the river, and were then in his district, had some doubt whether he had jurisdiction to re-settle them. The question was referred to the Commissioner, Mr. Tayler, who decided in favor of Mr. Lantour's jurisdiction, and directed him to renew the settlement with the owners of the plaintiff's zemindary, Sohagpoor, upon which an appeal was presented to the Board of Revenue, and they ordered the settlement not to be made with the owners of the plaintiff's zemindary, but with the owners of that of the defendant on the southern side of the river. It is in consequence of that order that differences have arisen between the parties as to whether the plaintiff was entitled to a renewal of the settlement in 1857 or whether the defendant was entitled to it.

The rule under the first clause of the 4th Section of Reg. XI of 1825 is that land gained by gradual accession, whether from the recess of a river or of the sea, is to be considered as an increment to the tenure of the person to whose land or estate it is thus annexed, "whether such land or estate be held immediately from Government by a zemindar or other superior land-holder, or as a subordinate tenure by any description of under-tenant whatever." The plaintiff claimed that the lands in dispute were formerly an increment to his estate by gradual accession, and that they had been settled with the owners of Sohagpore upon that basis. By the second clause of the fourth Section the rule before mentioned was not to be considered applicable to cases in which a river by a sudden change of its course breaks through and intersects an estate without any gradual encroachment, or by the violence of its stream separates a considerable piece of land from one estate and joins it to another estate without destroying the identity and preventing the recognition of the land so removed. The change of the course of the River Gunduck on the last occasion was a sudden change, and the land which had originally been settled with the plaintiff on the north side of the river was capable of being identified on the south side of the river. Therefore this land which had been in the possession of the plaintiff for twenty years and had been brought into cultivation by him, did not, according to the 4th Section of Reg. XI of 1825, belong to the owner of the zemindary on the south side of the river as having been gained by gradual accession. But a question arose whether in consequence of an established usage the river, however its course might be changed, was not to be considered as the boundary between the two zemindaries as it was between the two districts. The 2nd Section of the Regula-

* 20 W. R. 427 ; 2 Suth. P. C. R. 910.

tion of 1825 was relied upon by the defendant. By that Section it was enacted that, "Whenever any clear and definite usage of Shekust pywust respecting the disjunction and junction of land by the encroachment or recess of a river may have been immemorially established for determining the rights of the proprietors of two or more contiguous estates, divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage." The Sudder Board of Revenue thought that there was a clear and definite usage that under all circumstances the river should be the boundary between the zemindaries on the one side and those on the other. They say, "At the time of the permanent settlement, and since then, there has been, the Board observe, a distinct and clear usage that the main channel of the Gunduck should be the constant boundary between the two districts of Sarun and Tirhoot, and between the zemindaries on each bank divided by the river." They accordingly ordered a settlement to be made with the defendant, and in conformity with those directions a summary settlement of the lands, which are the subject of this appeal, was made with the defendant, the Maharajah of Hutwah, who obtained possession of the lands. Thereupon the plaintiff in January 1860 commenced this suit. He contended that the lands having been settled as an accretion to his zemindary on the north side of the river were his by virtue of proprietorship; and that being capable of identification, notwithstanding the change of the river, they belonged to him under cl. 2 s. 4 of the Regulation of 1825; and not to the defendant; and then the question arose whether there was such a custom as that which the Board of Revenue stated, namely, a custom that the river should be the boundary, not only of the districts, but of the zemindaries on either side.

The Principal Sudder Ameen tried the case, and he dismissed the plaintiff's suit upon some technical objections, and also upon the ground that the decision of the Board of Revenue that the settlement should be made with the plaintiff was final and conclusive. Upon appeal to the High Court they reversed that decision, and remanded the case to the Principal Sudder Ameen for re-trial.

The case afterwards came before this Board upon appeal, and their Lordships in their judgment of remand, alluding to the trial of the case by the Principal Sudder Ameen after the remand by the High Court, say:—"The opinion thus intimated clearly implies that the principal if not the only questions between the parties were whether the change in the course of the river having been sudden, and the lands being capable of identification, the case fell within the second clause, or whether the recession of the stream having been gradual, it had taken from the Tirhoot estate what had once belonged to it, and given what it so took to the Sarun estate by accretion in the proper sense of the term. The High Court seems to have assumed that the plaintiffs may once have had the permanent and proprietary interest in the lands, and altogether to have ignored the existence of the alleged usage as an element in the case. This seems to have misled the Principal Sudder Ameen who tried the cause on remand, for although in one part of his judgment he treats the temporary settlements with the maliks of Sohagpoor"—that is, the maliks of the zemindary on the north side of the river—"as having been made with reference to some such usage as that alleged, and therefore to have given them only a limited tenure, he omitted to try the issue whether the usage existed in fact." Their Lordships afterwards went on to say:—"The first settlement certainly purports to have been made with the then maliks of Sohagpoor in the character of proprietors of the alluvial land settled; but in their Lordships' opinion it is doubtful whether they were treated as proprietors by reason of the alleged usage, or because the deara land was supposed

to have formed by gradual accession on their estate, and to have become an increment thereto within the meaning of the first or of the latter part of the third clause of s. 4 of Reg. XI of 1825. Their Lordships have not before them the whole settlement proceedings, and the Board of Revenue, which presumably had access to them, has stated that the settlements were made in accordance with the supposed usage. The proceedings which are before their Lordships are not altogether inconsistent with this proposition. On the contrary, they contain passages which seem to favor it, though they do not, taken as a whole, support the finding on this point of the Principal Sudder Ameen. From what has been said above, it plainly appears that the material thing to be determined in this case was the existence of the alleged usage, yet the issue upon that point has never been tried." Their Lordships finally remanded the case in order that two new issues should be tried; "first, whether the land in dispute was settled in 1837 with the then maliks of Mouzah Sohagpoor as the proprietors of alluvion which had become an increment to their estate by gradual accretion, or upon what other grounds such settlement was made; the burden of proving the affirmative of the first part of this issue to be on the plaintiffs. Secondly, whether there was at the date of the permanent settlement, and has since been, a clear and definite usage that the main channel of the River Gunduck should be the constant boundary, not only between the districts of Sarun and Tirhoot, but also between the zemindaries on each bank divided by the river. The burden of proving the affirmative of this issue to be on the defendant."

The case then went down and was re-tried upon those issues, and further evidence was given on the part of the defendant to show that there was such a usage. The Subordinate Judge, upon the evidence, found that no such usage had been proved; and he also found on the first issue that the settlement in 1837 was not made upon the ground of the alleged usage under s. 2 Reg. XI of 1825, but on the ground of their proprietary title under the provisions of cl. 1 s. 4 of that Regulation, that is to say, that the land was settled in 1837 with the owners of Sohagpoor as the proprietors of alluvion which had become an increment to their estate by gradual accretion. An appeal was preferred from that judgment to the High Court, and that Court overruled the decision of the Lower Court upon the finding on the first issue, and they abstained from coming to any conclusion upon the second issue. There certainly is no sufficient evidence to justify their Lordships in finding that there was such a clear and definite usage as that stated in the second issue, and in overruling the decision of the Lower Court upon that issue upon which the High Court have expressed no opinion.

Mr. Justice Kemp, one of the learned Judges of the High Court who decided the case upon appeal, held that the Subordinate Judge was wrong in finding that the lands had been settled with the owners of Sohagpoor in 1837 upon the ground of their proprietary title under cl. 1 s. 4 of the before-mentioned Regulation. At page 237 of his judgment he does not quite accurately state what the issue really was. Speaking of their Lordships' judgment on remand, he says: "They then remark, 'that if it should appear that the alleged usage, that is, the usage set up by the defendants, namely that the River Gunduck is the boundary between the two zillahs of Sarun and Tirhoot, exists, and that the settlements were made on the basis of that usage, or' (and these observations are very important) 'for any other reason the interest of the maliks of Sohagpoor in the land in dispute was of a limited and temporary character and had expired, that would be fatal to the plaintiff's suit.'" There was no doubt that the river was the boundary between the two zillahs of Sarun and Tirhoot; but the real question was whether there was a clear and established usage that that river should be the constant boundary between the zemindaries on either side. That was the question as to usage which their Lordships intended to be decided.

On reversing the decision of the Lower Court upon the first issue, Mr.

Justice Kemp says: "Then comes the document to be found at page 33, Appendix 1, which is a proceeding of the Deputy Collector of Tirhoot, Mr. Edward De Rozario, dated 28th November 1837. At page 35 he says that, 'Having held a local enquiry and examination I effected a temporary settlement for seven years from 1245 to 1251 Fusli, with Jugdeo Narain, the proprietor of the bureri lands above mentioned,' that is, the lands of Sohagpoor." That does not affect the case at all. He merely says that he had made a temporary settlement with the owners of Sohagpoor. Mr. Justice Kemp proceeds, "Then follows, at page 41, a copy of the report of the same officer, viz., Mr. Edward De Rozario, the Deputy Collector of Tirhoot, to his immediate superior, Mr. Campbell. Before referring to this report we notice a passage in the settlement proceeding of Mr. De Rozario, which is to be found at page 39, Appendix 1. He says, " 'The proprietors of Mouzah Bhukain, etc., Pergunnah Goa, Zillah Sarun, were given to understand that a settlement of the land that has accreted from the Gunduck cannot be made contrary to the line of demarcation, namely, the River Gunduck.' Returning to the Report of Mr. De Rozario, submitting his proceeding to his immediate superior, we find at page 42, paragraph 6, of that Report that the petition of the maliks of Bhukain, in which they had claimed for an exception to the established usage of the recognised boundary of the main channel of the Gunduck to be made in their favor, was opposed to all regulations and was inadmissible." Those two documents are set out in the present record, first at page 44, in which Mr. De Rozario says, "Therefore the proprietors of Mouzah Bhukain, etc., Pergunnah Goa, Zillah Sarun, were given to understand that a settlement of the land that has accreted from the Gunduck cannot be made contrary to the line of demarcation, namely, the River Gunduck." He does not say that a clear and definite usage existed that the River Gunduck was to be the boundary between the two zemindaries. The other document to which the learned Judge refers is at page 47 of the Record, and is contained in a letter to Mr. Campbell, who was the Deputy Collector in charge of khas and resumed mehals in Tirhoot. That letter was dated the 16th February 1838, and contains the passage to which the learned Judge refers: "The petition of the maliks of Bhukain, etc., Zillah Sarun, for exception to the established boundary of the main channel of the Gunduck in opposition to all regulation was inadmissible, and their unfounded officiousness pointing out the permanently assessed land as portion of the alluvion from a puerile motive." To say the least of it, it is very ambiguous what was meant by that statement. But in the last paragraph of that letter, at page 48 of this Record, paragraph 9, he says: "These lands established as an alluvion of the estate registered in the name of Futteh Sing, descending on his demise to his sons Gunga Persad and Jugdeo Narain Sing, with the latter as the surviving proprietor, I have, under Reg. XI of 1825 effected a temporary settlement for seven years, from 1245 to 1251 Fusli inclusive, on the sudder jumma of Sicca Rs. 789 9, or Co.'s Rs. 842 3 2, which I now have the honor to submit to your approval." If Mr. De Rozario had relied upon a clear and established usage that the river was, under all circumstances, to be the boundary between the two zemindaries, it was unnecessary to say that it had been established that the lands were an alluvion of the estate, etc. It would have been sufficient to say they are to the north of the river, and consequently, according to the established usage, are part of the zemindary on the northern side of it. It appears, therefore, to their Lordships that the lands were settled with the predecessors of the plaintiffs as an alluvion of their estate, and that, as far as the statements in the letters go, they do not establish that it was made with the plaintiff upon the ground of there being an ancient and established usage that under all circumstances the River Gunduck should be treated as the boundary between the two zemindaries. Having referred to those documents, Mr. Justice Kemp proceeds to say that the settlements were merely temporary. He says, "These are all the proceedings of

any importance with reference to the first temporary settlement made with the plaintiffs by the revenue authorities. The second settlement was made for ten years with the plaintiff, from 1846 to 1856 by Mr. Deputy Collector. At page 45 will be found the proceeding of that officer with reference to this second temporary settlement made with the plaintiff. That proceeding was before their Lordships of the Privy Council." It does not appear that the second settlement at all affected the case; it was merely a renewal of the settlement of 1837, and if the settlement of 1837 had been made on the principle of established usage, the second settlement followed upon the ground of that usage. If, on the contrary, it was made with the plaintiff as the proprietor of an estate to which the lands had become an accretion by gradual accession, then the second settlement was made upon the same principle. Mr. Justice Kemp proceeds, "The next proceeding is at page 55. This was not before the Privy Council, but was subsequently filed after the remand by the plaintiffs. It is merely a letter of the Collector forwarding the proceedings connected with the temporary settlement concluded with the plaintiffs. But a passage has been referred to in it by the pleader for the plaintiffs, in which the Collector says that a settlement has been concluded for a period of ten years with the heirs of Gunga Persad and Jugdeo Narain as maliks of the Kurrari Mehal." That shows that the settlement was made with them, not in consequence of any known and established usage, but upon the ground of the ordinary rule under Reg. XI of 1825. Then he says, "Having reviewed the documents filed by the plaintiffs both before and after remand, we come to the decision upon the first issue laid down by their Lordships of the Privy Council; and as after a careful consideration we have come to a conclusion different to that which the Subordinate Judge has arrived at, we shall confine our decision to the finding on the first issue laid down, inasmuch as we consider it unnecessary to enter into the second issue laid down by their Lordships of the Privy Council. We are of opinion that the settlements made with the plaintiffs were temporary settlements, and were made on the basis that the Gunduck was the boundary line, not only of the two Zillahs Sarun and Tirhoot, but of the estates appertaining to those districts; that the land in dispute was settled with the plaintiffs on temporary leases, and that those settlements were of a limited and temporary character. Such being the case, to use the words of their Lordships, this finding is fatal to the plaintiff's suit."

With reference to the settlements being of a temporary character, we must consider what the law is upon the subject. If this accretion belonged to the plaintiffs by virtue of the first clause of s. 4 of Reg. XI of 1825 as lands which had been gained by gradual accession to their estate, then by virtue of the first clause of that Section it became an increment to the plaintiff's estate, and the property became his property. The words are: "When land is gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landowner, or as a subordinate tenure of any description of under tenant whatever; provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Reg. II of 1819, or of any other Regulation in force." Assume it to be a case within this Section, the land became the property of the predecessors of the plaintiffs liable to be assessed by the Government for revenue; but there was no obligation on the part of the Government to assess it permanently, nor would it have been proper to do so, because at the time when it

was first annexed it was mere sandy soil scarcely culturable, and was so reported by Mr. De Rozario. In his report at page 45, he says, "At first he"—that is Jugdeo Narain Sing, the plaintiff's predecessor—"raised a number of pleas as to his inability to pay the rent,"—that is, the revenue,—“and that the diara will not remain in existence, owing to the force of the River Gunduck. Upon this he was made to understand that the whole of the land is somewhat like a sandy desert, and, of course, after the lapse of some time it will become culturable, and yield a great profit.” Then he assented to take it at the revenue, which the Government fixed at the time, of Co.'s Rs. 842, and began to cultivate it; but the Government only assessed temporarily that which was his permanent property. A temporary assessment did not reduce to a temporary estate, or to an estate of a limited and temporary character, the interest of the plaintiff in the accretion, which was permanent, as being an increment to an estate which was permanent, but it merely fixed the period during which the increment should be subject to the revenue of Rs. 832, so that the Government at the expiration of the settlement might be at liberty to raise it according to the value of the land. At the expiration of the settlement of 1837 they renewed the settlement at a revenue of Rs. 1,500. The land had then become improved. The plaintiff remained in possession of the land under temporary settlements from the year 1837, for a period of nearly 20 years, down to the year 1857, and during the whole of that time he paid revenue to Government, partly during the time when the land was little better than a sandy desert. The plaintiff and his predecessors cultivated the land, and so improved it that in 1847 it was assessed at Rs. 1,500. The plaintiff was during twenty years in occupation of the land, when at the expiration of the settlement of 1847, in consequence of a sudden turn of the River Gunduck, it was on the southern side of the river capable of being identified, and still belonged to the plaintiff, unless there was a clear and definite usage that the River Gunduck was to be the boundary, not only between the two districts, but between the zemindaries on either side.

Such a custom has not been proved ever to have existed. The Subordinate Judge has found that there was no such usage. The High Court has not considered the evidence or reversed the finding of the Subordinate Judge upon the second issue, and their Lordships are of opinion that the established usage was not made out. The usage not having been proved, their Lordships are of opinion that there was no sufficient evidence to justify the finding of the High Court that the revenue settlements were made on the basis that the River Gunduck was the boundary line not only of the two zillahs, Sarun and Tirhoot, but of the estates appertaining to those districts; on the contrary, they are of opinion that the settlements, though temporary, were made with the predecessors of the plaintiff as an alluvion to the estate of Sohagpoor, which in 1837 was registered in the name of Futteh Sing, and upon the ground that the predecessors of the plaintiff were the maliks and proprietors of the estate, and consequently that the finding of the Lower Court upon the first issue, under the remand from this Board, was a correct finding, and that the reversal of that finding by the High Court was erroneous.

They will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that it be declared that the plaintiffs are entitled to the lands in dispute, and to have a settlement made with them, and that it be ordered that the plaintiffs do recover possession of the said lands, with mesne profits, from the date of the institution of the suit, such mesne profits to be assessed in execution of the decree; and that the respondent do pay the plaintiffs the costs in all the Lower Courts and the costs of the former appeal to Her Majesty in Council as already taxed as part of the costs in the cause; and their Lordships order that the respondent do pay the costs of this appeal.

The 28th June 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Contract—Fraudulent Misrepresentation—Re-formation.

On Appeal from the High Court at Calcutta.

Darimbya Debbya

versus

Maharajah Nilmoney Singh Deo Bahadoor.

In a suit by a widow to have a certain contract of sale, which her late husband entered into with the defendant, re-formed on the ground that her husband was induced to enter into it by fraudulent misrepresentations on the part of the defendant, the Privy Council, having regard to the probabilities of the case, to the fact that the action was not brought until the husband (the person who alone was able to throw much light upon it as far as the plaintiff's case was concerned) was dead, and considering the character of the evidence, came to the conclusion that, although there might be some suspicion of misrepresentations having been made to the husband, no sufficient case had been made out by the plaintiff to enable her to set aside the contract on the ground of fraud ; and intimated that, even if plaintiff had been entitled to set aside the contract on that ground, it did not follow that she would have been entitled to the relief she prayed for.

In this case we have to deal with two suits. The first suit is by the widow of one Gobind Pershaud Pundit against the Rajah of Pachete, in which she seeks to have a certain contract of sale which her husband entered into with the Rajah re-formed, on the ground that her husband was induced to enter into it by fraudulent misrepresentation on the part of the Rajah. She states her case in this way : that the Rajah settled a talook consisting of 247 mouzahs with her husband in consideration of a premium of Rs. 42,411, and a rent of Rs. 48,070 ; and she alleges that her husband, "relying on the word of the Rajah, gave a kubooleut without enquiring into the mouzahs and the rents ; and on commencing to make the collections it has appeared since that time up to the present that with regard to the mouzahs, the list of which and the particulars of the rents thereof which are objected to are written below according to the objections of their tenants and the persons in possession, and on account of certain lands not being ascertained, the rent of Rs. 16,045. 0. 5. 1. was not realized from the mehal. Information of this was given to the zemindar defendant and he promised to grant a remission of the rents objected to, etc. ; but up to this time he has not made any settlement. I therefore bring this suit for obtaining an abatement of the rent of Rs. 16,045 5 gundas 1 cowrie, and a refund of the consideration money proportionate to that amount."

It would appear that the husband of this lady was a man of considerable property, of much intelligence and enterprise, and that he bought on the 2nd June 1870 a putnee talook of the Rajah of Pachete of great extent, comprising no less than three pergunnahs, and acquired with that putnee the right to receive rents from a number of under-tenants who held under different tenures. The bynama or deed of sale of this property is the document which the widow seeks to have reformed. On the other hand, the Rajah brought against the widow an action for the amount of rent due. The course of litigation may be thus described : The case in the first place came before a Subordinate Judge, who came to the conclusion that no case of fraud had been made out against the Rajah upon the evidence, chiefly documentary, then before him, and further intimated that if a case of fraud had been made out, the plaintiff, although she might be entitled to set aside the contract, was not entitled to the relief she prayed for. An appeal was preferred from this judgment to the High Court, and the High Court on the 2nd May 1864 intimated that there was some *prima facie* evidence of fraud, inasmuch as it

appeared that, at all events with respect to some of the mouzahs mentioned in the bynama, there had been a material misrepresentation on the part of the Rajah of the rents which were received from them. Accordingly the case was remanded for further enquiry. Upon that a local investigation by an Ameen was directed by the Principal Sudder Ameen, the report of which extends over upwards of one hundred pages. The Ameen enquired with reference to each of the several mouzahs or tenures comprised in this putnee talook, in the first place, what rent was mentioned in the deed of sale; secondly, what rent the plaintiff stated as realizable; thirdly, what the plaintiff stated as unrealizable; fourthly, what was proved to be the excess of rent mentioned in the deed of sale above that actually realizable by the plaintiff, and then the rent of which the plaintiff is entitled to an abatement, and the amount of consideration money which she was entitled to have refunded. The Ameen, applying this investigation to each of the mouzahs separately, came to the conclusion, with respect to a great number of them, that the plaintiff was unable to obtain as much rent as that which the late pundit paid to the Rajah, and which the Ameen appears to have assumed to be that which the tenants had before paid to the Rajah; and reported that the plaintiff was entitled to relief upon the footing of the difference between the rent realizable and that which ought to have been realizable according to his view. The defendant, the Rajah of Pachete, did not appear before the Ameen, on the ground that he had preferred an appeal to the Privy Council against the judgment remanding the case. Their Lordships agree with the High Court in regarding this as an insufficient reason. The report of the Ameen was confirmed, with some reduction of the amount, by the judgment of the Principal Sudder Ameen, who found that gross fraud was practised by the Rajah upon the plaintiff; he also found that in a document which will be subsequently referred to,—the “sale bund,” as it is sometimes called,—there was a forgery on the part of the Rajah. The High Court reversed the decision of the Principal Sudder Ameen. They came to the conclusion that there was no forgery in the sale bund, and that there was no sufficient fraud proved on the part of the plaintiff to entitle her to the relief which she prayed. They also intimated a very serious doubt whether, even assuming that the plaintiff had been entitled to set aside the contract on the ground of fraud, she was entitled to the remedy which she sought. The High Court also affirmed the right of the defendant Rajah to obtain the full amount of rent which he claimed. From this judgment the present appeal is preferred.

It is to be observed that the late pundit entered into negotiations with respect to this purchase in the year 1859. He signed the sale bund, which contained an enumeration of the mouzahs purchased, together with the rent payable for each, on the 24th January 1860—that is, five months before the actual deed of sale was executed; and the observation arises which has been made by the High Court, that undoubtedly he had time during that interval, if he were so minded, to make any enquiries he pleased for the purpose of satisfying himself on the subject of his purchase. Whether he did make any enquiries or not, there is certainly no direct evidence. There is a letter from him by which it appears that he was disposed to take so much of the property as lies in one of the pergunnahs, namely, Chowrasse, at 50 per cent. above the current rent,—a letter which seems to have been ignored by the Principal Sudder Ameen. It further appears that on one or two occasions he did make representations to the Rajah with respect to a difficulty which there was in obtaining the rent from some of the mouzahs, and that the Rajah paid attention to his remonstrances. The value of this portion of the evidence is but slight; but, as far as it goes, it indicates that he was awake to his own interests. The bynama was executed on the 2nd June 1860, and contains a schedule corresponding, with a slight variation, to the list in the sale bund of the rents which he is to pay to the Rajah. Gobind Pershaud Pundit lived for 18 months after the completion of the sale. On account of some riot or

affray he was imprisoned in December 1860; he remained in prison for 12 months and died in December 1861. It appears that throughout the whole of that time he paid the stipulated rent according to the terms of the deed, making no complaint of any misrepresentation which had been practised upon him, and their Lordships cannot help thinking this a very material consideration. In the course of 18 months he and his agents would have time to ascertain what rents he was able to realize and what the general state of the property was; and there seems a strong presumption that if he had any reason to suppose that he had been defrauded he would have made some complaint in his lifetime. It is only after his death that his widow for the first time sets up the case of her husband having been imposed upon. That case is supported by the evidence of two witnesses. Neither of them is the dewan or the collector of the pundit, although it appears that the pundit had a dewan. But the first of them states that he became collector for the widow after the death of the pundit. The effect of the evidence of those two witnesses, servants of the plaintiff, is in general terms that the pundit relied upon the representations of the Rajah, that he was shown the Rajah's rent roll, and that he agreed to give the sums which are specified in the deed of sale on the strength of that rent roll. On the other hand a number of witnesses were called on the part of the Rajah who swore that the pundit was informed that the jumma entered in the rent roll was not in all cases that which was received, but in several cases a good deal more. It is stated that he, being a speculative man, and the owner of coal mines, silk and indigo factories, and having extensive operations, took this land, a large portion of which would appear to be waste, with the view of cultivating it or using it in various ways ancillary to the trades which he was carrying on. There is also evidence that there had been offers from other persons of an additional rent amounting to 50 per cent. upon so much of the property as lies in Pergunnah Chowrasse, one of the three pergunnahs in which the property was situated.

If these witnesses were to be believed, undoubtedly there would be no case of imposture which would entitle either the pundit or his representatives to set aside the sale. With respect to the alleged forgery their Lordships agree with the High Court that it is by no means established. Under these circumstances, having regard to the probabilities of the case, to the fact that the action was not brought until the person who alone was able to throw much light upon it, as far as the plaintiff's case was concerned, was dead, and considering the character of the evidence, their Lordships have come to the conclusion, that although there may be some suspicion of misrepresentations having been made to the pundit, no sufficient case of fraud has been made out to induce them to reverse the decision of the High Court.

They think it right further to observe that they must not be understood as intimating any opinion that even if the plaintiff would have been entitled to set aside the contract on the ground of fraud she would have been entitled to such relief as she seeks in the present suit.

On these grounds their Lordships will think it their duty humbly to advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal. Inasmuch as the Rajah has not thought fit to appear at the Bar, the appeal will be dismissed without costs, although some costs may perhaps have been incurred.

The 5th July 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Zemindary of Vegayanimapet—Joint Hindoo Family—Custom—Primogeniture—
Partition—Succession—Widow.*

On Appeal from the High Court at Madras.

Vadrevu Ranganayakamma

versus

Vadrevu Bulli Ramaiya.

In a suit for the recovery of the zemindary of Vegayanimapet, it was not disputed that the zemindary, according to an ancient custom, was impartible, and that, though it was part of a joint family property, it had for many years been held and enjoyed by the eldest male member in the direct line, but it was found that a partition took place, that the family became divided, and that the zemindary was allotted to the then eldest member as his separate share of the joint family property. It accordingly descended to his son, upon whose death it was held that his widow, the appellant, was entitled to succeed.

This was an appeal from the decision of the High Court of Madras, of the 18th December 1877, reversing a judgment of the Local Courts, at Cocanada, in the Madras Presidency.

Mr. Leith, Q.C., and Mr. Mayne for Appellant.

Mr. Doyne and Mr. E. B. Michell for Respondent.

The eldest branch of the family of the late Zemindar of Vegayanimapet having become extinct, the respondent, as the eldest son of the next senior branch of that family, instituted a suit against the appellant, as the zemindar's widow, for possession of the estates, which consisted of ten villages, and were estimated to be worth Rs. 84,000. The respondent alleged that succession to the zemindary was governed by the rule and custom of primogeniture; while the appellant, the widow, denied this, and asserted that her husband had left a will which gave her authority to adopt a son, which authority, however, she had not exercised. The Local Court rejected the plaint, but the High Court on appeal thought the succession by primogeniture established, and thus that the respondent was entitled to succeed in preference to the widow. The latter now appealed to Her Majesty in Council.

The judgment of the Judicial Committee was as follows:—

This is an appeal from a decree of the High Court in a suit in which the respondent was the plaintiff, and which he instituted against the appellant, for the recovery of the zemindary of Vegayanimapet in the district of Cocanada. It is not disputed that the zemindary, according to an ancient custom, was impartible, and that though it was part of the family property, it had for many years prior to and including the time of Somappa, whom it will be convenient to call Somappa the first, been held and enjoyed by the eldest male member in the direct line. Somappa the first had five sons, Sundarappa, who may in like manner be called Sundarappa the first, Umapati, Jogiraju, Bhunasunkarudu, and Narisimulu. Sundarappa the first, the eldest son, died in the lifetime of his father, leaving a son, Somappa the second, who was at the time of his father's death about three months old. He came of age about the year 1826. Somappa the second died, leaving a son, Sundarappa the second, who died without issue on the 18th December 1865, leaving a widow who was the defendant in the suit. There can be no doubt that if the family had continued joint, and the zemindary had continued to be part of the joint family estate, the widow could not have inherited from her husband: but it is contended that a partition took place, that the family became divided, and that the zemindary was allotted to Somappa the second as his separate share of the joint family property. If that were so, according to the decision in the case of *Periasami and others v. Periasami and others*, in the 5th Law Reports, Indian

Appeals, p. 61,* the estate, upon the death of Sundarappa the second, descended to the defendant, his widow. It is said that the partition was effected by a sunnud or samakhia which was entered into on the 29th June 1809. It was at one time contended that this document was not a genuine document, but the Subordinate Judge found that it was genuine, and the High Court acted upon it as a genuine document. Their Lordships see no reason, after the finding of the two Courts that this was a genuine document, to distrust that finding or to hold that it was not genuine. It must therefore be treated as a genuine document executed by the four brothers of Sundarappa the first, who were the surviving sons of the first Somappa. It was not an arrangement which was then for the first time come to, but an arrangement which had been come to by them in conjunction with their father, the first Somappa, who at that time constituted the head of the family. The object of the sunnud is thus recited in it: "In order to prevent any dispute arising among us in future in respect of our ancestral acquisition, namely,"—then specifying the zemindary in question, and other joint property of the family, the sunnud proceeds, "Our father Somappa made certain arrangements with us, four brothers, and Somappa the elder brother's son. This we have thought it proper to reduce to writing as follows: As the Vegayanimapet mutta zemindary,"—that is, the zemindary in dispute, should be held by Somappa, son of the eldest Sundarappa, "Umapati"—that is, the second brother—"should take care of the said zemindary until Somappa attains proper age, and deliver the same to him on his attaining his age of discretion. Besides, Somappa should enjoy the inam lands in the village of Rajavaram." It was contended that this arrangement was not that Somappa the second should take the zemindary as his separate share upon a partition, but that it was still to remain the joint family property, to be held and enjoyed according to the ancient custom. But it appears to their Lordships that it was the intention to effect a partition, and that Somappa the second should take the zemindary and the inam lands as his share of the joint family property, in accordance with the arrangement made with his grandfather, the first Somappa. Somappa the second was a child 15 months old at that time. The document then proceeds to specify certain other portions of the joint family property which were to be held and enjoyed by each of the four brothers respectively. It then proceeds: "Somappa and we four also should take in equal shares the inam lands, gardens, etc., standing in Umapati's name in the villages attached to Vegayanimapet mutta." It was contended at one time that the object of this was that the sons should take certain portions of the joint family property, not as a separate estate upon partition, but in lieu of maintenance which would otherwise have been allowed by the member of the family who took the zemindary under the custom. But it is evident that that could not be so, because each of the four brothers was agreeing with the others that each should hold the estates allotted to them respectively. Besides, the last clause—"Somappa and we four should take in equal shares the inam lands"—shows that the document was not providing for maintenance, for Somappa the second would not provide maintenance for himself by dividing the inam lands in equal shares with his uncles. That clause also tends to show that the document was intended to carry into effect a partition which had been made with the consent of the father. Then it goes on, "Until Somappa attains his proper age, we all should jointly manage the affairs of the said mutta." That is a little inconsistent with the previous clause, which says that, until Somappa should attain his age of discretion, Umapati should take care of and manage the zemindary. The inconsistency does not seem to be very important, but the words undoubtedly are: "Until Somappa attains his proper age, we all shall jointly manage the affairs of the said mutta, discharge the debt of about Rs. 20,000, due up to date, and perform Somappa's marriage and Upanayanam, and the auspicious ceremonies relating to

* See *ant.*, p. 508.

us four. After Somappa attains his proper age, the egayanimapet mutta zemindary and the inam lands allotted to him should be delivered over to him, and each should confine himself to the share allotted to him." Now it may be doubtful whether the words "allotted to him" refer to the inam lands only or also to the zemindary. There is nothing to show that they did not apply to the zemindary. The words are: "After Somappa attains his proper age, the zemindary and the inam lands allotted to him should be delivered over to him, and each should confine himself to the share allotted to him," thereby treating the allotment to Somappa the second in the same manner as the other portions of the joint family estate had been allotted to the other four brothers respectively. Then having partitioned the lands, they next proceed to partition the jewels. That is inconsistent with the supposition that the document was intended merely to provide allotments in lieu of maintenance. The document proceed thus: "Each should take to himself the jewels and silver articles in his possession. Sundarappa's jewels and silver articles, etc., as per list prepared by Umapati on Wednesday the 29th June 1808, should be in Umapati's possession until Somappa attains his proper age, and should thereafter be delivered to Somappa,"—the word "should" being used instead of "shall."

It was intended that when Somappa the second should attain his full age the zemindary was to be held by him. He was also to enjoy the inam lands which were allotted to him, and they were to be delivered over to him, together with the jewels which, according to the terms of the agreement, were to be his separate property. "The above terms should be acted up to. Except under these stipulations, no claim whatever can be urged by one against another in any manner. To this effect is this samakhia sunnud (deed of arrangements) entered into by us four of our own accord."

It is said that Somappa the second did not ratify this agreement, but the grandfather was the person who made the arrangement with his four surviving sons, and, in fact, it was ratified by Sundarappa the second, who set it up, and claimed the benefit of it in the answer which he put in in a suit instituted against him by the widow of one of the members of the family for maintenance, and which will be afterwards referred to. Furthermore, if the document did not effect a partition, Somappa the second, the grandson, and Sundarappa the second, his son, were entitled to a share in the other portions of the joint family property. But they have never had it. The other brothers and their descendants have retained the property which was allotted to them. The sunnud was executed by the four brothers; they have acted under it, and had the benefit of it. Sundarappa the second set it up in his defence in the suit as a document binding on all the parties. So far then as assent is concerned, their Lordships are of opinion that the document was assented to by Sundarappa the second, who was then representing his father's share in the estate which had descended to him after the death of his father.

The Subordinate Judge held that by means of this document a partition was effected of the joint estate, and that the zemindary fell to the share of Somappa the second. The High Court held, upon appeal, that the parties had no intention of relinquishing their rights in the zemindary, or to make it separate property. One of the issues raised in the suit was whether the family is divided. The Subordinate Judge entered into a very careful and minute consideration of all the evidence which had been adduced on that issue, and he also examined all the subsequent acts and conduct of the parties. Having heard the witnesses of the plaintiff, who were called to prove that the family continued joint and was never divided, he disbelieved them, and came to the conclusion that the family was a divided family. Unfortunately the High Court has expressed no opinion upon that point, nor did they allude to the several acts of the parties upon which the Subordinate Judge relied in support of his view that the family was divided, and that it was the intention of the parties to allot the zemindary to Somappa the

second as his separate share of the joint family estate. No members of the family were called by the plaintiff, but members of the family were called by the defendant, and the learned Judge believed them. According to the terms of the sunnud Umapati or the four brothers—it matters not which—were to manage the zemindary until Somappa should attain his full age. He did attain his full age in 1826. This must now be treated as a genuine document, and Umapati ought, when Somappa the second arrived at age, according to the terms of the agreement, to have handed him over the estate free from the debt of Rs. 20,000, which were to be discharged out of the profits of the estate during the minority. He ought also to have handed him over the jewels; but either he or the four brothers remained in possession during the whole of Somappa the second's minority, and when he arrived at age Umapati did not deliver over the estate. In 1833 Somappa the second was obliged to bring an action against Umapati to recover it. It is probable that Somappa the second at that time did not know of the sunnud. It is not likely that when Umapati was fraudulently keeping the estate, which by the very terms of the deed he was to hand over to him, he would inform him of the sunnud, which showed that he was to hand over the estate to him on his attaining proper age. The probability is that Umapati, who was so dishonest as to retain this young man's estate after he came of age, did not show him or inform him of the deed. Somappa the second commenced his suit in 1833, and he then relied upon the family custom, by which the zemindary was to be held and enjoyed by the eldest male member of the family in the direct line of succession. He said: "My grandfather sent a petition sealed and signed by him and attested by witnesses, under date the 29th September 1798, in which it is clearly stated that, according to the custom 'obtaining from generation to generation in our family, the eldest line inherits the zemindary, that the other members of the family receive maintenance; that this was the case for the seven generations past; that after his death his eldest son and my father, Sundarappa, should, according to the custom, succeed to the zemindary.'" It is said that that is a strong argument against him with reference to the construction of the sunnud,—that he claimed not by virtue of the sunnud, but by virtue of succession, according to the custom. The suit was defended, and the defendant in his answer stated, "The custom of the family has been for the eldest surviving son to succeed to the zemindary, and for the other members of the family to receive an allowance; that defendant's grandfather had six sons. The eldest was Venkata Jogi. He died before his father, and the second son, Somappa, defendant's father, succeeded on his father's death, and paid an allowance to Venkata Jogi's son as long as he lived; that defendant, being the eldest surviving son at the time of his father's death, he succeeded, and his father executed a sunnud appointing defendant his successor, and fixed an allowance of 70 pagodas a year to be paid to his other sons." So that he set up that according to the custom the estate had descended to him, knowing that he had executed the document in which he had admitted that the estate was to go to Somappa the second, and that he was to hold the estate for him during his minority, and hand it over to him upon his coming of age. After retaining the estate for five years and more after the young man had become of age, he set up the defence that it never was his, and that it descended to him Umapati himself. The Provincial Court of Appeal decided that the plaintiff, Somappa the second, was entitled to the estate according to the family custom. The decree was as follows:—"The Acting First Judge, on the above grounds, decrees that the plaintiff is the legal heir of his grandfather, that the zemindary of Vegayanimapet should be placed in his possession when the attachment by the Collector is removed;" and then he awarded to the plaintiff damages Rs. 6,208, the net produce of the zemindary during the five years that Umapati had improperly retained it in his possession. Their Lordships are of opinion that the young man Somappa the second, at the time when he commenced the suit, had been kept by Umapati in ignorance of the

sunnud which afterwards came to his knowledge; and there is nothing to show that he knew of the sunnud when he presented the petition of the 4th September 1845, at page 27 of the Record, in which he relied upon the family custom.

In 1864, Suramma, the widow of Mritianjayudu, a son of Bhimasankaradu, the third brother, sued Sundarappa the second for maintenance (page 63 of the Record), and the defendant in the suit set up the sunnud as a defence (pages 30-31). In his answer he said: "During the minority of my father Somappa, son of Sundarappa, who was the eldest of the five sons of my great grandfather Somappa, a samakhia sunnud or deed of arrangement was entered into, and on the strength thereof my zemindary passed to my father for his share under the revised decree passed in suit No. 47 of 1834 on the file of the late Provincial Court." This is the defence by which, as has already been observed, Sundarappa the second ratified the sunnud. He set up the sunnud, and stated—not quite accurately certainly—that the father had recovered the zemindary on the strength of it. The father had not recovered the zemindary on the strength of it, although he had recovered the estate. At page 63 of the Record there is the judgment of the District Moonsiff's Court, in which the District Moonsiff says: "It appears clearly from the evidence for the defendant and from the samakhia (deed of arrangement) that the Pasupalli Mokhasa and the lands in Sarpavaram, and other villages, came to the share of the plaintiff's father-in-law. As the plaintiff has failed *in toto* to prove the first and third points, *i.e.*, as to divisions;"—(it means as to there having been no division of the estate)—"and as to the possession of property, it is not necessary to record with reference to them any reasons other than those given above." That decision was afterwards upheld on appeal by the Court of the Principal Sudder Ameen, who held that the widow was not entitled to maintenance, upon, amongst other grounds, that her husband had admitted that the families were divided.

Another document relied upon by the Subordinate Judge was one which showed that Sundarappa the second had mortgaged the zemindary, from which the Judge inferred that he had treated it as his separate and distinct property, and not a portion of the joint property which he was holding separately by virtue of the custom. Their Lordships are of opinion that no great importance can be attached to the mortgage, because, even if Sundarappa the second had held the estate by virtue of the family custom separately from the other co-members of the joint family, he would have been entitled to mortgage it during his life, although it would not have been binding upon the other members of the family after his death. Their Lordships, therefore, do not attach that importance to this document which the Subordinate Judge appears to have done.

The document No. 10 of the 4th February 1873 has next to be considered. It is a document by which some of the brothers sold a portion of land to the widow. It is not important so far as the sale is concerned, except that it shows that they were treating themselves as separate and not as members of a joint family; but it is important as showing that in the document itself the defendant is described as the zemindarni of this zemindary. She is described as "the widow of the late Sundarappa, and zemindarni" of the particular zemindary, and that document is attested by the plaintiff himself. It is not always that a witness to a document knows what the contents of the document are, or how the parties have been described, but it frequently occurs in native documents that a man signs as a witness to show that he is acknowledging the instrument to be correct; but whether this is so or not, it appears that she was described as the owner of the zemindary, and that the plaintiff attested the document as a witness. No very great importance, however, can be attached to this document, because it appears that it was entered into on the 4th February 1873, after the date of the kararnama of the 11th June, from which it appears that the plaintiff was about to commence his suit, and in which he agreed with other members of the family

that if they would advance the money they were to have a share in the estate if he recovered it. It is hardly likely that he would intend to admit this lady to be entitled to the zemindary, although, as she was then in possession, she might be described as the zemindarni. On the other hand, their Lordships do not think that the kararnama of the 11th June 1870 is any evidence against the defendant. It was executed by members of the family in the absence of the defendant, who was no party to it, and consequently anything that they might say in it would not be evidence against her. But it does bear upon the case, in so far as it shows that the parties to it were dealing with each other, not as members of a joint family, but as persons entitled to separate estates.

Looking, therefore, to the terms of the sunnud itself, and to the subsequent conduct and acts of the parties, their Lordships have come to the conclusion that the Subordinate Judge was right in his construction of it, and that the document amounted to an agreement by which the joint family estate was divided among the several members of the joint family, and that the zemindary in dispute fell to the lot of Somappa the second as his separate property.

Another observation is to be made, *viz.*, that after the death of the husband of the defendant the widow was recognized by the Government as the owner of the zemindary. It was known that she took possession of the zemindary, and that she was recognized by the Government as the owner of it, and yet no suit was brought by the plaintiff to recover possession until 1876, about eleven years after the death of Sundarappa the second, the husband of the defendant, during the whole of which time the defendant had been in the quiet and undisturbed possession of the zemindary. That delay, after the parties must have known that the widow was in possession, is very strong evidence in support of the construction which the Subordinate Judge put upon the sunnud, and as showing that the parties considered that by that document Somappa the second took the zemindary as a portion of his separate estate upon partition.

As the zemindary became the separate property of Somappa the second, and descended to his son Sundarappa the second, it is clear that the widow was entitled to succeed upon the death of her husband. It therefore becomes wholly immaterial to decide who would have been entitled to succeed under the custom if the estate had remained a part of the joint family property. Very learned arguments have been adduced on both sides upon that question, but their Lordships think it unnecessary to decide the point, and do not think it right to express any opinion now which might affect the interests of persons hereafter upon the death of the widow.

Under these circumstances their Lordships are of opinion that the judgment of the Subordinate Judge was correct, and that the High Court were in error in overruling that judgment. Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that the decree of the Subordinate Court be affirmed, and that it be ordered that the respondent do pay the costs incurred in the High Court. Further, their Lordships order that the respondent do pay the costs of this appeal.

The 15th July 1879.

Present :

Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

*Joint Hindoo Family Property—Purchase by One Member—Practice
(Execution)—Irregularity.*

On Appeal from the High Court at Calcutta.

Bissessur Lall Sahoo

versus

Maharajah Luchmessur Singh, Minor under the Court of Wards.

The purchase of certain property by a member of a joint Hindoo family which was found to have never separated, was held to be a purchase, not on his own account, but for the joint family and as joint family property, and to be liable to sale in execution of decree.

In execution proceedings, the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right.

This was an appeal from a decision of the High Court at Calcutta of the 14th September 1876, reversing a decree of the local Court at Tirhoot in the Bengal Presidency.

Mr. Doyne for Appellant.*Mr. Cowie, Q.C., and Mr. Graham* for Respondent.

The suit was brought to recover the surplus of the proceeds of an execution sale of certain property called Muddunpore in the Tirhoot district; and the principal question raised was whether the land belonged to one Ramnath Dass separately, or to him and his father jointly. The High Court decided that the property was joint estate, and by that decree judgment was given in favor of the respondent, who, being a minor, is represented by the Court of Wards. From that decision this appeal was instituted.

Sir Robert Collier gave judgment as follows:—

The points to be decided in this case arise in this way: One Nath Dass died in the year 1853 leaving a son, Ramnath Dass, who died in the year 1855; and Ramnath Dass left two sons, Mosaheb and Chooman. The Rajah of Ramnugger, as he has been called in the argument,—that is to say, the guardian of the infant Rajah of Ramnugger,—brought three suits in the year 1862 in respect of rent due from members of the family of Mosaheb and Chooman. In the first suit the judgment was given on the 22nd March 1862, and it seems that the plaintiff in that suit sued the widow of Nath Dass and the widow of Ramnath Dass as guardians of two young men who are assumed to be Mosaheb and Chooman under other names. The claim was for the recovery of rent, about Rs. 3,000 odd, which amounted to about Rs. 8,000 with interest and costs, and the statement is that Nath Dass and Ramnath Dass took a lease of a certain Mouzah Rudarpore, and that the rent accrued in respect of that mouzah. Then it is ordered “that this decree will not be executed against the person and self-acquired property of the judgment-debtors, but it will be executed against the property left by the deceased leaseholders.”

Upon this judgment execution was issued against a certain Mouzah Muddunpore, which appears to have been bought in the year 1847 in the name of Ramnath Dass. Whether it was bought by Ramnath Dass for himself and separately, or as a member of the joint family, is a question to be hereafter discussed.

There were two other judgments, the nature of which will be subsequently referred to, dated respectively the 9th April 1862 and the 16th April 1862, whereby large sums were decreed beyond the Rs. 8,000 which was obtained by the first decree; and an order was obtained by the plaintiff empowering him to put up Mouzah Muddunpore for sale in satisfaction of all three decrees. This was done, and it was bought in by the plaintiff at, in round numbers, Rs. 35,000. Mosaheb and Chooman made no objection to this proceeding at the time, or indeed at all; but some three years afterwards they sold to the plaintiff in this suit their right to recover the difference between the Rs. 8,000, the sum obtained by the first decree, and the whole Rs. 35,000 for which Muddunpore was sold; that is to

say, they claimed to recover the sum which Mouzah Muddunpore was charged with in execution of the last two decrees; and whatever rights they had the plaintiff has, neither more nor less.

It is necessary in the first place to advert to what was the main contention in the case. It was contended on the part of the plaintiff that the family of Nath and Ramnath became separate about the year 1839. It was alleged that at that time there was a quarrel between Ramnath Dass and his father, and that they ceased to be joint in food. But on the part of the plaintiff there was scarcely any evidence of separation of estate: in fact, on his own case, there was some evidence that there was no separation in estate, and that Ramnath Dass acquired no separate property. The first Court held that the separation had been proved, and that Mouzah Muddunpore was bought by Ramnath Dass for himself and with his own property, although it certainly does not appear, according to the evidence of the plaintiff, how he could have obtained the funds for purchasing it. The High Court reversed the decision on this point of the Lower Court, and came to the conclusion that the family was joint, and had never separated; and their Lordships agree with the High Court.

This being so, the consequence follows, as has been laid down before in the very well-known case of *Gopeekrist Gosain v. Gungapersaud Gosain*, in the 6th Moore's Indian Appeals, p. 53,* that the purchase of Muddunpore by Ramnath Dass would be assumed to be a purchase, not on his own account, but for the joint family, and that Muddunpore would be joint family property.

It now becomes necessary to examine the two decrees subsequent to that of the 22nd March 1862 with respect to which there is no dispute. The next decree is dated the 9th April 1862, and in that suit Mosaheb Dass is sued as the heir of Nath Dass, and the decree is for the recovery of Rs. 39,000 on account of the rents of a certain Mouzah Ramnugger, and it is stated that Nath Dass had taken a lease of that from 1847 to 1854. Then it is further ordered that this decree is not to be executed against the person and self-acquired property of the defendant, but against the property left by the deceased leaseholder Baboo Nath Dass only.

It appears to their Lordships that acting on the principle which follows from their finding that this family was joint, it must be assumed that Mosaheb Dass is sued as a representative of the family, and that it must further be assumed that Nath Dass in taking the lease of the mouzah here referred to—Ramnugger, in respect of which the rent was due—must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt from the family. With respect to the order as to the execution, it appears to their Lordships that the fair construction of it—though it may not be drawn up with much accuracy—is that the decree is not to be executed against the self-acquired property of Mosaheb, but against the family property which is there described as that left by Nath Dass for the purpose of distinguishing it from the separate property which may have belonged to Mosaheb. The only difficulty with reference to the second and third decrees arises from a certain informality with which they have been drawn up. It appears to their Lordships that looking to the substance of the case, this second decree is a decree against the representative of the family in respect of a family debt, and that it is one which could be properly executed against the joint property of the family, and that Muddunpore was a part of that joint property.

The same reasoning applies to the third decree, although curiously enough the action seems to have been brought against the widow as the guardian of Mosaheb. Here there is the same direction with reference to the property, but substantially the same observations apply which have been applied to the former decrees.

Their Lordships have therefore come to the conclusion that although there

may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family, and may be properly executed against the joint family property. Their Lordships have therefore come to the conclusion that the High Court has been right in dismissing the appeal from the Lower Court.

This being their Lordships' view of the case, they do not think it necessary to go into the question which was touched upon but not decided by the High Court, whether the plaintiffs, or either of them, were bound to dispute the sale of Mouzah Muddunpore in the execution proceeding, and were debarred from bringing this suit.

Two cases have been referred to, one of *Ishan Chunder Mitter v. Bukah Ali Soudagur*, reported in the first volume of Marshall's Reports, page 614, and another in the fourteenth volume of Moore's Indian Appeals, page 605, *The General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Singh*,* the effect of which may be stated thus: that in execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right.

Under these circumstances their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty to affirm that judgment and to dismiss this appeal with costs.

The 18th July 1879.

Present :

Sir Montague E. Smith, Sir Robert P. Collier, and Sir Henry Keating.

Contract—Purchase of Cotton—Guarantors—Use of Name—Acquiescence.

On Appeal from the Court of the Judicial Commissioner of Ajmere.

Seth Sameer Mull and another

versus

Choga Lall.

It being found that the defendant, in a contract for the purchase of a certain quantity of cotton, used the name of the plaintiffs, and that the vendors sold to him on the credit of that name, and further that the defendant had the authority of the plaintiffs to use their name, and that their name had been used with their full concurrence in a number of transactions during nine successive days, and that they were present, or some of their agents, when this further transaction of the same kind was entered into, it appeared to their Lordships a fair inference that they were cognisant of, and allowed their name to be so used in the last transaction. HELD therefore that they were liable, according to the custom, to the vendors who would be entitled to recover over what they paid against the defendant.

HELD also that, if there was no actual authority at the time, the defendant's use of their name as his guarantors, and his treating them and holding them out as liable to pay on his behalf the price of this cotton, thereby authorised them, if they thought fit, subsequently to make that payment on his behalf; in other words, that they had a right to ratify the use which he had made of their name, and that they had not deprived themselves of that right by their previous conduct in, for a time, repudiating their liability.

This was an appeal from an order of the Judicial Commissioner of Ajmere, in the Central Provinces of India, of the 3rd April 1876.

Mr. Cowie, Q.C., and Mr. C. W. Arathoon for Appellants.

Mr. Mayne for Respondent.

The facts of the case are sufficiently stated in the judgment of the Judicial Committee, which was delivered as follows by *Sir Robert Collier* :—

* 17 W. R. 459; 2 Suth. P. C. R. 579.

Although this case has undergone several lengthened investigations, it appears to their Lordships that the facts material to its decision lie in a small compass. The plaintiffs are bankers carrying on business at Ajmere, and also at a place called Beawar, which is also at times called by another name, Nyanuggur. The defendant is a merchant at Nusserabad, and the transaction out of which this appeal arises is a purchase of a quantity of cotton at Beawar. It appears that at Beawar there is a custom which seems to their Lordships to be fairly stated in the case of the respondents. That case says: "There is an admitted custom prevailing at Nyanuggur, according to which a merchant coming from any other district is only allowed to trade in the name and upon the credit of a Nyanuggur firm. The actual dealings are effected by the stranger himself or by his broker, but in each transaction the name of a Nyanuggur merchant is given, and his name is entered as the principal in the transaction. Credit is given to him, and the final settlement of the transaction is effected with him. He is known as the arath or agent. At the conclusion of such transaction a memorandum of it is sent to the arath by the person who makes use of his credit. This memorandum is known by the term panri." It appears that towards the end of August 1870, about the 24th or 25th, the defendant came to Beawar for the purpose of extensively dealing in cotton. He remained there 10 days, and during nine days he effected a number of purchases according to this custom, which he may be assumed to have been fully acquainted with, and used the plaintiffs as his "araths" in the sense in which that term has been used in the description of the custom given in the respondents' case. These transactions, extending over nine days, amounted to as much as 6,025 maunds of cotton; and with reference to all these purchases, the defendant being on the spot vouched the plaintiffs, who were also on the spot, and they must be taken to have perfectly well known that he represented them as his "araths" according to the custom.

There is no dispute with respect to these previous transactions, which form a continuous series of dealings, but the dispute arises with respect to the last transaction in which the defendant was engaged. On the night of the 10th day of his sojourn at Beawar the defendant entered into another transaction of a similar character, but larger in amount, whereby he purchased of various persons in the market as much as 14,000 maunds of cotton, employing the same brokers as before, and referring again to the plaintiffs as his araths or guarantors. It further appears that the plaintiffs, or at all events their agents, were at the time in the bazaar, and one of the Commissioners who made investigations into this subject observes that from the evidence recorded he is inclined to believe that they were cognizant of the proceedings or took part in them. The defendant suddenly left Beawar on the next morning; he sent a "panri," which has been described as a memorandum of the transaction—it does not exactly appear when, but probably very soon after—to the plaintiffs, in which he acknowledged his liability as far as the 6,025 maunds were concerned, but in which he took no notice of this last transaction. Thereupon the sellers applied to the plaintiffs, as guarantors, to make good the purchase money, and the plaintiffs undoubtedly at that time said that as they had not had a panri they could not hold themselves responsible. It appears that a dispute arose, and subsequently the matter was referred to a punchayet, and this punchayet determined that the plaintiffs ought to pay to the vendors of the cotton the sum of one rupee per maund, amounting to Rs. 14,000, being the loss sustained by the vendors in consequence of the fall of the price of cotton, and for that sum they bring this action against the defendant.

The case has come before three Commissioners, the Deputy Commissioner, the Commissioner, and the Judicial Commissioner. The first Commissioner found in favor of the defendant, the second in favor of the plaintiffs, the third in favor of the defendant; and from the last judgment the appeal is preferred.

It appears to their Lordships that the result of the evidence and of the

findings which have been come to by the Assistant Commissioners who were deputed to investigate the case is, that the defendant in the contract for the purchase of the 14,000 maunds used the name of the plaintiffs, and that the vendors sold to him on the credit of that name; and further, that the defendant had the authority of the plaintiffs to use their name. The plaintiffs' name had been used with their full concurrence in a number of transactions during nine successive days; they were present, or some of their agents, when this further transaction of the same kind was entered into, and it appears to their Lordships a fair inference that they were cognizant of and allowed their name to be so used in the last transaction, as they had in the others. If so, they were undoubtedly liable, according to the custom, to the vendors, and they would be entitled to recover over what they paid against the defendant.

But it further appears to their Lordships that if there was no actual authority at the time, still that the defendant having used the name of the plaintiffs as his guarantors, and treated them and held them out as liable to pay on his behalf the price of this cotton, thereby authorised them, if they thought fit, subsequently to make that payment on his behalf. They may not unnaturally have at first hesitated to undertake the responsibility and endeavored to avail themselves of the absence of a panri, still when they subsequently made the payment, not indeed of the whole amount but such as had been arrived at upon a reference to a kind of arbitration, they were entitled to treat the use of their name by the defendant as an authority to make that payment on his behalf, and the defendant cannot dispute their right to do so. In other words, they had a right to ratify the use which he had made of their name, and they have not deprived themselves of that right by their previous conduct in, for a time, repudiating their liability.

Under these circumstances their Lordships are of opinion that the judgment of the Judicial Commissioner was erroneous, and they will humbly advise Her Majesty that that judgment be reversed, and that the judgment of the Commissioner of Ajmere be affirmed with the costs of this appeal.

The 19th July 1879.

Present :

Sir Montague E. Smith, Sir Robert P. Collier, and Sir Henry S. Keating.

Rent—Settlement Order—Evidence.

On Appeal from the Court of the Commissioner of Roy Bareilly in Oudh.

Rajah Bijai Bahadur Singh

versus

Baboo Bhyron Bux Singh.

Their Lordships refused to allow an unexplained note embodied in the order of the Settlement Officer to over-ride the former arrangement of the parties, so as to render the respondent, a natural son of the late Rajah Shumshare Bahadur, liable to pay the appellant, the legitimate son and heir of the late Rajah, a rent of Rs. 3,650 instead of Rs. 2,001, in the absence of all evidence as to what was the rent actually paid by the respondent after the settlement was made.

Mr. C. W. Arathoon for Appellant.

No one for Respondent.

Their Lordships, after giving full consideration to the arguments of Mr. Arathoon in support of his appeal, do not see their way to disturb the concurrent judgments of the two Courts below.

The action was brought by the respondent Bhyron Bux Singh, who is the illegitimate son of Rajah Shumshare Bahadur Singh, against the appellant Rajah Bijai Bahadur Singh, who is the legitimate son of the late Rajah, and his claim was to obtain villages or shares of villages in talook Behlolpur, yielding an annual jumma of Rs. 3,650, in lieu of a village called Sawansa which had been given to him by various pottahs executed by his father, and by other pottahs which were executed by the present Rajah.

The first pottah is one which by the English date was made on the 14th June 1846. It seems that the village Sawansa was under mortgage to the late Rajah, who appeared to entertain a doubt whether the mortgagor would redeem it; but in the grant of it to his illegitimate son he made a provision for the event of the mortgagor redeeming the estate. The grant is in these terms: "I, Rajah Shumshare Bahadur Singh, do hereby declare that I, having obtained talooka Sawansa by mortgage, have given it as a zemindary grant to Baboo Bhyron Bux Singh and relinquish my claim in his favor." Then, "In the event of the mortgage being redeemed, I will make over to him in lieu of the Sawansa estate villages from talooka Behlolpur yielding an equal revenue. I have therefore executed this as a zemindary grant lease." That is a clear provision that in the event of the village Sawansa being redeemed, other villages of equal value shall be substituted for it.

The next grant from the father is on the 27th November 1847, which is in confirmation of the former grant, but gives the estate on more favorable terms: "I, the Rajah, give the entire talooka of Sawansa, etc., including land revenue and cesses, as rent free nankar to Baboo Bhyron Bux." It is given rent free, and, therefore, on terms more favorable to the son.

Then there is a further grant in the lifetime of the father on the 28th August 1850. It seems to have been made by the Rani on behalf of the Rajah. It is stated in the Record to be "executed by Rani Bulraj Kinwar;" but the grant is in the following terms:—"Rajah Shumshare Bahadur Singh. I execute this as an ancestral zemindary lease of Ghatampur, Raepur, Muarpur, and Manyarpur in favor of Bhyron Bux Singh. He is to have these villages rent free." That is a grant of other villages than Sawansa, and is only material as part of the history of the gifts made by the father to the illegitimate son. These grants were all made in the time of the Nawab, and before the conquest of Oudh by the British. That conquest having taken place, and Lord Canning's proclamation confiscating the estates in Oudh having been made on the 15th March 1858, the present appellant obtained the sunnud of the Behlolpur talook from the British Government; but before he got the sunnud, and presumably after the British Government had settled the talook with him, he granted two pottahs to his brother, which are material in considering the position in which the two brothers stood at the time when the present dispute arose between them.

The first of these pottahs is dated the 9th August 1858, and is in these terms: "I, Rajah Bijai Bahadur Singh, of Pergunnah Partabgarh, have given talooka Sawansa to Baboo Bhyron Bux Singh as a zemindary for his maintenance. I will take Rs. 2,501 as rent by usual instalments." He grants to his brother the talooka Sawansa, but reserves a rent of Rs. 2,501. By a postscript to the grant the rent is virtually reduced by Rs. 500. This is the postscript: "He is to receive further Rs. 500 nankar annually, leaving the rent payable to be Rs. 2,001. I will have no objection to having the said amount deducted." That grant does not refer to the provision in the original grant by the father for the substitution of other villages in case Sawansa should be redeemed; but in a subsequent grant, which is of the date of 17th November 1861, there is a passage, the construction of which has been disputed, and to which reference will presently be made. That grant is: "I, Rajah Bijai Bahadur Singh, of Pergunnah Partabgarh, do hereby execute this as a lease of the whole of talooka Sawansa, including land

revenue and sayer, and of the villages of Raepur, Kalan, and Ghatampur in talooka Behlolpur," which were the villages mentioned in the subsidiary grant of the father,—“in favor of my brother Bhyron Bux Singh, at an annual rent of Rs. 2,001 Queen's coin, which he will pay by usual instalments. This lease is given to him in perpetuity.” Then there is this passage: “Whatever Dadwa Sahab, my father, had granted, I have maintained also.” These words were obviously inserted with reference to something beyond what had been contained in the previous part of the grant; and their Lordships think it may reasonably be inferred that it was intended by the Rajah to confirm by these words that part of the father's grant which provided for the substitution of villages in case Sawansa was redeemed and taken away from his illegitimate son. There is nothing else shown to which these words could refer. These are the grants on which the plaintiff founds his case.

What happened was, that after the Act XIII of 1866 had been passed, by which it was understood that the rights of mortgagors were set up and the bar of limitation removed, the mortgagor of the estate of Sawansa took proceedings to redeem it, and obtained a decree for redemption. That decree was obtained in a suit against the Rajah and his illegitimate brother; both were bound by it, and the estate of Sawansa passed from the hands of the illegitimate son into the possession of the mortgagor. He was therefore deprived of the estate which his father had given, and his brother had confirmed to him.

That being his position, he brought this suit in order to obtain other villages in the talook in substitution for the estate which he had thus lost. The first and great defence of the present Rajah is that he was not entitled to anything; that the agreement in the father's original grant that the estate should be substituted was not continued in the father's subsequent grants, and was not contained in the grants made by himself. Their Lordships, however, think that the father's subsequent grants did not abrogate this agreement, and they have already declared their opinion to be that in the last grant, which he himself made, he confirmed it. They are, therefore, clearly of opinion that the plaintiff was entitled to this substitution, unless something has occurred subsequently between the brothers to deprive him of that right.

Now it is said that there was an agreement made at the time of the settlement of this talooka before the Settlement Officer which destroyed the plaintiff's right altogether, or, if it did not destroy his right, altered the terms upon which he was entitled to get a substituted estate. The settlement proceedings are, unfortunately, not set out at length in the Record. So much as appears of them is to be found at page 10. It would seem that at the time of the settlement the present plaintiff put forward a claim—this was before the redemption of the Sawansa estate—to have Sawansa settled with him as an under-proprietor. This claim is not upon the Record, and what we have is a petition of the Rajah, which recites it. His petition is: “That the claim brought in your Court by Baboo Bhyron Bux Singh to under-proprietary right of talooka Sawansa is just. The estate has all along been in his possession, under a zemindary grant made by Rajah Shumshare Bahadur Singh, petitioner's father, as well as under the grant made by petitioner himself; the petitioner, therefore, prays that the name of Baboo Bhyron Bux be recorded as under-proprietor of Sawansa estate included in talooka Behlolpur, Pergunnah Partabgarh, without any condition, to which I have no objection, and I admit the claim in every way, but the estate should remain included in talooka Behlolpur.”

Now, although we have not the claim, it may be presumed from the Rajah's petition that the plaintiff based it upon the grants to which reference has been made, and therefore that the claim was to have this estate upon payment to the Rajah of, at most, a rent of Rs. 2,001; and if the Record had shown no more than this petition, there would be nothing to show an intention to alter the plaintiff's

right to have an estate substituted in the event of Sawansa being taken away, or the terms on which he was to hold either Sawansa or the substituted estate.

But it is said that what follows, although it may not displace the plaintiff's right to have an estate substituted, does interfere with his right to have it upon the old terms, that is, upon the terms of paying the rent of Rs. 2,001. It is contended that it creates an arrangement by which he was to hold the Sawansa estate upon the terms of paying Government revenue and a malikhana of 5 per cent. to the Rajah. The whole of that contention is based upon the order of the Settlement Officer, which is in these terms:—"Rajah Bijai Bahadur Singh personally filed this to-day,"—that is, referring to his petition,—“and admitted its contents. As Baboo Bhyron Bux is to be recorded under-proprietor of the Sawansa estate without condition, it is desirable, for the security of the talooka, that his liability to pay the talookdary allowance at the rate of 5 per cent. besides the jumma, which may be fixed, should be noted; and as the Rajah and Baboo Bhyron Bux assent to this: Ordered, that the name of Baboo Bhyron Bux be entered as under-proprietor of all the villages in talooka Sawansa.” That is a note of the Settlement Officer. It, no doubt, is stated to have been assented to by the Rajah and by Bhyron Bux, but it would be unreasonable to come to the conclusion from this unexplained note of the Settlement Officer, which he has inserted in his order, that the brothers intended so materially to change the arrangements which had existed up to that moment, and which were recognized in the petition filed by the Rajah,—so materially that the plaintiff, instead of paying a rent of Rs. 2,001, would have to pay a rent, including the Government revenue and the malikhana, of Rs. 3,650. It may be that this note was only intended for the purposes of the Government; but however that may be, there is nothing which is so clear and free from ambiguity that it can be relied on to establish that the brothers intended to alter the rights as they existed between themselves at the time when the settlement was made, and when the petition of the Rajah was filed assenting to the plaintiff's claim in all its terms.

Their Lordships would have been glad to know what was actually done, and what was the rent really paid by the plaintiff after the settlement was made, but the Record is entirely silent upon these things. That this question could not have been overlooked in the Courts below is plain, for an issue was framed in order to raise the question whether these settlement proceedings did alter the arrangement as it existed between the brothers. That issue is the fifth: “Were the conditions of the pottah of 15th Katik, 1269 Fusli, or of the pottah of 5th Par Buddi, 1255 Fusli, affected by the settlement decree of the 22nd March 1862 to the detriment of the plaintiff's present claim.” The officiating Deputy Commissioner, without giving any reasons, records a verdict for the plaintiff on that issue. But the attention of the Commissioner was expressly directed to this question, and in his judgment their Lordships find this paragraph: “The decree of the Settlement Court does not, I think, affect the merits of the claim. That decree goes no further than to record the status of the plaintiff.” Their Lordships apprehend the meaning of that to be the status of the plaintiff as an under-proprietor, and are disposed to think that if the effect of the order had been that for which Mr. Arathoon contends, these Judges—the Assistant Commissioner and the Commissioner—would have known that that was so. They are much better acquainted with what is meant by the orders of the Settlement Officers than their Lordships can be, and they had the means of satisfying themselves as to what this order really meant by reference to the proceedings or by directing enquiries. Their Lordships think that credit must be given to the Judges below who had their attention called to the issue and to the decree which is referred to in it, that they did not form their opinion without due investigation and consideration.

On the whole, therefore, their Lordships think that it would be exceedingly dangerous for them to act upon the speculation that this note embodied in the

order of the Settlement Officer was intended to override the former arrangement of these parties. They will therefore humbly advise Her Majesty that the judgments appealed from should be affirmed, and this appeal dismissed.

The 26th July 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

*Will—Gift to Idol—Construction—Charge on Estate—Accumulations—
Execution of Decree—Attachment and Sale.*

*On Appeal from the High Court at Calcutta.**

Ashutosh Dutt

versus

Doorga Churn Chatterjee and another.

According to the construction of the will in this case, it was held that the property in dispute was not wholly *debutter*, but that the will created a charge upon the property for the expenses of the daily worship of an idol as it was performed at the time of the death of the testatrix, and of the *poojahs*, *shradhs*, and religious ceremonies for which provision was made by the will, the charge being termed generally a charge for such religious acts and ceremonies, that the surplus income belonged to the members of the joint family, of whom the respondent was one, and that his interest was liable to be attached and sold in satisfaction of a decree against him personally.

This was an appeal from a decision of a Divisional Bench of the High Court of Calcutta of the 5th December 1876, affirming a decree of the Subordinate Judge of Hooghly.

Mr. Leith, Q.C., and Mr. Doyne for Appellant.

No one for Respondents.

The suit was instituted by the respondents as shebaita or custodians—trustees of a family idol—to prevent an order for execution of a decree obtained by the appellant against the first named respondent from being carried out by a sale of his share in a certain estate on the ground that he (the respondent) was only interested as custodian, and that he had no personal or beneficial interest which could be legally sold. The judgment of the two Courts below concurred in so holding, and the question on appeal was whether the sale ought not, in the circumstances, to have been allowed to proceed.

Sir Barnes Peacock delivered the judgment of the Judicial Committee as follows:—

The principal question to be determined in this appeal is, whether or not the respondent Doorga Churn Chatterjee had any right, title, or interest in a certain talook called Lot Panchgatchia, in Zillah Hooghly, liable to be attached and sold in execution of a money decree against him. The question arose in this manner. The appellant sued him in the High Court, Original Jurisdiction, and on the 16th November 1864 obtained a decree against him for Rs. 3,500, with interest and costs. In execution of that decree an attachment was issued. The attachment is not on the record, but it appears from the plaint that under it a one-third share of the talook was attached, and thereupon Doorga Churn (the debtor) and his brother Shama Churn, who are the respondents in this appeal, intervened and put in a claim to the property, alleging that it was not liable to attachment, inasmuch

* From the judgment of Garth, C.J., and Morris, J., dated 5th December 1876.

as they held it in trust for an idol, Raj Rajeswar, by virtue of a will executed by their mother Saraswati. The Judge of Hooghly having investigated the claim, distrusted the genuineness and *bona fides* of the will; he stated that he did not believe that the property was held in trust for the idol, and, under the provisions of s. 246 of Act VIII of 1859, disallowed the claim of the respondents, and ordered the execution to proceed (Record p. 31). The present suit was consequently brought by the respondents against the appellant under the same Section to set aside the order of the Judge, and prayed that the will executed by their late mother should be confirmed, that the share of the talook which had been attached and ordered to be sold should be declared debuttur property, or property dedicated to religious uses, and not liable to be attached or sold for a private debt of Doorga Churn. (Plaint, Record, p. 2.)

A written statement was put in on behalf of the defendant, and several issues were raised, and amongst them the 3rd, 4th, and 5th, which were the material ones on the merits. The 3rd was, whether the will set up by the plaintiffs was a genuine document, and whether the mother, Saraswati, endowed the property in suit for the sole benefit of the idol, and whether the profits of the disputed estate had been appropriated to the idol alone. 4th, whether the plaintiffs were entitled to a declaration that the estate was not liable to be attached and sold in execution of the decree obtained against one of them personally. 5th, whether the plaintiffs were the beneficial owners of the property. The Subordinate Judge found in substance that the will was genuine, that it was not colorable or fraudulent, and that it was intended to be acted upon, and thereupon he held that the property was debuttur, and not liable to be attached or sold for a private debt, and ordered it to be released from attachment. Each party was ordered to bear his own costs. (Decree, Record, p. 48.)

Upon appeal to the High Court it was contended that the Lower Court was wrong in finding that the will was a *bona fide* instrument, and that the Court ought to have found upon the evidence on the record and the probabilities of the case that the will did not create a *bona fide* endowment, but was a mere device to secure the property from sale in execution of decree; that the endowment to the household idol was a mere colorable device to give a show of legality to a transaction which was in reality a perpetuity and to preserve the property in the hands of the family, and that, as such, it was void and illegal.

Further, it was contended that under any view of the nature and effect of the will the debtor, Doorga Churn, had a considerable beneficial interest in the property.

The High Court affirmed the decision of the Lower Court. They said:— "We have no doubt that the will made by Srimati Saraswati Debi is a valid disposition of her property, and that the effect of it was to create an endowment substantially for religious uses. That being so, it is clear that the attachment issued against a share of this property at the instance of the execution creditor, and the order made by the Judge of Hooghly that the execution should proceed, ought both to be set aside; and it is impossible to say that the Subordinate Judge was wrong in confirming the will, and declaring the subject of it to be dewuttur property. It may be that, under that clause of the instrument which disposes of the surplus proceeds of the estate, the 'shanshar,' or members of the family establishment, may hereafter become entitled to some beneficial interest in such surplus; but this interest is of such a fluctuating and uncertain character that it could never form the subject of attachment or sale."

The Lower Court having found that the will was genuine and *bona fide*, and the High Court having upheld the decision, it has not been attempted to dispute that finding. It must, therefore, be assumed that the will was genuine and *bona fide* intended to operate; and effect must be given to it, so far as its provisions are in accordance with law.

The will is in the words following:—

"This will is executed by Srimati Saraswati Debi. I am always sick; hence I execute this will to the following effect:—I dedicate the auction-purchased property, No. 3496, Lot Panchgatchia, Pergunnah Baligori, Zillah Hooghly, standing in my name, to the Thakoor Ishwar Raj Rajeswar that is in my house. And the Sarodia Pooja and other ceremonies that are being performed in the house will be performed as hitherto. After all these acts have been observed from the proceeds of the said property, if there be a surplus in the profits, then the family will be supported therefrom. This property of mine will not be liable for the debts of any person. None will be able to transfer it. None will have the rights of gift and sale. I appoint my eldest son Doorga Churn Chuttopadhya and the second son Shama Churn Chuttopadhya to be the executors of this will. When my youngest son Bhogobati Churn Chuttopadhya, who is now a minor, arrives at majority, he will similarly be an executor. Collecting the proceeds of this property, you will deduct therefrom the rent, revenue, taxes, charges for repairs, and whatever other expenses may be necessary for the preservation of property, and the collection charges; and will defray from the aforesaid profits the expenses of the daily worship of the said Thakoor, the expenses of the *parbans*, i.e., the *Dole-jattr*, the *Rashyattr*, etc., on his account, [the expenses of] the Doorga Pooja, the Shama Pooja, and the Jagadhatri Pooja, the expenses of the annual *shradh* of my father-in-law, of the first *shradh* of myself and my husband after our death, and the expenses of our *ekodista* and *sapindikaran*. I appoint you as the executors of this will. You will pay my debts, and, collecting the sums due to me, you will incorporate them with my estate. And from the proceeds thereof you will meet the expenses described above; and if there be a surplus after deducting the said expenses, it will also be disbursed in the manner aforesaid. After your death, he who is my heir for the time being will be the executor of this will. Beyond performing the aforesaid worship of the *deb* and the ceremonies and *poojas*, none of my heirs shall have any interest in or profit from my property. And they will have no power of gift or sale over it. And it will not be attached or sold on account of their debts. To this effect, of my own accord and in full possession of my senses, I execute this will. The 2nd Chait 1274.

"SARASWATI DEBI"

According to the construction which their Lordships put upon the will, it cannot be said that the property was wholly debutter. They consider that it created a charge upon the property for the expenses of the daily worship of the idol, as it was performed at the time of the death of the testatrix, and of the *poojas*, *shradhs*, and religious ceremonies for which provision is made by the will. For the purpose of this decision the charge may be termed generally a charge for such religious acts and ceremonies. So far the case falls within the class of which that of *Sonatum Bysack v. Sreemutty Juggutsoondree Dossee*, 8 Moore I. A., p. 66,* may be referred to as an example.

The next question that arises is, who are entitled to the beneficial interest in the talook, subject to the religious and ceremonial trust. The testatrix has certainly attempted to dispose of this, and, if she has done so effectually, it cannot be held, as has been held in some cases, to have passed to her sons in their character of heirs at law as property undisposed of. Her disposition is contained in the words "after all these acts have been observed from the proceeds of the said property, if there be a surplus, then the family will be supported therefrom."

Their Lordships, not without some doubt and hesitation, have come to the conclusion that these words amount to a bequest of the surplus to the members of the joint family for their own use and benefit. It is true that the testatrix further

declares "this property of mine will not be liable for the debts of any person. None will be able to transfer it, none will have the rights of gift and sale." But these directions, being inconsistent with the interest given, were wholly beyond her power, and must be rejected as having no operation. This being so, it follows that Doorga Churn took a share of the property in question, which, after satisfying the expenses actually incurred in the worship of the idol, cannot be assumed to be valueless, and might be considerable, and which, in their Lordships' opinion, was subject to be taken in execution by his creditor. Inasmuch as their Lordships are not precisely informed of the state of the family on the death of the testatrix, they are unable to specify what that share was, and there being no *constat* as to what is required for the performance of the religious trust, the interest acquired by a purchaser at any such execution sale would have to be ascertained and realised in some other further proceeding. In these circumstances, their Lordships are of opinion that the attachment should be allowed to stand; but that the summary order of the Judge of Hooghly, which would apparently authorise the sale of one third of the talook, as if unaffected by the will of the testatrix, is erroneous, and should be set aside.

They will therefore humbly advise Her Majesty that the decrees of both the Lower Courts be reversed. That it be declared that the will of Saraswati was a genuine will and *bona fide* intended to operate, and that the effect of the will was to charge the property in the hands of the executors thereby appointed with the payment of such sums as might be necessary to defray the expenses which might from time to time be incurred in the daily worship of the idol therein mentioned, in the manner in which such service was performed at the time of the death of the testatrix, and with the expenses of the parbans and of the poojas and other religious acts and ceremonies in the said will mentioned; that, after defraying such expenses, the surplus belonged to the members of the joint family, of whom Doorga Churn was one, and that his interest in the talook, under the said will, was liable to be attached and sold in execution of the decree of the High Court of the 16th November 1864; and to order that the summary order of the Judge of Hooghly be set aside, but that the appellant be at liberty to proceed to a sale in execution of the right, title, and interest of Doorga Churn in the said talook under the said will, and that each party do bear their own costs of the suit in both the Courts below.

The appellants having failed in their attempt to impeach the genuineness and *bona fides* of the will, their Lordships are of opinion that they are not entitled to the costs of this appeal.

The 14th November 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Limitation—Act IX of 1871, sch. 2 art. 145—Co-sharers—Execution Sale—
Appeal.*

On Appeal from the High Court at Calcutta.

Dewan Manwar Ali

versus

Unnoda Pershad Roy.

Where, in a suit by a judgment creditor and execution purchaser of a co-sharer to enforce his rights, it was decided not only that the share of that co-sharer passed to the purchaser under the sale in

execution, but that the purchaser was entitled to hold that share in *ijmali*, or joint enjoyment with the other co-sharer; and against this decree the co-sharer, whose share had been sold, appealed, but execution was not taken out till after the appeal was finally disposed of: HELD that there was no necessity or duty lying upon the other co-sharer to assert his rights to the sole enjoyment of his share until the execution purchaser was put into possession, or, at all events, until the rights of the parties had been finally determined by the dismissal of the appeal, the case being governed by the limitation prescribed by art. 145 sch. 2 of Act IX of 1871.

Mr. Doyne for Appellant.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Respondent.

This was an appeal from a decision of a Divisional Bench of the High Court at Calcutta of the 25th February 1876, reversing that of the local tribunal at Tipperah.

The facts of the case are fully stated in the judgment of the Judicial Committee, which was delivered as follows by *Sir James Colvile*:—

The facts of this case are complicated, but when fully stated and explained they do not appear to their Lordships to present any great difficulty. The first, if not the only question, on the appeal is whether the plaintiff's right to sue has been barred by the Statute of Limitation. That was the only question decided by the High Court, and their Lordships may at once say that if that has been improperly decided they can see no ground whatever for doubting the correctness of the decision of the Lower Court, which, upon the other material issue in the suit, held that there was no pretence for saying that the lands in dispute were not *khalisha* lands, that is, lands appertaining to the zemindary, but *lakheraj* lands held under some title other than that of the zemindars.

The facts are shortly these: The estate in question, which is a fractional part of Pergunnah Surail, was derived from a Mahomedan lady by her husband and two sons, and was held by them in the following proportions:—The plaintiff, who was one of those sons, had a ten-annas share, his father had a two-annas share, and his brother, or half-brother, Sumdul, had a four-annas share. Their enjoyment of the property was, up to the year 1839, what has been termed *ijmali* or joint—that is, they divided the rents of each village in proportion to their above-mentioned shares in the estate. In 1839 the family arrangement, which has been called a *butwarra*, is said to have taken place. Their Lordships see no reason to doubt that such a transaction did take place. Under it the different villages constituting the estate were divided, the plaintiff taking solely certain specified villages as his ten-annas share, and his father and Sumdul taking jointly certain other villages which were allotted to them as representing a six-annas share. That state of things seems to have continued, and to have been acted upon up to the year 1856. In 1856 Sumdul, being in embarrassed circumstances, an execution issued against his four annas of the estate at the suit of one Nusiruddin. It should be mentioned, however, that before this, Munsur Ali, the father, had died in February 1842, and that in different ways his two annas had come to be vested in the plaintiff, so that at the time of the execution the elder brother, the plaintiff, had a twelve-annas share, and Sumdul only a four-annas share, in the zemindary. There seems to have been the usual resistance to execution on the part of Sumdul, and a suit was brought by Nusiruddin, who was execution purchaser as well as judgment creditor, in the year 1858 to enforce his rights. The first judgment in that suit was pronounced on the 3rd December 1860. It was a judgment of a somewhat peculiar character. Nusiruddin had brought the suit, not only against Sumdul and certain persons in whom Sumdul alleged his four annas had become vested prior to the execution, but also against the present plaintiff, the owner of the twelve-annas share; and it was decided not only that the four-annas share had continued to be the property of Sumdul at the date of the execution, and had passed under the sale in execution, but further that the family arrangement or *butwarra* which had been acted on so long, and had been pleaded by the plaintiff, had not been proved against and was not binding upon Nusiruddin, and that he

was accordingly entitled to hold the four annas of Sumdul, purchased by him in ijmali enjoyment with the plaintiff. The High Court has held that the right of the plaintiff to assert the rights which he has asserted in this suit accrued to him at the date of this decree, and that therefore, the decree having been passed in 1860, the present suit, which was instituted on the 17th September 1873, is out of time.

It appears that Sumdul, but not the plaintiff, appealed against this decree, and that his appeal was not finally disposed of until the 19th June 1863. Execution was then taken out by Nusiruddin against Sumdul, but there were fresh delays, and the heirs of Nusiruddin, who had died in the meantime, did not obtain constructive possession of Sumdul's four annas until July 1864. Sumdul then set up a title to hold as lakheraj the lands in question in this suit which had formed part of the villages allotted by the butwarra, as the six annas share, treating them as no part of the khalisha lands, his interest wherein had passed under the execution.

It appears to their Lordships that this, or, at all events, the date of the dismissal of the appeal, is the earliest at which it can be said that the title of the plaintiff to the relief which he seeks in the present suit accrued. The effect of the decree in Nusiruddin's suit, in so far as it set aside the partition, was to give to him a right to take from the plaintiff four annas of the rents of all the villages previously allotted to him, and to give to the plaintiff a corresponding equity or right to have the twelve annas of the rents of the villages which had formerly belonged to Sumdul. It cannot, their Lordships think, be said that the plaintiff was bound to assert this right in 1860, because, Sumdul having appealed against the decree, there was of course a possibility of its being reversed or altered, and of Nusiruddin's suit being dismissed altogether. It was therefore uncertain against whom the right to receive the twelve-annas share of the villages in question was to be asserted; nor did it follow that because the butwarra or family arrangement had been declared to be of no effect as between Nusiruddin and the present plaintiff, it was of no effect as between the plaintiff and his brother who were co-defendants in Nusiruddin's suit. Again, it appears that no attempt was made by Nusiruddin to take out execution pending the appeal, and it may fairly be supposed that by arrangement between the brothers there was an agreement that the property should continue to be enjoyed as it had been under the partition. In these circumstances it seems to their Lordships that even if technically the lands now in question remained, pending the appeal, in Sumdul, there was no necessity or duty lying upon the plaintiff to assert his rights in those lands until Nusiruddin's heirs were put into possession, or, at all events, until the rights of the parties had been finally determined by the dismissal of the appeal. These considerations are alone sufficient to bring the plaintiff's suit within the twelve years, and to dispose of this question of limitation. The provision of the Act of 1871 which seems to their Lordships to govern the case is the 145th Article of the 2nd Schedule, which says that the time from which the period of twelve years is to be calculated is that when the possession of the defendant or of some person through whom he claims became adverse to the plaintiff. Their Lordships think, for the reasons above stated, that there was no possession adverse to the plaintiff before 1863. A question has been raised at the Bar whether the possession adverse to the plaintiff did not really begin when Sumdul, driven to his last shift and unable to resist the execution on the part of Nusiruddin against his zemindary interest, first set up the claim to the lands in question in this suit as lakheraj lands held by a title other than his zemindary title, and therefore capable of being held by him, although all his interest in the zemindary had passed away. There is some evidence on the part of the plaintiff that the ijaradars of his two annas' interest in those lands were then actually and forcibly dispossessed under color of this title. It is not, however, necessary to decide this question. It is sufficient

to say that their Lordships cannot concur with the High Court in thinking that the twelve years are to be calculated from the 3rd December 1860 or from any time previous to the year 1863.

It has already been intimated that in their Lordships' opinion the defendant has wholly failed to establish a title as lakherajdir to the lands in question. Their Lordships must therefore humbly advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and in lieu thereof to order that the appeal to that Court be dismissed, and the decree of the Subordinate Judge affirmed with costs.

The appellant will also be entitled to the costs of this appeal.

The 21st November 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Forests—Proprietorship of Soil—Right to Timber—Hereditary Khot—
Construction.*

On Appeal from the High Court at Bombay.

Nagardas Saubhagyadas

versus

The Conservator of Forests and the Sub-Collector of Kolaba.

In a suit for a share of the proceeds of certain timber alleged to have been cut down by the Government in a village, of three-fourths of which plaintiff claimed to be proprietor :

HELD that the plaintiff's sunnuds merely gave him a hereditary right, as Collector of Revenue, to the perquisites arising out of certain cesses or dues, but no proprietary right in the village, no interest in the soil, and no right to the timber ; nor was he entitled to the proprietorship of the soil of the village by reason of his *ratani* or hereditary khoti, as it was clear that the proprietorship of the soil was not vested in every khot, and the clauses of his own agreement negatived such a right.

This was an appeal from a decision of the High Court of Bombay, of the 11th October 1875, reversing a decree of the local tribunal at Tanna in that Presidency.

Mr. Cowie, Q.C., and Mr. J. D. Mayne for Appellant.

Mr. Scoble, Q.C., and Mr. W. A. Raikes for Respondents.

The appellant's father owned a three-fourths share of the ancient holders of the village of Pigode, in the Kolaba Collectorate ; and from 1865 to 1867 the Forest Department cut down and sold on behalf of Government, certain timber in that village. The appellant's father, who had died since the proceedings were instituted, then brought his suit in the District Court to establish an alleged proprietary title to three-fourths of all the trees in the forest of the whole village, as well as those in the village itself, and to recover Rs. 3,479 in respect of the timber. The local tribunal decided in his favor, but the High Court reversed the decree. Hence this appeal.

Sir Barnes Peacock delivered the judgment of the Judicial Committee as follows :—

This is a suit in which the plaintiff claims against the Conservator of Forests in the Presidency of Bombay, and the Sub-Collector of Kolaba in the Tanna Zillah, a three-fourths share of the proceeds of certain teak and izaili timber, which he alleges was cut down by the Government in the village of Pigode. His plaint states that his share in the village of Pigode, or Pigoda, was acquired by

him as the proprietor thereof, and he states that it is his watani (hereditary) khoti and isafati (village). He says, "Deducting the four annas share which belongs to the Government of the proprietorship of the said village, the remainder of the village, namely, a 12 annas share thereof, belongs to me as proprietor. Although I have a proprietary title to the three-fourths of the whole jungle (forest) of the aforesaid village, including teakwood, as well as izaili (inferior wood), by reason of my watani khoti and isafati thereof, the defendants in the years 1865-66, and 1866-67, cut down teakwood and izaili wood thereof, and sold the same by auction as well as by private sale. Having (a right to take) a share of three-fourths of the proceeds of the same, I made several applications to both the defendants, requesting to be allowed to have a three-fourths of the sale proceeds, but I obtained no redress. I sent notices also to them, but received no reply"—and so on. Then he claims three-fourths of the proceeds of the timber, which he alleges was so cut down by the Government. The principal question is, was he the proprietor of the soil of three-fourths of the village, and as such proprietor entitled, as he alleges, to three-fourths of the jungle, including teakwood as well as izaili?

It will be necessary in the first place to consider what were his rights under the isafati title. That depends upon two sunnuds which were put in and relied upon, one dated in 1653, and the other in 1722. The sunnud of 1653 will be found at page 183 of the Record. After certain recitals it proceeds, "The firman is as follows: From the (beginning of the) months of the year one thousand (and) fifty four," then there is a blank, the marginal note stating, "There is no grammatical connection whatever between the equivalent of this sentence and what follows in the original. It may probably be intended to mean that the various rights below named, appertaining to the village of Pegoonda, had been enjoyed by Ismailji Abaji from the beginning of the Arabic year 1054." The firman proceeds, "At this time Ismailji Abaji Desai of the tappa (district of) Kharapat, in the jurisdiction of the above-mentioned (town), has represented to the threshold of the universe"—that is, the Sovereign—"that the village of Pegoonda, in the above-mentioned tappa (district), is a personal holding (khood-rawan) in lieu of isabat (dues) in this way, namely, that the fixed revenue of the above-mentioned village, consisting of ready money and corn, goes into the possession of the revenue station (thana), and some of the (taxes called) bab, and the whole of the (rights called) kanoonat relating to the above-mentioned village (assigned) for the maintenance of (his) children are his own reversionary rights (doombala khood),"—which is translated or explained in the margin to mean—"that will revert to the Sovereign on ceasing to be held by the present holder."—"And the (rights to certain perquisites called) hak-e-lawazimat and (those called) khariastotore of the above-mentioned tappa (district) are a personal holding;" then the applicant goes on to show what were his personal holdings, and that the profits of the tobacco shop were a personal holding with a reversionary right to the Sovereign. Then he states, "It is hoped that by the royal grace, a gracious firman may be granted (to him) for the satisfaction of his mind." The firman which was granted is, "Let them (the above-named officers) recognize (the said rights as) reversionary (Soombala) and continue the same;" that is to say, let them recognize all his personal rights, with reversion to the Crown, and then after him they are to continue the same rights to his children and children's children. It appears to their Lordships that the effect of this document was simply to give the grantee as the Collector of the Revenue certain perquisites arising out of the dues, and to convert that right, which was then a mere personal right with reversion to the Sovereign, into an hereditary right, which was to descend to his children and to his children's children. It appears, therefore, to their Lordships to be clear that that sunnud gave no proprietary right in the village; it did not give an interest in the soil, and it gave no right to the timber.

The next document of 1722, which was a Marathi document, will be found at

page 53 of the Record. It is a short document: "To Mashaul-anam (*i.e.*, the Honorable) the Desai, the Adhikari and the Kulkararui of Talooka (or Taraf) Nagothua," and so on. The villages which are with (*i.e.*, held by) you as isafat have been (*i.e.*, are hereby) 'settled and granted' or 'granted on certain terms being made' by Rajishri." Then come the names of three villages of which one is Pigode. "In all three villages have been (*i.e.*, are hereby) 'settled' (or granted on certain terms being made). Therefore (as to) the babatas (cesses or tolls) appertaining to the said villages, whether cesses in cash or in kind (grain), whatever the amount (thereof) may come to (the same) shall be 'received by you' (or 'paid over to you')." All that was granted is that he was to be allowed the babatas or the cesses or tolls, he being the Desai, or the Collector of the Revenue on behalf of the Government. That document, therefore, did not convey any interest in the soil, but merely gave a certain right to certain cesses or dues as the perquisites of the grantee as the Collector of the Government Revenue. Therefore, as regards his isafati rights, they did not give him the right of proprietorship.

The next question is, was he entitled to the proprietorship of the soil of the village by reason of his *watani* or hereditary khoti. With reference to that point a report of Captain Wingate was read from a collection of papers by the Government of India, from which it appears that a khoti had the right of proprietorship; but that was merely the expression of the opinion of Captain Wingate at that time; since the date of that report, however, the point came before the High Court of Bombay, and was judicially determined. In that case—reported in the 3rd Bombay High Court Reports at page 132—the Government had resumed the khoti, had granted certain rights to the sub-tenants of the estate, and were willing to allow the plaintiff to take the khoti again upon certain conditions; namely, that she should be bound by the terms which the Government had entered into with the sub-tenants or holders of the land; and it was held that she was not entitled to have the khoti except upon those conditions. The reasons for the decision were that the khot was not the proprietor of the soil. The learned Judge who decided the case in the first instance, went very fully into the matter, and held that the khot was merely an hereditary farmer of the Revenue. The reasons are given in the report, and it will be unnecessary to read them. It is sufficient to say that that decision was opposed to the view taken by Captain Wingate, to which reference was made from the Records of the Government of India. Without expressing any opinion that no khot is or can be the proprietor of the soil, it is sufficient to say that it is clear that the proprietorship of the soil is not vested in every khot.

Then the question comes, was the plaintiff in this case, by virtue of his khoti, entitled to the proprietorship of the soil and to the timber upon it?

It appears that an agreement was entered into by the plaintiff on the 24th December 1861, which will be found at page 395 of the Record. It is as follows: "I give in writing this kararnama as follows: Being invested under Government Regulation (*i.e.*, Resolution), English Letter No. 1832, dated the 18th May 1860, received by me from the Government with (authority) to carry on the vabivat (management) from the year 1859-60 to the year 1886-87 as khoti of the fourth takshim (share) of the mauja (village) aforementioned,"—that is, including this village,—“and being also authorized (by the Government) to collect the assessment of the Government shares (also), and having consented to do so, I give in writing the (following) body of clauses relating to the management to be carried on (by me). They are written as below: The full assessment on the village aforementioned fixed at the survey is Rs. 2196 13a. 3p., deducting therefrom the sum of Rs. 1648 5a. 9p. in respect of the Government shares, the assessment on the remaining fourth share has been fixed at Rs. 548 7a. 6p. The same I agree to pay by instalments as mentioned below,”—naming four instalments. Then by the 8th section, "The village aforementioned has been given (let) to me for 28 years, from the (end of the

year) 1859-60. Accordingly, for 28 years from the current year 1860-61 up to the year 1886-87, I will without any hindrance continue to the cultivating tenants or their heirs (*i.e.*, I will allow the tenants to hold) such of the khoti-nisbat lands as are entered in their names in the survey papers. The amounts of assessment on those lands have been settled at the survey." Then there are several other clauses, but the more important ones are the 15th and 16th. He says in the 15th clause, "Some land belonging to the aforementioned village has been divided into numbers and reserved to itself by the Government for preserving a forest thereon. I will preserve the trees thereon. I will not allow any person to cut down the same, nor will I myself cut them down. In like manner I will not allow any person to cultivate the same, nor will I myself cultivate the same. Should any person cultivate the same, or cut down the trees thereon, I will inform Government of the same. Should the Government order that cattle may be allowed to graze on the aforesaid land reserved for a forest, I will accordingly allow cattle to graze thereon. I will not make any objection thereto. I will also preserve the teakwood trees that may be growing in this village in places other than the survey numbers aforesaid. I will not allow any one to cut them down, nor will I cut them down. If any person does cut them, I will immediately inform the Government of the same."

Now that is an express agreement on the part of the khot that he will preserve all the trees in the Government reserves, and that he will preserve the teakwood trees that may be growing in the village in places other than the survey numbers. Can the plaintiff in the face of that agreement, whatever his rights may have been as a khot, say, as he has said in his declaration, that he has "the proprietary title to the three-fourths of the whole jungle (forest) of the aforesaid village, including teakwood as well as inferior wood."

It appears to their Lordships to be clear that according to the 15th section of that agreement, all the timber in the reserves was to belong to the Government, and that the khot was not to cut down any of the teakwood whether in the reserves or not, and that he was not to allow any other person to do so.

Then in clause 16 he says, "The Government has given to me the ownership of a fourth part of all the trees that now are growing, and of all the new ones that may grow hereafter in the village aforementioned, excepting the trees in the aforesaid preserved forest, and those on the lands claimed by the people, and those on cultivated lands, as also excepting the teakwood and blackwood trees growing on waste lands." Therefore he admits that the Government, when they authorised him to carry on the management of one-fourth of the village and to collect the Government revenue thereof, had the power to reserve, and that they did reserve, all the trees in allotments reserved for a forest, and all the teakwood trees in every other part of the village.

It appears to their Lordships that there is no evidence that the Government cut down any izaili wood. At page 173 there is an entry which shows that some persons as trespassers went on to the Government reserves and cut down some izaili timber. A sum is credited to the forest account in respect of the proceeds of izaili (inferior kinds of) wood. The entry is—"Some people having cut wood from the Government forest at Mauja Pigoda without permission, and having used the same for building their own houses and cattle pens, a report was made from the Peta Mahalkaris, Outward No. 109 of the year 1864-65, whereupon an order was received from his Honour the Deputy Conservator of Forests, bearing Registered No. 361, dated the 16th August 1865, to the effect that the value of the wood (so cut) should be recovered accordingly; (money was) recovered from the said people as per memorandum, bearing the Mahalkaris' signature, bearing the above date." The entry shows that the Government sued some persons as trespassers for cutting down izaili wood in the Government forest, and the plaintiff claims in his declaration to be entitled to that izaili wood, because he says he is

entitled to all izaili wood throughout the village. There is no evidence in the case of any izaili wood being cut down in any other part of the village excepting in this portion of the village which was reserved as Government forest. The plaintiff, as it appears to their Lordships, has not made out a title to any teak-wood, and he has not made out a case against the Government as to their having cut izaili wood in any place, nor of their having recovered the value of izaili wood cut in any part of the village, except the Government reserves in which the plaintiff was clearly not entitled to any of the trees.

Under these circumstances their Lordships are of opinion that the decision of the High Court was right, and they will therefore humbly recommend Her Majesty that the decree of the High Court be affirmed, and that the appellants do pay the costs of this appeal.

The 25th November 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Bahrulia Clan—Family Custom—Exclusion from Inheritance (of Daughters)
—Evidence (Act I of 1872 s. 35)—Wajibularz or Village Administration
Papers.*

*On Appeal from the Courts of the Commissioner of Lucknow and the
Judicial Commissioner of Oudh.*

Rani Lekraj Kuar

versus

Baboo Mahpal Singh

and

Rani Rughubuns Kuar

versus

Baboo Mahpal Singh.

(Two Consolidated Appeals.)

Wajibularz or village administration papers, prepared and attested by Settlement Officers or their subordinates in Oudh, were held admissible in evidence, under s. 35 of the Indian Evidence Act I of 1872, to prove that, in the Bahrulia clan, a custom exists to exclude daughters from succeeding to the inheritance of their father's estate.

These were consolidated appeals from judgments of the Commissioner of Lucknow, and of the Judicial Commissioner of Oudh, respectively, pronounced in 1876.

Mr. Leith, Q.C., and Mr. Doyne for Appellants.

Mr. Graham and Mr. Theodore Thomas for Respondent.

The respondent claimed the property in dispute—the talooks of Surajpur and Rawut Saroi in the province of Oudh—on the ground that he, as the nearest male relation of the last talookdar who died sonless, was, by virtue of a family custom by which daughters were excluded from inheritance, entitled to it. One of the appellants was the only daughter of the late talookdar, and the other was his stepmother, and they protested against his claim; but the Courts in India decided against them.

Their Lordships, without calling on the Counsel for the respondent, proceeded to pass judgment, which was delivered as follows by *Sir Montague Smith* :—

The question in this appeal is whether the plaintiff Baboo Mahpal Singh, or

one of the defendants, Rani Rughubuns Kuar, is entitled as the next heir to Udit Pertab Singh, one of the talookdars of Oudh, to the talook of Surajpur, and another talook of which Udit Pertab Singh died possessed. Udit died without male issue, leaving a widow, since deceased, and an only daughter, the defendant Rughubuns. The plaintiff is the nearest male relation of the deceased talookdar, standing in the position of first cousin once removed. On the death of Udit Pertab Singh, his widow Subhraj was put into possession of the talooks in dispute; but under a compromise with Rani Lekhraj Kuar, the stepmother of the deceased talookdar, the possession was given up to Rani Lekhraj. That was the state of things when the present plaint was brought, and Rani Lekhraj Kuar was alone made the defendant. The first judgment in the case was given by the Deputy Commissioner when the Record was in this state. On an appeal from his judgment, the Commissioner directed that the daughter, Rani Rughubuns Kuar, should be joined as a defendant, and remanded the case to the Deputy Commissioner, directing a new issue which was necessary in consequence of her being brought into the suit. That issue in substance was whether the plaintiff or the daughter was the next heir to Udit Pertab Singh, and entitled to succeed to his estate. There can be no doubt that by the general Hindoo law, which would prevail in the absence of any special custom, the daughter would have been entitled to the inheritance of her sonless father. The question which is raised in the cause, and by the issue which was joined after Rughubuns had become a defendant on the Record, is whether in the Bahrulia clan, to which this family belongs, a custom exists to exclude daughters from succeeding to the inheritance of their father's estate.

Other questions were raised in the suit, but the only question which remains to be determined is whether the evidence which was given by the plaintiff to support that custom was properly admissible? This evidence consists of a number of wajibularz, or village administration papers, which state, in a manner which will be hereafter adverted to, a custom to the effect that daughters are excluded from inheritance in the Bahrulia clan. There is no doubt that if those papers are properly admissible in evidence as proof of the custom, Rughubuns, the daughter, would be excluded by the custom stated in them. These wajibularz, or village papers, are regarded as of great importance by the Government. They were directed to be made by Reg. VII of 1822, and it may be as well to read the language of it before adverting to the objections which have been taken to the reception of the papers in the present suit. The 9th Section is, "It shall be the duty of Collectors, and other persons exercising the powers of Collectors, on the occasion of making or revising settlements of the land revenue, to unite with the adjustment of the assessment and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures, as full as practicable a specification of all persons enjoying the possession and property of the soil, or vested with any heritable or transferable interest in the land;" and other purposes are referred to in this Section. Then in the latter part of it there occurs this passage: "The information collected on the above points shall be so arranged and recorded as to admit of immediate reference hereafter by the Courts of Judicature." It is stated by the Judicial Commissioner that officers in administering the Province of Oudh were directed to be guided by the spirit of this amongst other resolutions.

The papers which are objected to were offered in evidence and received by the Courts under the 35th Section of the Indian Evidence Act 1872. The Section is this: "An entry in any public or other official book, register, or record stating a fact in issue or relevant fact, and made by a public servant in the discharge of

his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact."

The manner in which these village papers were made up with respect to the custom appears to be, that the officer recorded the statements of persons who were connected with the villages in the pergunnah in which this talook is situate. Some of the persons whose statements were taken were the proprietors of villages in the talook; others appear to be the proprietors of villages not in the talook, but in the pergunnah. The Record contains translations of the wajibularz, but not of the whole contents of the papers. Extracts from them only are printed, and these extracts show that the persons giving the information made statements, which are contained in paragraph 4, declaring the existence of the custom in question. These documents are entered on record in the office, and they must be taken upon the evidence to have been regularly entered and kept there as authentic wajibularz papers. The objections which were taken to their reception are stated in the judgment of the Judicial Commissioner, and are these: "Exception was taken to these documents on the part of the daughter on the ground that they were not prepared or attested by the Settlement Officer in person as required by Reg. VII of 1822, and that they relate to matters which the Settlement Officer had no jurisdiction to include in them." Those are the only objections which are stated by the Judicial Commissioner to have been made. A further objection which was relied on by Mr. Cowie appears also to have been taken by the daughter in the course of the proceedings, *viz.*, that she was not bound by the statements in question, inasmuch as she was no party to the making up of the wajibularz. Before dealing with these objections, it will be convenient to refer to what the Commissioner says of the documents. He says: "These are official records of admitted customs all properly attested." It must therefore be taken that they are official records kept in the archives of the office, and that they are authenticated by the signatures of the officers who made them, that being what their Lordships understand from the statement of the Commissioner that they are all properly attested.

The first objection, and the one most relied upon, is that these papers were not prepared or attested by the Settlement Officer in person. We have no precise information of the manner in which the Regulations were directed to be of force in Oudh, but the Judicial Commissioner, as already mentioned, says: "Officers in administering the Province were directed to be guided by the spirit of this amongst other Regulations, but they were not tied down to its exact text." It is plain that they could not be so tied down, because the Regulation in question refers to Collectors, and there are no Collectors in the Province of Oudh. Therefore in applying this Regulation in its spirit, we must substitute for Collectors and their subordinates the persons who were performing the duties which would have fallen upon Collectors in the parts of India to which the Regulation originally applied. These would be the Settlement Officers, or those subordinate to the Settlement Officers, who were employed in making or revising the settlements. The words of the Regulation are:—"It shall be the duty of Collectors and other officers exercising the powers of Collectors, on the occasion of making or revising settlements of the land revenue," to make up the papers. When documents are found to be recorded as being properly made up, and when they are found to be acted upon as authentic records, the rule of law is to presume that everything had been rightly done in their preparation unless the contrary appears. Upon this objection the Judicial Commissioner makes the following observation: "The mere fact then that the Settlement Records of this Province were prepared and attested by officers subordinate to the Settlement Officer, and not by the Settlement Officer in person, cannot be accepted as in any way invalidating the records themselves." He was of opinion that the officers who obtained this information,

and who attested the record of what they had obtained, were officers subordinate to the Settlement Officer, and this being so, their Lordships think that the Judicial Commissioner was right in holding that the wajibularz were prepared by the proper officers, and that this first objection ought not to prevail.

If then these documents were made by proper officers, is there any valid objection to receiving in evidence the information which they record? The objection taken and referred to by the Judicial Commissioner does not very precisely hit the point which has been argued at the Bar. He says, "The objection was that they"—that is, the administration papers—"relate to matters which the Settlement Officer had no jurisdiction to include in them." That objection seems to their Lordships to be unfounded. The officers who were to make the enquiries were directed to ascertain and record "the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures. This custom of the Bahrulia clan relating to the mode of inheritance in the clan seems clearly to be a usage of the kind which the Regulation requires the officer to ascertain and record.

The objection which has been argued is that the papers, upon the face of them, do not show that the officers had passed any judgment upon the information they received, and contain no record of their opinions or findings upon them. It is true that no express statement of the opinion or finding of the officers appears upon the papers, but their Lordships think that the fact that the officers recorded these statements, and attested them by their signature, amounts to an acknowledgment by them that the information they contained was worthy of credit, and gave a true description of the custom. Suppose the papers had had a heading such as the following: "The usages of the Bahrulia clan appear in the information recorded below." This would undoubtedly be an expression by the officer of his opinion that the statements contained a correct description of the custom. Then, when we find that the statements are recorded and authenticated in the manner that has been mentioned, and placed in the Government Records, ought it not to be implied that the officer has in effect affirmed that the information embodied in the recorded statements was true, and described an existing custom? Their Lordships think that such an implication may in this case be properly made.

The Indian Evidence Act has repealed all rules of evidence not contained in any Statute or Regulations, and the plaintiff must therefore show that these papers are admissible under some provision of the Indian Evidence Act. That relied on is the 35th Section, which has been already read. It is necessary to look at the precise terms of this Section; and for the present purpose it may be read: "An entry in any official record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, is itself a relevant fact." There can be no doubt that the entries in question, supposing them to bear the construction already given to them, state a relevant fact, if not the very fact in issue, *viz.*, the usage of the Bahrulia clan. If so, then the entry having stated that relevant fact, the entry itself becomes by force of the Section a relevant fact; that is to say, it may be given in evidence as a relevant fact, because, being made by a public officer, it contains an entry of a fact which is relevant.

There is another ground upon which it is said that these entries would be admissible. Supposing that these papers were not to be treated as records themselves describing the custom, but as recording only the opinions of persons likely to know it, the 48th Section would appear in that view of the entries to make them admissible. The 48th Section is, "When the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant." Then if opinions of this nature were relevant, the

entry of such opinions in an official record is itself a relevant fact, which makes the entry admissible. There may be doubt whether what for the present purpose are assumed to be opinions would fall under the 48th Clause, or the 49th, which is as follows, and refers to family usages: "When the Court has to form an opinion as to the usages and tenets of any body of men or family, the opinions of persons having special means of knowledge therein are relevant facts." It is enough for their Lordships, without giving an opinion on this last ground, to rest their decision as to the admissibility of the entries on the first ground. Placing the admissibility of the papers on this ground, the Evidence Act does not appear to have altered the law with regard to papers of this description, for it had been decided by the High Court of the North-Western Provinces that wajibularz papers, being a record of rights made by a public servant, were admissible in evidence and entitled to weight in proof of village customs. That case is found in the 2nd volume of the North-Western Provinces High Court Reports, page 397.

On the part of the daughter it was objected that being no party to the making up of the papers, she was not bound by the statements in them: She is, no doubt, not bound in the sense of being concluded by them. They do not in any way estop her from asserting her right or disputing the custom which is stated in them. They are only received as evidence, and are open to be answered, and the statements in them may be rebutted. No evidence however was given on the part of either of these defendants to show that the custom did not exist, and their Lordships cannot but observe that if the custom did not exist, nothing could have been easier than to obtain proof of descents and succession to property, which would negative it. It appears that there are numerous villages in this talook, and more in the pergunnah; the Bahrulia clan is a large one, and if the custom did not exist the defendants must have had means, to be obtained without difficulty, of disproving it.

Their Lordships therefore think that these administration papers were properly admitted in evidence, that the objections made to their reception have failed; and that being so, it is not disputed that they contain full proof of this custom.

Their Lordships are of opinion that the judgments of the Court below are right, and they will humbly advise Her Majesty to affirm them, and to dismiss the appeal with costs.

The 27th November 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Mortgage (of Malikhana Interest)—Reg. XXXIV of 1803, ss. 9 and 10—
Accounts—Contract—Usury.*

On Appeal from the High Court at Allahabad.

• Badri Pershad

versus

Babu Murlidhur and others.

There is no ground for the contention that a mortgagee cannot by contract relieve himself from the statutory obligation of filing accounts under ss. 9 and 10 Reg. XXXIV of 1803.

Where, at the time when a mortgage of the malikhana interest of certain talookdars was made, the law by which the contract was governed limited the rate of interest to 12 per cent., and the mortgage

provided that the mortgagee should take the income of the malikhana in lieu of interest and so be saved from having to account for them, crediting every harvest with a certain amount of the income as interest at 12 per cent. and taking the remainder of the malikhana (a fixed sum) as an allowance for the costs of collection: HELD that this stipulation was not in the nature of a contract for interest, and that there was no evasion thereby of the law, or any contract to give usurious interest.

Quare.—Whether, if the surplus malikhana, *ultra* the interest, were a fluctuating instead of a fixed sum, the mortgagee would not be bound to file the statutory accounts.

Mr. Doyne, for Appellant.

Mr. Leith, Q.C., and *Mr. J. G. Witt* for Respondent.

This was an appeal from a decision of the High Court at Allahabad of the 24th November 1876, affirming a decree of the local tribunal at Alighur. The facts of the case are fully stated in the judgment of the Judicial Committee, which was delivered as follows by *Sir James Colville* without calling on the Counsel for the respondents:—

This is a suit brought by the purchaser and assignee of a mortgagor's interest against the purchasers and assignees of the mortgagee's interest. The mortgage deed between the original parties was dated 16th January 1852. It was a mortgage of what was called the malikhana interest of certain talookdars; the amount of that malikhana being, during the pendency of the then settlement, a fixed and known sum. The mortgage deed contained this stipulation: "We hereby make a written agreement that the said mortgagee having taken possession of the mortgaged villages, with all the powers enjoyed by us, may on his own authority collect the jumma fixed by the Government from the villages of the ilaka, and himself pay the revenue to the Government, instalment after instalment, according to the usage in the pergunnah; that he may bring to his own use the income of the malikhana due to us, crediting every harvest Rs. 1,656 per year as interest on the amount of consideration on this mortgage, at the rate of 1 per cent. per mensem, and take the remainder, Rs. 565, the surplus of the malikhana, as his own collection fee and pay of the agent and peons employed for making collections in the villages; that is, he may credit the income of the malikhana to the payment of two items—one, the interest on the mortgage amount, and the other the expenses incurred in making collections in the villages; for we have agreed that the amount of interest of the mortgage consideration, and the expenses of making collections in the villages, should be equal to (or cover) the malikhana profits, and we have no longer any right to claim a rendition of the account of mesne profits accruing during the time of the mortgagee's possession."

The principal question raised by the present appeal, and argued by *Mr. Doyne* at the Bar, is whether this agreement is sufficient to deprive the plaintiff of his statutory right, under the 9th and 10th Sections of Reg. XXXIV of 1803, to call upon the defendants to render the account mentioned in these two Sections. A preliminary question however arises as to the legal validity of the agreement. There can be no doubt that such a contract would previous to that Regulation have been a good and legal contract, and that it would, under the law as it now exists since the repeal of the usury laws, be also a good and legal contract, it being an old and well-known customary form of mortgage that the mortgagee should take the mesne profits in lieu of interest, and so be saved from having to account for them. But there can be, on the other hand, no doubt that at the time when this mortgage was made, the law by which the contract was governed was otherwise; that the Regulation had limited the rate of interest to 12 per cent., and contained provisions under which securities might be avoided if they contracted directly or indirectly for a higher rate of interest; and that the taking of the accounts between mortgagor and mortgagee was regulated by the 9th and 10th Sections. Therefore if the stipulation in question had been made in evasion of the usury law introduced by the Regulation, and as a contrivance for giving the mortgagees a higher rate of interest than that to which they were by law entitled,

it would have been a bad contract, and could not have prevented the accounts from being taken in the usual manner. In the present case, however, both the Indian Courts have found in favor of the legal validity of the stipulation as will presently be more fully stated. It has however been contended that, however this may be, a mortgagee cannot by contract relieve himself from the statutory obligation of filing accounts under the 9th and 10th Sections; and this is the principal, if not only, point raised by the appellant.

Their Lordships are of opinion that this contention is not well founded. There is nothing in the Regulation which says expressly that the accounts must be filed whether they are required for the determination of the rights of the parties in the suit or not. On the other hand the 15th Section says:—"Nothing in this Regulation being intended to alter the terms of contract settled between the parties in the transactions to which it refers (illegal interest excepted), the several provisions in it are to be construed accordingly; and any question of right between the parties is to be regularly brought before and determined by the Courts of Civil Justice." It is under this enactment that the Courts below have tried and determined the validity of the stipulation in question. They have found that it is not in the nature of a contract for interest; that there was no evasion thereby of the law, or any contract to give usurious interest; that the Rs. 565 constituted a percentage which was *bond fide* agreed to be allowed to the mortgagees for the expense and risk of collecting; and which, being only about 5½ per cent., was certainly neither exorbitant nor unusual. Having so found, they were bound to give effect to their decision, by treating the agreement as an answer to the suit, which proceeded on the assumption that the whole of the mortgage money, principal and interest, would be satisfied, if the accounts were taken, contrary to the legal contract of the parties, on the basis of charging the mortgagees annually with the Rs. 565, or so much thereof as they should fail to prove had been actually expended by them in respect of the costs of collection.

Their Lordships must by no means be taken to decide that if the amounts received by the mortgagees had been fluctuating they might not have been bound to file the statutory accounts. Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up. In the present case, however, it is clear that the only sum which the mortgagees could receive, *ultra* the interest, was a fixed and unvarying balance of Rs. 565, and this the Courts have found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection. If this be so, the only result of compelling the defendants to file accounts would be to increase the costs of suit, which must ultimately fall on the plaintiff.

Their Lordships therefore see no reason for questioning the correctness of the decision to which both the Indian Courts have come, and they must humbly advise Her Majesty to confirm the decree of the High Court, and to dismiss this appeal with costs.

The 3rd December 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Limitation—Act IX of 1871 s. 20—Written Acknowledgment (by Agent)—Revocation of Authority—Termination of Authority (Notice of)—Joinder of Parties—Parol Evidence (of Contents of Written Documents)

On Appeal from the High Court at Calcutta.

Dinomoyi Debi Chowdhrahi

VERSUS

Roy Luchmiput Sing Bahadoor.

Plaintiff was held to have failed in taking this case out of the operation of s. 20 Act IX of 1871 by showing that the authority (whatever it may have been before) of the person who had signed the acknowledgments relied on as the defendant's agent, had continued to the time when these acknowledgments were signed, or that the defendant had given any special authority to the said agent to sign the acknowledgments.

In the absence of evidence to the contrary, it was inferred from the facts stated that the agent's service had come to an end, thus making it clear that he could have had no general authority.

Formal notice of termination of the agent's authority is not necessary. It will be enough if the plaintiff knew of the agent having quitted defendant's service, and of his authority having been thus revoked.

Persons acting as agents only in the transactions which formed the subject of this action, and being in no way personally liable to the plaintiff, should not have been joined as defendants.

Nothing is more dangerous than to allow parol evidence to be given of what written documents are alleged to contain, when there is reason to suppose that the documents themselves exist. If a letter exists, it may be found to contain something very different from that which the witness represents to be its contents.

Mr. Cowie, Q.C., and Mr. Doyne for Appellant.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Respondent.

This was an appeal from a decision of a Division Bench of the High Court of Calcutta of the 15th February 1877, reversing that of the Subordinate Judge.

The facts of the case are fully stated in the judgment of the Judicial Committee, which was delivered as follows by *Sir Montague Smith*:—

This suit was brought by Roy Luchmiput Sing Bahadoor, who is a banker carrying on his business at Rungpur, and having a branch bank at Baloochur in Moorshedabad, against a lady of the name of Dinomoyi Debi Chowdhrahi, to recover a large sum of money which is claimed as being due upon the balance of a banking account. This balance represents principal due up to the 29th Assin 1276, Rs. 12,402, and interest from that date to the 22nd Assin 1280, Rs. 5,548, making altogether Rs. 17,950. The plaintiff joined, as defendant in the action, Ram Tarun Hazra, who was in the service of the first defendant and whose position will be hereafter referred to, and also, as a third defendant, Rhada Churn Banerjee, her son-in-law and her dewan. There seems to have been no ground whatever for joining these two persons, for they acted as agents only in the transactions which formed the subject of the action, and were in no way personally liable to the plaintiff. They may be considered as being out of the suit. The defence made to this claim was first, a denial that the balance claimed was due, and secondly, that if that balance was at any time due, the right to recover it was barred by the Statute of Limitations, No. IX of 1871. It seems that Ram Tarun Hazra was what is called a jummanavis, a kind of accountant in the defendant's service; but undoubtedly he had mookhtarnamahs or am-mookhtarnamahs from the defendant, for the lady herself, who was examined on the part of the plaintiff, admits that they were given to him. However, they have not been produced. It is unquestionable also that Rhada Churn acted as dewan of the lady. It seems that she had on one or two occasions deposited considerable sums with the plaintiff on deposit, and had also left with him on deposit valuable property in gold and silver; but on the other side moneys were drawn out from time to time on her account. A large sum of money, Rs. 17,000, was drawn from the bank to pay for an estate which she purchased. The items of the banking account were disputed in the Court below, particularly with regard to that sum of Rs. 17,000, and another sum of Rs. 16,000, which, though it was admitted to have been taken out for the purchase of this estate, was said to have been again paid into the bank. The banking account was managed, and the sums drawn out by Ram

Tarun Hazra, who seems to have been the principal actor in the transactions with the bank, though Rhada Churn interfered in them, and must have known what was the state of the account from time to time. It seems that the account began in 1272, and was finally closed, so far as regards the drawing out and paying in of money, in 1274.

Four accounts altogether have been referred to, which bear the signature of Ram Tarun Hazra. The period of adjusting these accounts appears to have been in the month of Assin, treated as the beginning of the commercial year. The accounts were kept both in Hindee and Bengali books. The dates spoken of in this judgment are those in the Bengali books. The last account (the third) which was adjusted—before we come to the adjustment and hat chitta which are in question in this suit—was adjusted on the 10th Assin 1275, which corresponds with the 25th September 1868. No other account was adjusted until that in question, and upon the adjustment of which the hat chitta in dispute was said to be given on 24th Assar 1277, corresponding with 7th July 1870. Therefore this account, instead of being adjusted as in ordinary course it would have been in Assin of 1275, was not adjusted until the 24th Assar 1277; and it was adjusted, not at Mahigunge, where the former accounts had been settled, but at Baloochur in Moorshedabad. It is said that the reason of the delay and of the settlement having taken place at Moorshedabad, was that there had been some altercation about the amount of interest which should be charged upon the balance due. The two Judges of the High Court, Mr. Justice Kemp and Mr. Justice Ainslie, differed in the view they took of the truth of this mode of accounting for the delay. Mr. Justice Kemp gave credit to the statement of the plaintiff's witnesses who said that the cause of the delay was the dispute about the interest. Mr. Justice Ainslie thought that the plaintiff's story with regard to it was a mere pretence. It is unnecessary, in their Lordships' view, to determine which of the learned Judges is right in his view of the evidence on that point. It is enough to say that this settlement was made out of the ordinary course, being made nine or ten months after the usual time for adjusting the account, and at an unusual place.

With regard to the first question, whether the balance which appears upon the accounts was at any time due from the defendant to the plaintiff, their Lordships, during the course of the argument, intimated that they did not find sufficient grounds for disagreeing with the judgment of the High Court upon that point. They desire to give no further expression of their opinion than to observe that the learned Judges had materials and evidence before them which they might fairly and properly consider, and their Lordships are not prepared to disagree with their judgment.

The question remains whether the debt is not barred by limitation. The last settlement of account, which was regularly made and adjusted by Hazra, took place on 10th Assin 1275, nearly five years before the suit. In order therefore to take the case out of the operation of Act No. IX of 1871 it is necessary for the plaintiff to establish that there has been an acknowledgment either by the defendant herself or by an agent of hers within the period of three years, which is the period of limitation applicable to the present claim. The 20th Section of Act IX enacts: "No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act unless such promise or acknowledgment is contained in some writing signed before the expiration of the prescribed period by the party to be charged therewith, or by his agent generally, or specially authorised in this behalf." The case of the plaintiff is, that an acknowledgment was signed by Hazra, and that he, at the time he signed it, was the defendant's agent, either generally or specially authorised in that behalf. The case is put in two ways: first, that his general authority to act for the lady continued up to the time when he signed the documents to be presently referred to: and secondly, it

is said that there is evidence of a special authority given to him by her to make these acknowledgments.

The account relied on is alleged to have been adjusted by Hazra on 24th Assar 1277 (the 7th July 1870). This account was entered in the plaintiff's khata for the year 1275. It is extremely simple. It states the previous balance up to 10th Assin 1275, Rs. 11,108, and the only new item is this:—"On account of Chati game, Rs. 2." Then interest is added from the 11th Assin 1275 to the 29th Assin 1276, making a total of Rs. 12,402 8 annas, which is the sum mentioned in the plaint. On the same day the memorandum, called the hat chitta, stating the account in a similar manner, was signed by Hazra. It contains the addition, "Interest will be paid at Rs. 1 per cent. per mensem."

The extent of Hazra's authority is not shown by any document. The defendant, who was called as a witness for the plaintiff, stated that she gave am-mookhtarnamahs to Hazra; but they have not been produced, nor is there any evidence of their contents. It was the duty of the plaintiff, if he relied upon those am-mookhtarnamahs, to produce them. It appears that one at least was registered, and the plaintiff might have produced a copy. No effort was made to obtain the original. Hazra might have been served with a subpoena to produce it: and their Lordships, on the evidence before them, see no reason to suppose that Hazra was otherwise than favorable to the plaintiff. If he really had authority, and if he had given these documents acting within that authority, it was his interest to establish those facts; and from his being found in communication with the plaintiff, and also from the plaintiff having produced documents which he could only have obtained from Hazra, there is reason to suppose that he was, to say the least, well disposed to the plaintiff and to the present claim. Though the written authority has not been produced, their Lordships think enough appears upon the evidence to show that he had authority, at one time, to borrow money; indeed his acts in that respect were ratified by the lady herself.

Then comes the question whether the authority which he may once have had was continued down to the time (the 7th July 1870) when the acknowledgments in question were signed. In the absence of the am-mookhtarnamahs the answer to that question must depend on other evidence.

It is proved that in Bhadro 1276 Hazra left Rungpur and the residence of the defendant and went to his own home in Moorshedabad, and he never returned to Rungpur. That was 10 or 11 months before the signature of these acknowledgments. The fact that he left the defendant's service and did not return is proved conclusively by a great number of witnesses. The defendant herself gives this account of it: "Hazra having taken a month's leave, went home and never returned, and he performed no business on my behalf. After that the said Hazra was no longer my servant." Another witness, Shoshodhur Chaki, says: "In the month of Srabun or Bhadro 1276, Ram Tarun Hazra went to his house at Rampara in Moorshedabad. He has not come back since then. He did not get his salary after he had gone away, nor did he perform any business." The same facts are stated by 10 or 12 witnesses called on the part of the plaintiff. Their evidence is nowhere denied or questioned, and is supported, if support were necessary, by the witnesses called on behalf of the defendant. Whether when he first went away he was discharged or not is immaterial. In the absence of evidence to the contrary, it is certainly to be inferred from the facts stated that his service had come to an end. If so, it is clear that he could have no general authority to sign these acknowledgments on behalf of the defendant.

Then it is said that the plaintiff had no notice that Hazra's authority had been put an end to, and therefore that as far as he is concerned it must be deemed to have continued. Formal notice in cases of this sort is not required. It will be enough if the plaintiff knew of the agent's authority having ceased. That would depend upon his knowing whether Hazra had quitted the defendant's ser-

vice, and that his authority was in that way revoked. Their Lordships find that Raout Mull, who was the plaintiff's gomashtha, and apparently one of the managers of the kooti at Mahigunge, was aware of the fact, and it is nowhere denied that the circumstances under which Hazra had left, and continued to be absent, were known. Hazra had gone to his own country in Moorshedabad. Raout Mull says that he knew he had gone there, and Hazra is afterwards found to be communicating with the plaintiff upon this suit. The inference to be drawn from all the facts of the case is, that the Plaintiff or his manager must have been aware of the situation in which Hazra was, and that his connexion with the defendant had come to an end. If that be so, the plaintiff's case fails, so far as it depends on Hazra's general authority from the defendant to make the acknowledgments at the time at which he made them.

It is then contended that the defendant gave a special authority to Hazra to make the very adjustment which constitutes the acknowledgment in question. If that had been made out, nothing of course could have been plainer than this case would have become. What is relied on to establish the special authority is a letter alleged to have been written by the defendant herself. The evidence of it is to be found in the deposition of Raout Mull, and his statement is this: "Afterwards, in the year 1276, the Hazra went to his country in Zillah Moorshedabad. Dinomoyi wrote a letter saying, 'You have calculated interest at too high a rate; for this reason the account cannot be adjusted here. The Hazra is in Moorshedabad; he will go to the plaintiff, and when the plaintiff reduces the rate of interest the account will be adjusted.'" An enquiry in the course of the examination of this witness was made by the defendant's Counsel as to where letters were kept, and he says this:—"The letters that used to come when I was present, I used to make over to the serishtadar of the kooti. They used to remain in the kooti with the gomashtha. The letters that used to come to the gomashtha remained with him." And then again he says:—"The said letter was written after the karbar was closed. I do not remember the year. Dinomoyi wrote at the commencement of the Nagri year 1276, or Bengali year 1277, about the adjustment of the accounts in Moorshedabad. I do not remember whether the said letter was to the address of the plaintiff, or of me, or of the gomashtha. I do not remember whether it contained the seal and signature of Dinomoyi or the signature of Bahda Churn in bakalum. I received the said letter through the burkunder of the plaintiff's kooti. The said letter used to remain in the plaintiff's serishta. I cannot say where it is now." This witness could not say where it was at the time he was speaking, for he was no longer in the service of the plaintiff, having left it for some time. This important letter, which would be evidence of specific authority having been given by the lady to Hazra to adjust the accounts, was not produced, and no attempt was made to account for its non-production. The learned Judges of the High Court do not seem to have recognized the weight of the objections which arise from the non-production of this letter, and the want of any proper explanation to account for its absence. All Mr. Justice Kemp says of it is this: "It is to be regretted that the plaintiff has not been able to file the letter from the lady, the defendant No. 1, to this firm." The learned Judge assumes in that sentence that he was not able to file it, but there is no evidence that he was unable to do so. If such a letter existed, it should have been in his serishta. If any accident had occurred to prevent its production, it might have been shown.

Their Lordships therefore cannot agree with the Judges of the High Court in thinking that a special authority to Hazra to make the acknowledgments in question was sufficiently proved. It is a cardinal rule of evidence, not one of technicality, but of substance, that where written documents exist they shall be produced as being the best evidence of their own contents. Nothing is more dangerous than to allow parol evidence to be given of what they are alleged to

contain, when there is reason to suppose that the documents themselves exist. If a letter exists, it may contain something very different from that which the witness represents to be its contents. When an important letter is not produced, and no explanation is given for its non-production, an inference not unnaturally arises, either that the letter, if written, does not contain that which it is represented to contain, and therefore that it would not suit the purpose of the party to produce it, or that no such letter ever existed.

Their Lordships therefore think that the parol contents of this letter were not properly received in evidence; and they further think, independently of the technical point of its admissibility, that the evidence does not afford trustworthy proof of the contents of the supposed letter. It is to be observed that there is no evidence that the adjustment said to have been made in pursuance of it was ever communicated to the defendant.

On these grounds their Lordships are of opinion that Hazra's authority, whatever it may have been, did not continue to the time when these acknowledgments were signed, and that the plaintiff has failed to prove any special authority from the lady to Hazra to make them.

Their Lordships must humbly advise Her Majesty to reverse the judgment of the High Court, and to affirm the judgment of the Subordinate Judge, and to direct that the plaintiff do pay the costs of the litigation in India. He must also pay the costs of this appeal.

The 5th December 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Oudh Talookdars—Birt Tenures—Shankallaps—Sub-settlement—Limitation—
Act XVI of 1865—Act XIII of 1866—Act XXVI of 1866.*

On Appeal from the Court of the Judicial Commissioner of Oudh.

Sir Maharajah Drig Bijai Sing

versus

Gopal Datt Panday.

The provision of limitation (as it is called) in the Circular of 1861 made no distinction between birt tenures and all tenures in the nature of shankallaps. It applied to all birt tenures, but not to shankallaps, except those that were of the nature of birt, as in this case. But that provision was in effect repealed by Acts XVI of 1865 and XIII of 1866, so that a suit of a birteeah became cognisable notwithstanding that he may not have been in possession in 1855.

Plaintiff having been found to have held by an under-proprietary right as distinguished from a holding through privilege in favor, his claim to a sub-settlement was held not barred by the Rules contained in the Schedule to Act XXVI of 1866.

Mr. Doyne and Mr. J. H. W. Arathoon for Appellant.

No one for Respondent.

The appellant is His Highness the Maharajah of Bulrampore, K.C.S.I., and the question in litigation between him and the respondent is as to whether the latter had established a claim to under-proprietary right as birt zemindar in two villages and half of a third, which formed part of the Maharajah's estate. The facts of the case are fully stated in the judgment of the Judicial Committee, which was delivered as follows by *Sir Robert Collier*:—

In this case the plaintiff made a claim to a settlement in virtue of his under-proprietary right, which he describes as that of a "birt zemindar," in twenty-eight

villages; but that claim has now been reduced to a claim in respect of two villages and half of a third. It was at first dismissed by the Settlement Officer, on the ground that inasmuch as plaintiff did not prove that he had been in possession in 1262 and 1263 Fusli—in other words, in the year 1855, the year before the annexation of Oudh—his claim could not be entertained. The Commissioner of Oudh not being satisfied with the decision on this ground, remanded the case; and upon remand, first the Settlement Officer, and secondly the Commissioner, found that the plaintiff was entitled to the right he claimed, which is sometimes described as a “birt shankallap” right, sometimes as a “shankallap” right, (some kinds of shankallap being almost identical with that of birt, some being different from it,) and an under-settlement was decreed to him. The Judicial Commissioner, in pursuance of a power which he possessed, allowed an appeal to this Board upon a point of law, which he states to be whether paragraph 5 of ruling 5 of the Judicial Commissioner, which he sets out, was or was not correct. The ruling is in these terms: “In the investigation of this and all cases of the same nature it must be remembered that the extension of the term of limitation made by Act XVI of 1865 is founded only on the agreement of the talookdars, and does not apply to tenures originating in favor. A claimant who cannot prove possession of his shankallap holding in 1262-1263 Fusli has no *locus standi* in Court. This ruling appears to be based upon a Circular of 1861, which their Lordships will assume to have had at the time the force of law. The passages in that Circular, on which the ruling is supposed to be founded, are principally these: The first Section enacts, “Though the settlement recently concluded with the talookdars has been declared final and perpetual, subject only to revision of assessment, it has at the same time been provided that the rights of the under-proprietors, or parties holding intermediate interest in the land between the talookdar and the ryot, shall be maintained as these rights existed in 1855.” Then follows s. 24, which relates to birt tenures, and is in these terms: “Where the birteeah has lost possession there is no more to be said. We are not to restore it to him. But the Chief Commissioner is clearly of opinion the birteeahs who are found in direct engagement with the State at annexation, or who have uninterruptedly held whole villages on the terms of their pottahs under the talookdars, must be maintained in the full enjoyment of their rights in subordination to the talookdars.” Then come other Sections which illustrate the meaning of birt. Section 25 says: “The meaning of the term ‘birt’ is a ‘cession.’ It was the purchase of the proprietary rights subordinate to the talookdar on certain conditions as to payment of rent which were held to be binding, though undoubtedly often violated by superior power.” Section 26 runs thus: “Instructions are also required regarding the treatment of shankallap at settlement. Some shankallap is of much the same nature as birt, and therefore will be governed by the same rules; but it differs so far from ‘bai-birt’ that it is a condition of the former tenure that the talookdar can redeem it at any time by repaying the purchase money. The option of availing himself of this condition should be afforded him at settlement. Other ‘shankallap,’ that which is styled kooshust and is usually given to Brahmins and pundits, is a pure maafi tenure given by the talookdar, and will be treated like other rent free grants by talookdars.” The latter words refer us back to s. 20, which is in these terms: “Those birts conferred by favor, or ‘regatte’ birts, as they are styled, in contradistinction to the former, or bai-birts, are not birts in their essential characteristics, but are identical with the rent free grants made by talookdars, and therefore liable to resumption by them at regular settlement, when the Government will take its full share of the rental, as has already been explained in paragraph 14 of the maafi rules.”

Their Lordships observe that the ruling referred to by the Judicial Commissioner draws a distinction in reference to the application of the term of limitation (as it is called) to birt tenures, and to tenures in the nature of shan-

kallap, which are to some extent different from birt tenures, and are assumed to be held at the option of the talookdar; but their Lordships find no such distinction in the Circular of 1861. The words treated as words of limitation in s. 24 apply to all birt tenures. If a shankallap be a birt tenure they apply to it; if it be not a birt tenure they do not apply to it, and it follows that there is no term of limitation in the Regulation applicable to shankallaps. But it must be assumed for the present purpose that this is a shankallap to which the term of limitation, as it is called, applies; that is to say, that it is a shankallap of the nature of a birt, which seems to be the effect of all the holdings in this case.

Sections 1 and 24 enact in effect that if a birteeah is out of possession in the year 1855 his claim cannot be recognized. They are not, in the technical sense, enactments of limitation, though their effect is in some respects the same, *viz.*, to prevent the owner of a birt tenure being heard to support his claim; and they appear to be treated as enactments of limitation by the authorities in Oudh, and to some extent by the Legislature itself. We then come to a Statute, No. XVI of 1865, which is intituled "An Act to remove doubts as to the jurisdiction of the Revenue Courts in the Province of Oudh." Section 5 is in these terms: "No suit relating to any under-tenure which shall be cognisable in any Revenue Court under this Act"—and claims of this kind come under that category—"shall be debarred from a hearing under the rules relating to the limitation of suits in force in the Province of Oudh if the cause of action shall have arisen on or after the 13th day of February 1844," that is, 12 years before the annexation of Oudh, which occurred on the 13th February 1856. Act XIII of 1866 followed, which is very much *in pari materia*. The 1st Section, after re-enacting in almost the same words the provisions of the 5th Section of the former Act, goes on to say, "And any suit or appeal relating to any tenure, and cognisable as aforesaid, which may have been rejected or dismissed upon the ground that the suit was barred under the said rules, may be revived and heard on the merits if the cause of suit shall have arisen on or after such day," that day being the 13th February 1844. It appears to their Lordships that whether the provision in the Regulation referred to be considered a provision of limitation or not, it was in effect repealed by these Statutes, and that the suit of a birteeah became cognisable, notwithstanding that he may not have been in possession in 1855. Therefore, as far as any objection could be raised on the question of limitation, their Lordships are of opinion that these two Statutes are an answer to it.

But it has been contended that the disability, which it is said the plaintiff labours under to prove his title, is not in effect a disability under a Statute of Limitations, but a disability affecting the title itself. Act No. XXVI of 1866 is relied upon for this purpose. It is entitled, "An Act to legalise the rules made by the Chief Commissioner of Oudh for the better determination of certain claims of subordinate proprietors in that province;" and it enacts, "Whereas certain rules have been made by the Chief Commissioner of Oudh for the better determination of certain claims by persons possessed of subordinate rights of property in the territories subject to his administration; and whereas it is expedient that such rules shall have the force of law, it is hereby enacted as follows:—1. The rules for determining the conditions to which persons possessed of subordinate rights of property to talookas in the territories subject to the administration of the Chief Commissioner of Oudh shall be entitled to obtain a sub-settlement of lands, villages, or sub-divisions thereof which they held under talookdars on or before the 13th day of February 1856, and for determining the amounts payable to the talookdars by such subordinate proprietors, which rules were made by the said Chief Commissioner, sanctioned by the Governor-General of India in Council, and published in the Gazette of India for September 1st 1866, and which are republished in the schedule to this Act, are hereby declared to have the force of law."

It has been contended that the rules which have the force of law under this schedule bar the plaintiff's claim. The chief reliance has been placed upon the 1st and 2nd Sections. The first Section is to the effect that—"The extension of the term of limitation for the hearing of claims to under-proprietary rights in land makes of itself no alteration in the principles hitherto observed in the recognition of a right to sub-settlement." Rule 2 goes on to say, "When no rights are proved to have been exercised or enjoyed by an under-proprietor during the period of limitation, beyond the possession of certain lands as seer or nankar, no sub-settlement can be made. But the claimants will be entitled, in accordance with the rules contained in the Circular Orders which have hitherto been in force in Oudh upon this subject, to the recognition of a proprietary right in such lands." That does not apply to this case. "To entitle the claimant to obtain a sub-settlement, he must show that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." So far it appears to their Lordships that the finding of the Courts is in favor of the plaintiff. He must be taken to have kept alive his rights until he was ousted in the year 1851, which their Lordships find upon the evidence was the time when he was ejected by the Rajah. Then follow these words on which reliance has been placed: "He must also show that he, either by himself or by some other person or persons from whom he has inherited, has by virtue of his under-proprietary right, and not merely through privilege granted on account of service or by favor of the talookdar, held such lands under contract (pucka) with some degree of continuousness since the village came into the talooka;" and the next Section explains what is meant by "some degree of continuousness." It has been argued that inasmuch as this is a shankallap tenure of the kooshust description, and held merely by favor, and not as of right, the plaintiff is excluded by the above words. Their Lordships are of opinion, however, that he is not so excluded; they adopt the findings of fact of the different Courts. The claim of the plaintiff is treated in the first place by the Settlement Officer, who originally dismissed it on the grounds which have been stated, as a claim not to "kooshust," but to "birt shankallap." The judgment of the first Court upon remand is to this effect: "I consider it proved that there were five shankallap villages held by the plaintiff's family; that about 1256 Fusli" (it is agreed that that should stand 1258 Fusli) "they lost possession when Jadunath executed the conditional deed of sale. There is proof that plaintiff held his share separately, from the defendant's own written note on the wajibularz presented by Jadunath; and as the defendant neglects to produce the deed, there is no evidence to show that Jadunath did or could legally convey the rights of Gopal Datt; that the Rajah had no right to eject him in 1856 Fusli, and he is now entitled to regain possession and to hold as an under-proprietor." That decision is confirmed by the Commissioner, Mr. Capper.

It appears to their Lordships that the effect of the finding is that the plaintiff did hold, not merely in the words of the Section, "through privilege granted on account of services or by favor of the talookdar," but by an under-proprietary right which is distinguished from a holding through privilege in favor; that he was entitled to hold, not merely during the will of the talookdar, to which the latter part of the Section appears to point, but *in invitum*; and their Lordships are of opinion that from the length of his holding, which appears to be considerable, and the circumstances which have been found in the case, it may fairly be inferred that he held pucka or under contract, or at all events under an arrangement from which a contract might be inferred. That being so, their Lordships are of opinion that he is not excluded, by the words which have been read, from the right of coming before the Court and proving his case.

It has not been seriously disputed that if this be so, he has held with that degree of continuousness which is required by the Act.

For these reasons their Lordships are of opinion that the decision appealed against is right, and they will humbly advise Her Majesty that the judgment of the Commissioner be affirmed.

The 11th December 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Hindoo Law—Adoption (by Widow)—Authority to Adopt—Estoppel—Soodras—
Use of Ceremonies.*

On Appeal from the High Court at Calcutta.

Indromoni Chowdhrahi

versus

Behari Lal Mullick, for Self and as Guardian of Haran Krishna Mullick.

The previous setting up by a Hindoo widow of a written authority from her late husband to adopt, which really never existed, was held not to prevent her from falling back upon a verbal permission to adopt, nor to affect the credit of the witnesses who now speak to the verbal authority to adopt and to the alleged exercise of it by her.

Amongst Soodras in Bengal no ceremonies are necessary to the validity of an adoption, in addition to the giving and taking of a child in adoption.

Mr. Cowie, Q.C., and Mr. Doyne for Appellant.

No one for Respondent.

The facts of the case are fully stated in the judgment of the Judicial Committee, which was declared as follows by *Sir James Colville* :—

This suit was brought by the plaintiff, the widow of one Gopal Lal Mullick, to recover possession of property which formerly belonged to his nephew, Gocool Chunder, who died in November 1841. Her case is that upon Gocool Chunder's death the property claimed descended to his widow Brojosoondari, by whom it was enjoyed during her life; that on her death, on the 3rd April 1868, it devolved on Gopal Lal Mullick, as the nearest collateral heir of Gocool; and that Gopal Lal Mullick, who died on the 7th October 1868, devised (for it is under a testamentary gift that she claims) all his interest in it to her. She treated Behari Lal as the principal defendant, and alleged that he was fraudulently holding the property under the false pretence that Brojosoondari had adopted his brother Haran Krishna, and that he is the guardian of her adopted son. The defendants insisted upon the adoption as valid, and the question was thus reduced to one of title between the plaintiff and Haran Krishna. In this state of things the principal questions which arise on the Record are whether the will upon which the title of the plaintiff depends was executed by her husband; and if so, whether her title was defeated by a valid adoption. This question of adoption of course involves the two issues, whether Brojosoondari had authority to adopt, and whether she had in fact exercised that authority by adopting Haran Krishna. To these issues of fact has been superadded one of law, namely, whether, supposing the adoption to have been made in fact, but without certain ceremonies, those ceremonies were so essential to such an adoption that the omission to perform them invalidated that which would otherwise have been a good adoption. The Lower Court found in favor of the plaintiff that the will had been executed;

it found also that the authority to adopt, which it was said Brojosoondari had exercised, had been given to her by her husband ; but it also found that no adoption in fact by her in exercise of that power had been established, and that if it had been established it would have been invalid for want of the necessary ceremonies. The High Court abstained from dealing with the issue as to the will, obviously because if the adoption were a good adoption it would prevent any interest in the property from passing to Gopal Lall Mullick, and he therefore could have had none to dispose of in favor of the plaintiff. And taking up in the first instance the issues as to the adoption, it found that the widow had authority to adopt ; that she had duly exercised that authority ; and having first referred to a Full Bench* the question whether ceremonies were necessary and essential to an adoption in the case of Soodras, and having received from that body a certificate that they were not essential, it adopted that finding, and so disposed of the question of law. The result was a decree dismissing the plaintiff's suit ; and the present appeal is against that decree.

Before considering the question of adoption, it may be well to refer a little more particularly to some of the antecedent facts of the case. Gocool Chunder, as has already been said, died in November 1841. He left him surviving, not only his widow, but Gobind Lall Mullick, his father. The estate in question had descended to him and a deceased brother Brojendro Chunder Mullick from their paternal grandfather, either directly or through their mother Rashmoni Dossee, it does not appear very clearly which. Brojendro Chunder Mullick died without children, and unmarried, and his eight annas share passed by law to his father. For several years the father-in-law and the widow appear to have gone on harmoniously. She was probably very young, her husband having died young, and the father-in-law naturally administered the whole estate. Then quarrels began between them, and Gobind Lall seems to have conceived the notion of defeating the widow's estate altogether by setting up a case that his son Gocool Chunder had in his lifetime adopted a cousin Doyodronath by name, who was one of the grandsons of Gopal Lall Mullick. Litigation ensued, and in the course of that litigation the widow appears to have pleaded a written authority to adopt. The case was tried before a Principal Sudder Ameen, who decided against her authority to adopt, but also decided against the case of adoption by her husband which was set up by Gobind Lall Mullick. The result of this decision, if it had stood, would have been to confirm Brojosoondari in her widow's estate, but with a negation of the genuineness of the written *anumati patro* which she had set up. On appeal the Sudder Court took the somewhat singular course of saying that inasmuch as the property was situated in different zillahs, and their previous leave to bring the suit in the zillah in which it was brought had not been obtained, the whole proceedings were *coram non judice* and must begin again. In that state of things, Gobind Lall Mullick, the father-in-law, died in the month of March 1858. Shortly after his death the solehnamah, or instrument of compromise, on which so much turns in this case, was executed between Gopal Lall Mullick and the widow. It contains clear admissions on the part of Gopal Lall that the case set up by his brother Gobind Lall as to the adoption of Doyodronath was a false case, and that the widow had an authority from her husband to adopt five sons in succession. It further contains the following provision : " And you shall take as your adopted son, in the manner prescribed by the Shastras, the son born of the womb of the wife of Anund Mohun Mullick, your sister's husband ; that is to say, the son born of the womb of your uterine sister ; but if for any cause you cannot adopt that son, you shall, by adopting successively the sons of any other person or persons of the same caste with yourself, maintain in accordance with your husband's permission the line of person, by whom offerings of water and the funeral cake are to be made to yourself and

your husband, and to the pitriloka (ancestors) of both of you." This solehnamah also contained a confirmation of the gifts which Gobind Lall was said to have made out of the eight annas share which he inherited from his son Brojendro Mullick, viz., two gifts of four annas, and of one anna to Gopal Lall Mullick, and a gift of the remaining three annas to Brojosoondari herself; and further, an agreement between the parties thenceforth to hold the estate in the proportions of 11 annas and 5 annas.

It appears to their Lordships impossible for the representative of Gopal Lall, claiming through him, to contend in the face of this document that there was no power to adopt. Two Courts, moreover, have found that there was authority to adopt, and their Lordships feel bound in this, if in any case, to adhere to their rule of not disturbing the concurrent finding of two Courts upon an issue of fact. It has however been strongly argued before them that inasmuch as the widow once set up a written authority to adopt, whereas the witnesses who now speak to the adoption seek to prove only a verbal authority to adopt, so much discredit attaches to the case for the adoption that the witnesses who depose to it are not to be believed when in conflict with those for the plaintiff. Their Lordships do not conceive that that argument is well founded. The solehnamah, it may be observed, does not itself state whether the authority to adopt was written or verbal. It may well be that according to the course, unhappily too common, of Hindoo litigation, when the widow found that her father-in-law, who was the principal witness, if the story now told is true, to the giving the verbal authority to adopt, had turned round upon her and was seeking to dispossess her by setting up a false case of an adoption by her husband, she may have been advised, and may have been foolish and wicked enough to adopt the advice, to set up a written authority to adopt which really never existed. And she may at the time when the solehnamah was executed have abandoned that case, and fallen back upon a verbal permission to adopt which was then admitted. But if this were so, her inconsistent conduct would not affect the credit of those witnesses who now speak to the verbal authority to adopt, and to the alleged exercise of it by her. Therefore their Lordships think that this argument ought not to have much weight with them in determining the credit of the witnesses who have sworn to the adoption.

The story of the adoption as told by the defendant's witnesses, is as follows: Brojosoondari, who had previously adopted one Romesh Chowdhry, and after his death had taken some steps to procure in adoption a son of one Mozoomdar, an adoption which it is clear on the evidence was never perfected, determined to adopt Haran Krishna, the second son of Anund Mohun Mullick, being a person answering to the description in the solehnamah of the child to be taken in adoption. The child was formally given and received in adoption at Brojosoondari's house at Neemteeta in Zillah Moorshedabad on the 20th December 1867, corresponding with the 6th Pous, B. 1274; but no religious ceremonies were performed on that occasion. A few days afterwards she went to a place called Ashtamoonissa in Zillah Pubna, which was the home of her father, and took up her abode with Gourang Chunder Roy, her nephew or cousin, taking with her Haran Krishna, the adopted son. Three months afterwards, in the month of Cheyt, she caused the putreshti jag ceremonies, including the Datta Homam or burnt sacrifice, to be celebrated under her auspices in the house of this Gourang Chunder Roy; and on that occasion executed a waseetnamah in favor of Behari Lall, authorising him to act as guardian of, and manager of the estate for, the adopted son during his minority. On the following day, the 31st March 1868, she further recognised the adoption by executing a perwannah to the ryots, declaring that she had adopted this child, and that they were to pay their rent to Behari Lall on his account. She died at Ashtamoonissa a few days afterwards, on the 3rd April 1868, and at her obsequies, which took place there, Haran Krishna took the part which it is usual and proper for a son of the deceased to take. After the return of the

defendants to Neemteeta there was a dispute as to the fact of the adoption, and Gopal Lall Mullick and his faction appear to have got possession, temporarily at least, of the house of Brojosoondari at Neemteeta. It is pretty clearly established that Gopal Lall Mullick performed or affected to perform the *sradh*, which is customarily performed 30 days after the death of the deceased, at her house, whilst Haran Krishna, as her adopted son, was performing a rival *sradh* in the house of his natural father. But although Gopal Lall Mullick may have got temporary possession of the house, there is nothing to show that he ever got possession of the property. There is in the Record some evidence of a threatened or apprehended disturbance, and of some persons having been bound over to keep the peace, but there is nothing to show how Haran Krishna got into possession, as he unquestionably did get into possession, or that Gopal Lall Mullick ever took any legal proceedings to disturb or question that possession. That is the general effect of the evidence in favor of the adoption.

On the other side there are a great many witnesses who deny altogether the fact of the adoption. Some of them, relying on the absence of the usual publicity, say that if there had been an adoption they must have known of it; that they would have been invited guests, and would have been present at the ceremony; others again attempt to prove two distinct alibis, one being directed to show that Brojosoondari was not at Neemteeta, where the adoption is said to have taken place in the month of Pous, but had quitted it for Ashtamoonissa in the preceding month of Aughran or at some prior time; the other to show that Haran Krishna did not accompany her, but remained in the interval between Pous and Cheyt in the house of his natural father. It may be remarked that the most respectable witness who speaks to the presence of Haran Krishna in the house of his natural father at one time during this period is the pleader who was examined first for the plaintiff, and that his testimony is not absolutely inconsistent with the defendant's case, because it is part of that case that Haran Krishna was not at Ashtamoonissa during the whole time of Brojosoondari's residence there, but in consequence of the illness of his natural mother was sent back to his natural father's house at Neemteeta for a time, returning in or before Cheyt to Ashtamoonissa. The evidence, however, of other witnesses who speak to the fact of his continued residence at Neemteeta is utterly irreconcilable with the notion of his having gone with Brojosoondari to Ashtamoonissa, or indeed with his ever having been there. Therefore there is a direct conflict of evidence, and it is perfectly impossible to reconcile the two stories. The learned Judges of the High Court seem to have gone very carefully through the evidence on both sides, and their Lordships are not disposed to dissent from the conclusion to which they came, that the testimony of the witnesses on the part of the defendant, and especially that of Gourang Chunder Roy, is more worthy of credit than that of the witnesses for the plaintiff. It is not necessary for their Lordships to go in detail through the evidence on both sides. It is sufficient to say that the conclusion to which the High Court came is that to which their Lordships, after hearing the whole of the evidence read, would themselves have been disposed to come, and that they also think it is confirmed by the probabilities of the case. One of the arguments on the other side as to the improbability of the alleged adoption was founded upon the state of ill feeling which is said to have existed, and which does seem at one time to have existed, between Brojosoondari and Anund Mohun, and her sister. It is not, however, shown that that state of feeling, if it existed at one time, continued to exist up to the time of the alleged adoption. That it once existed is a circumstance which may perhaps explain why, instead of taking Haran Krishna in the first instance, Brojosoondari adopted Romesh Chowdry, and afterwards showed some disposition to adopt a second person out of the family; but it seems very difficult to reconcile the hypothesis that her hostility toward Anund Mohun and his wife continued up to the time of her death, with the unquestionable fact that Anund Mohun's son

Behari was with her at Ashtamoonissa, a place distant from his and her ordinary abode, for some time before, and up to, the time of her death. The reasonable inference to be drawn from that fact is that whatever may have been the state of feeling at a previous time between Brojosoondari and Anund Mohun, his branch of the family had been restored to her favor. Another point which was much argued as throwing discredit upon the evidence for the adoption was founded on a document which the High Court has held was not properly proved in the cause, and which certainly might have been better proved if the person to whom it is said to have been addressed had been produced as a witness. This is the letter which Anund Mohun is said to have written on receiving the news of Brojosoondari's death to one Gour Soonder Chowdry, and in which he is supposed to speak of her having executed a gift on her deathbed in favor of his son Behari, a gift inconsistent with the alleged adoption. Their Lordships are not prepared to say that if this letter had been better proved it might not have been explained as referring to the waseeutnamah under which Behari has certainly acted as guardian of the adopted son, though the document itself is lost. On the other hand the facts already stated as to the possession of the estate by Behari as guardian for Haran Krishna, and the omission of Gopal Lall to take legal proceedings to obtain possession, and the perwannah to the tenants, which the High Court has found to have been executed by Brojosoondari in her lifetime, go far to corroborate the general truth of the oral evidence in favor of the defendant.

Upon the whole, therefore, their Lordships are of opinion, after weighing the evidence on both sides, that they must affirm the decision of the High Court as to the fact of adoption.

The next question to be considered is the correctness of the finding of the High Court to the effect that amongst Sudras in Bengal no ceremonies are necessary in addition to the giving and taking the child in adoption. The strongest argument against this proposition is, of course, founded on the 56th sloka of s. 5 of the Dattaka Mimansa, which says, "It is therefore established that the filial relation of adopted sons is occasioned only by the proper ceremonies, of gift, acceptance, and burnt sacrifice, and so forth; should either be wanting, the filial relation even fails." It is admitted that whatever may be the force of the words "so forth" in the case of Brahmins, or members of the other superior classes, the only religious ceremony that is essential to an adoption by a Sudra is the Datta Homam, or burnt sacrifice, which it is said he, though as incompetent to perform that for himself as he is to repeat the prescribed texts of the Vedas, may perform by the intervention of a Brahmin priest. The authorities, however, which have been with great candour fully cited by Mr. Cowie, show that it has long been questioned whether even the performance of the Datta Homam was essential to a valid adoption, at all events in the case of Sudras. Jagganatha lays down (3 Digest 244) this broad proposition: "The oblation to fire with holy words from the Veda is an unessential part of the ceremony; even though it be defective, the adoption is nevertheless valid," and in arguing in support of this proposition he seems to make no distinction between Sudras and the superior castes. In the case before the Privy Council, 2 Knapp 287 (which it appears was a case between Brahmins), Lord Wyndford says in his judgment, "But although neither written acknowledgments nor the performance of any religious ceremonial are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notice given of the times when adoptions are to take place in all families of distinction as those of zemindars or opulent Brahmins, that wherever these have been omitted, it behoves the Court to regard with extreme suspicion the proof offered in support of an adoption." This statement of the law is perhaps of more value than it would otherwise have been, when it is considered that the case was argued on one side by Mr. Sergeant Spankie, who had great experience in India and probably was better acquainted than English

Counsel at that period generally were with questions of Hindoo usage and law. It cannot, however, be considered as more than a dictum, since the decision was against the adoption as a fact. It was, nevertheless, in accordance with the law as then laid down by Sir Thomas Strange at pp. 83 and 84 of the 1st vol. of his Treatise, 1st edit., and the authorities cited by him. Then it has been more recently decided in the Madras High Court that even in the case of an adoption by a Brahmini woman the ceremony is not necessary. Their Lordships intend to follow the example of the High Court in this case in not considering to what extent the Madras decision is correct and how far the ceremonies may be omitted in the case of adoption by a Brahmini woman. They may, however, observe that the reasoning of the Madras Court applies even *à fortiori* to Sudras. The other Indian decisions which have been cited, and particularly those of the late Sudder Dewanny Adawlut, clearly show that the present question has long been treated as an open and vexed one by pundits as well as Judges. It was so treated in a case before their Lordships in 1872, *Sreenarain Mitter v. Srinisti Krishna*,* 11 B. L. R. P. C. 171, but was not then decided, the suit being dismissed upon another ground. Lastly, the Full Bench in this case appears to have satisfied itself that the passage in the Dattaka Nirṇaya, upon which Pundit Shamachurn Sircar in his Vyavastha Darpana relies as an answer to those who deny that the performance of the Datta Homam is essential to an adoption by a Sudra, is in fact an authority the other way.

Upon the whole, then, their Lordships have come to the conclusion that the weight of authority is in favor of the finding of the Full Bench of the High Court.

They would have been sorry to come to a different conclusion, because, although it may be true that the use of the ceremony in question on the occasion of an adoption is so general amongst Sudras that the absence of it may fairly, as Lord Wyndford observed, cast suspicion upon a doubtful case of adoption, yet to hold that where the giving and taking of a child in adoption are established, the omission of the ceremony invalidates that adoption, would mischievously, as they conceive, strengthen the meshes of the purely ceremonial law, and tend to encourage suits to impeach *bond fide* adoptions. Their Lordships, agreeing with and adopting the finding of the Full Bench of the High Court, do not think it necessary to consider what would be the effect of the subsequent ceremonies performed at Ashtamoonissa as a remedy of any defect which up to that time may have existed in the adoption. They only observe that they have not been referred to any distinct authority that the defect may not be so supplied, particularly in cases where, as here, according to the evidence, it was from the first announced that the ceremonies usually incident to an adoption would take place at a subsequent time.

The title of the defendant being established, their Lordships need not consider whether the will, which is an essential link in that of the plaintiff, has been proved, and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. There will of course be no order for costs, the case having been heard *ex parte*.

* *Nom. Noggendro Chundro Mitter v. Sreemutty Kishen Soondary Dassee*, 19 W. R. 133; 2 Sph. P. C. R. 774.

The 13th December 1879.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Hindoo Law—Succession—Impartibility—Zemindary of Nuzvid—Construction
of Sunnud—Primogeniture.*

On Appeal from the High Court at Madras.

Rajah Venkata Narasimha Appa Row Bahadur

versus

Rajah Narayya Appa Row Bahadur and others,
and

By order of Revivor of the said Rajah Venkata Narasimha Appa Row Bahadur
versus

The Court of Wards, acting on behalf of the late Respondent, Rajah Narayya
Appa Row Bahadur, now deceased, and others.

Where an ancient zemindary, which under the Mahomedan Government was a family raj descendible to a single heir according to the rule of primogeniture, was under the British Government divided into two distinct zemindaries, one of which (the larger) was granted to the eldest son, and the other to the second son, their Lordships, without expressing any opinion as to whether the former (with which they had nothing to do in this appeal) was or was not impartible or descendible to a single heir, held, according to the proper construction of the sunnud under which the latter was granted to the second son and his heirs or assigns for ever, that the zemindary thereby created for the first time was not impartible or descendible otherwise than according to the ordinary rule of the Hindoo law.

The Hunsapore Case, distinguished.

Mr. Cowie, Q.C., and Mr. Grady for Appellant.

Mr. Leith, Q.C., and Mr. Mayne for Respondents.

The judgment of the Judicial Committee, in which the facts of the case are fully stated, was delivered as follows by *Sir Barnes Peacock* :—

This is an appeal from a judgment and decree of the High Court of Judicature at Madras, affirming a judgment and decree of the Acting District Judge of Guntur, in a suit in which the appellant was the plaintiff, and the deceased respondent, Rajah Narayya Appa Row, was one, and the principal one, of the defendants.

The suit was brought to recover, amongst other things, a sixth part or share of the zemindary of the six pergunnahs of Nuzvid, in the Kondapalli Circar, to which the plaintiff claimed to be entitled by inheritance, as one of the six sons of Rajah Shobhanadri.

It was not disputed that the zemindary, prior to the year 1802, formed part of an ancient and much larger estate, which was indivisible and descendible to a single heir, and that prior to the British rule it was a military jagheer held on the tenure of military service, and in the nature of a raj or principality.

It is unnecessary to trace the succession to the ancient zemindary farther back than to the year 1772. It is found by the Judge of the First Court that in that year, Vankatadri, who had succeeded to the estate, died, and was succeeded by his son Narayya, who was proclaimed a rebel, and made a State prisoner in 1783. The entire estate was confiscated and resumed by Government, and in the year 1784 was restored to Venkata Narasimha, the eldest son of Narayya, the rebel. It may be assumed that the estate, which was restored in its entirety, was restored as it existed prior to the confiscation, and that the rule as to impart-

bility and descent continued as before. *See the Hunsapore Case*, 12 Moore Ind. Appeals, p. 1.*

Narayya, the rebel, had three sons, Venkata Narasimha, the eldest, to whom the estate was restored, Ramachandra, and Narasimha.

In 1793 the estate was again resumed by Government for arrears of revenue, and in 1802 two new zemindaries were carved out of it, of which the zemindary of Nuzvid, now the subject of dispute, was granted to the second son, Ramachandra, and the other, Nidadavolu, which was of much greater extent, to the eldest son Venkata Narasimha.

Upon the death of Ramachandra, he was succeeded by his only son, Shobanadri. In 1816 the third brother, Narasimha, brought a suit against his eldest brother, the zemindar of Nidadavolu, and against the guardian of the minor zemindar of Nuzvid, in which he claimed one-third of the whole property as being joint and divisible family property. He obtained a decree in his favor in the original Court. This was reversed on appeal by the Sudder Court, and his suit was dismissed. The ground of the decision was that the act of the Government in creating the two zemindaries was an act of State, and that the zemindars held by a title which the Courts could not question. No appeal was preferred against the decree of the Sudder Court, which became final. The unsuccessful plaintiff died some time after the decree, and an arrangement was made by which the two zemindars settled an annual sum upon his family for their maintenance. This was afterwards commuted into a grant of land in full of all claims past and future. Whatever, therefore, might have been the rights of the third brother, Narasimha, they have been extinguished.

On the 7th December 1864 the eldest of the said three brothers, the zemindar of Nidadavolu, died, leaving two childless widows, and a will, in which he expressed a wish that his estates should be divided equally between his widows. The Collector, in reporting the facts to the Board of Revenue, expressed his opinion that the elder wife should be recognised as successor, and that no division of the estates should be allowed, as they were of ancient origin.

Shobanadri, the second holder of the newly-created Nuzvid zemindary, had six sons. In 1866 his extravagance and mismanagement of the estate had caused quarrels between himself and his eldest son, Narayya, the principal defendant, and the original first respondent, for the settlement of which the assistance of the Collector and the Government was invoked. In consequence of these disputes, Shobanadri presented a petition to Government in November 1866, praying that orders might be issued for the division of his estate among his sons. On the 7th January 1867 the Government replied, referring him to the Collector, to whom instructions had been communicated on the subject of his petition. What those instructions were does not appear. From what follows, however, it is evident, as stated by the respondents in their case, that his request for a division was refused.

Shobanadri died on the 28th October 1868, leaving six sons, of whom the plaintiff was one. The eldest, Narayya, was placed in possession of the zemindary by the Collector, and on the 19th December was registered under the orders of the Board of Revenue as zemindar of Nuzvid.

On the 30th November 1868, Venkata Narasimha, the plaintiff and present appellant, petitioned Government, praying for a division of the zemindary, and was informed in reply that the estate was not divisible. He repeated his application on the 26th January 1869, referring to the wish expressed by his father that the zemindary should be divided among his sons. To this petition the Government again replied that the zemindary cannot be divided, except under the provisions of Reg. XXV of 1802, or in conformity with a decree of a competent Court.

On the 20th October 1871, the plaintiff commenced his suit against the deceased respondent, Narayya, as the principal defendant, and joined his four other brothers as co-defendants.

The first defendant, Narayya, put in a written statement, and contended that the disputed zemindary was an ancient zemindary, and of the nature of an impartible raj. The other defendants upheld the plaintiff's right to a division of the zemindary, but stated that the plaintiff had no cause of action against them.

On the 8th July, the First Court framed, amongst others, the following issue, *viz.*, "Whether the real property constituting the zemindary of Nuzvid is divisible or not," and having found that issue against the plaintiff, dismissed his suit, so far as it related to the zemindary in dispute.

The High Court, upon appeal, affirmed the decision of the first Court, whereupon the plaintiff appealed to Her Majesty in Council against the judgment and decree of the High Court.

Pending the appeal, the first and principal defendant, Rajah Narayya, who was the first respondent, died, and by order of the Court of Wards were made respondents in his place.

The case has been fully argued on both sides, and the only question to be considered is whether when the ancient zemindary was divided into two, the newly constituted zemindary of Nuzvid now in dispute was subject to the same rule as regards impartibility and inheritance as that to which the entire ancient zemindary was subject.

The sunnud under which the zemindary of Nuzvid was granted to Ramachandra is dated the 8th December 1802, and will be found at page 153 of the Record. It is directed to Ramachandra, describing him as the zemindar of the six pergunnahs of Nuzvid in the Kondapalli Circar, and, after reciting the benefits to be derived from a permanent settlement of the revenue, it was declared in the 2nd paragraph (p. 154) that the Government had resolved to grant to zemindars and other landholders and their heirs and successors a permanent property in their lands in all time to come, and to fix for ever a moderate assessment of public revenue on such lands.

By cl. 4 the settlement was fixed at a certain amount. By cl. 7 it was said, "You shall be at free liberty to transfer, without the previous consent of Government, or of any other authority, to whomsoever you may think proper, either by sale, gift, or otherwise, your proprietary right in the whole or in any part of your zemindary; such transfers of your land shall be valid and recognized by the Courts and officers of Government, provided they shall not be repugnant to the Mahomedan or the Hindoo laws, or to the regulations of the British Government." And, finally, after annexing to the grant certain stipulations, the 15th Article declared that "continuing to perform the above stipulations, and to perform the duties of allegiance to Government, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named the zemindary of" The name of the zemindary is not inserted, but at the end of the sunnud there was added a list headed "A list of the villages in the zemindary of the six pergunnahs of Nuzvid, in the Kondapalli Circar."

The name of the zemindary in dispute appears, therefore, to be in strictness, "The zemindary of the six pergunnahs of Nuzvid, in the Kondapalli Circar," but for convenience it is treated as the zemindary of Nuzvid.

The provisions of the sunnud differed in no respect from those which are contained in every ordinary deed of permanent settlement; the feudal or military tenure was at an end; the six pergunnahs to which the sunnud related became a new zemindary, subject only to the payment of a fixed land revenue, and subject to the ordinary stipulations and the performance of the duties ordinarily imposed upon zemindars.

It is stated in the 11th paragraph of the written statement of the first defendant, "that under the empire of the Mahomedans the ancient zemindary of Nuzvid was extensive, and was governed by its Chiefs with absolute power and independence; but under the policy of the British Government the same has become divested of its military character, and dwindled into a large peashcush paying zemindary."

This is doubtless a correct statement.

In the former state of things indivisibility and impartibility and descent to a single heir were the ancient nature of the tenure, and with good reason when the estate was subject to military services and under the government of a chieftain, and was in the nature of a raj or principality; but when the ancient zemindary was resumed and two new estates were created out of it, of which the zemindars ceased to be liable to military service, or to be independent chiefs, but held merely as ordinary zemindars, subject to the payment of a fixed assessment of revenue, there was no reason why the rule of impartibility or descendibility to a single heir, according to the rule of primogeniture, should be extended to the newly created estates.

There was no State policy which required that the new estate of Nuzvid should be indivisible, otherwise cl. 7 would not have been inserted in the sunnud. If Ramachandra had transferred by gift, sale, or otherwise any portion of his zemindary, such portion would not have been impartible or descendible, according to the rule of primogeniture to a single heir of the transferee, if a Hindoo or Mahomedan. Indeed it was expressly stipulated in the sunnud, that transfers in whole or in part should be valid, provided they should not be repugnant to the Hindoo or Mahomedan laws, which they would have been if they had been limited to the eldest son or other single heir of a Hindoo or Mahomedan transferee. There was no reason why the new zemindary should have been made impartible or limited to Rajah Ramachandra and his heirs according to the rule of primogeniture, when, so far as Government was concerned, he might have divided it by will amongst several devisees.

The limitation in para. 15 of the sunnud was to his heirs, by which, according to their Lordships' interpretation, his heirs according to the ordinary rule of Hindoo law were intended. Ramachandra did not at the date of the sunnud hold an estate descendible to a single heir according to the rule of primogeniture, and there is no reason why the limitation to his heirs should be construed to mean a single heir according to the rule of primogeniture, when the descent from his transferees would be regulated by the ordinary rules of inheritance. If the Government had intended to make the estate impartible, and to limit the succession to a single heir according to the rule of primogeniture, instead of to the heirs of the grantees, according to the rule of Hindoo law, there is no doubt they would have expressed their intention in unambiguous language. Their Lordships have nothing to do with the case of Venkata's new zemindary of Nidadavolu, and therefore abstain from any expression of opinion as to whether it was impartible or descendible to a single heir or not. Nor are they, nor were the Civil Courts, bound by any views of the revenue authorities as to the effect or construction of the grant or the intention of the Government. Nor has the decision of the Sudder Court in Narasimha's case any bearing upon the construction of the sunnud of 1802, or upon the rights of the parties to the suit. In the *Hunsapore Case* (12 Moore's Ind. Appeals, p. 9),* the zemindary was an impartible raj, which by family usage and custom descended to the oldest male heir, according to the rule of primogeniture, subject to the obligation of making babooana allowances to the junior members of the family for maintenance. It was seized and confiscated by the British Government in 1767, in consequence of the rebellion of the Rajah, who was expelled by force of arms. The Government, having kept possession until

* 9 W. R. P. C. 15; 2 Suth. P. C. R. 114.

1790, granted it in that year to a younger member of the family, on whom subsequently they conferred the title of Rajah. There was no fresh sunnud, and the only question raised was, what was the nature of the estate granted; whether it was a fresh grant of the family raj with its customary rule of descent, or merely a grant of the lands formerly included in the raj, to be held as an ordinary zemindary. In that case, the estate, whilst in the hands of the Government, had never been broken up, and it was held that it was the intention of the Government to restore the zemindary as it existed before the confiscation, and that the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*. There the estate was transferred in its entirety, but in this case the estate was divided into two distinct zemindaries, and a new sunnud granted allowing the same to be alienated in part or in whole, and making it inheritable by a person and his heirs and assigns for ever, that person being one who had never held an estate descendible to his eldest male heir.

The word heirs used in the sunnud must, in their Lordships' opinion, be construed to mean the heirs of the grantee, according to the ordinary rules of inheritance of the Hindoo law.

With reference to the effect of the sunnud of 1802, some reliance was attempted to be placed on an agreement said to have been entered into between Venkata Narasimha and his brother, Rajah Ramachandra, dated 17th July 1795, but their Lordships do not think that it was legally proved, and therefore reject it. In considering the effect of the sunnud of the 8th December 1802, reference may be had to the letter of Mr. John Read, the Collector of Masulipatam, to the Secretary of the land revenue settlement division, dated 25th July 1802, in which he submitted a plan for the division of the ancient zemindary of Nuzvid, and offered an opinion as to the respective claims of Venkata Narasimha and of Ramachandra, preparatory to the introduction of the permanent settlement (Record, p. 169). In that letter, of which their Lordships are of opinion that the official copy of the copy filed with the Board of Revenue (which was an official record) was under the circumstances admissible in evidence, Mr. Read says:—

“A perusal of the late Collector's correspondence will show that Ramachandra Row's claim to participate in the zemindary has been long and steadily maintained, so late, indeed, as the 17th July 1795. The views of Venkata Narasimha Appa Row and Ramachandra Row underwent the discussion of their relatives and adherents. In consequence, an agreement was exchanged, providing for the division of the estate, effects, and zemindary of their deceased father, conformable to the usage in such cases.

“No doubt remains of the execution of this agreement, although I cannot find it received the sanction of the Collector. The elder Appa Row pretends to state that the document was forcibly taken, and has presented what he terms a corrected plan for the division of the zemindary. The charge of forcible exchange I believe to be incorrect, and the agreement, to which Venkata Narasimha Appa Row appeals, is no more than a loose memorandum in the handwriting of the Rajahmundry Peishkar.”

But even without that letter their Lordships have no doubt whatever as to the proper construction of the sunnud of 1802, and that the zemindary thereby created for the first time was not impartible or descendible otherwise than according to the ordinary rule of the Hindoo law.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgments and decrees of both the Lower Courts, and to order that the appellant do recover one-sixth part or share of the villages included in the zemindary of the six pergunnahs of Nuzvid, in the Kondapalli Circar, together with his costs in both the Lower Courts in proportion to the value of that property.

It was found by the First Court that the Kamatan lands and gardens in

various villages to a total value of Rs. 58,500, of which a garden valued at Rs. 300 is in the plaintiff's possession, and also the forts, houses, granaries, stables, etc., valued at Rs. 123,500, form part of the zemindary, and were therefore indivisible under the first issue, and no appeal was preferred against that finding.

Their Lordships will therefore further humbly advise Her Majesty that the said Kamatan lands and gardens, forts, houses, granaries, stables, etc., above mentioned, be declared to be part of the zemindary above mentioned, and that the appellant is entitled to recover one-sixth part or share thereof, with the exception of the said garden, valued at Rs. 300, in the plaintiff's possession.

Their Lordships will further recommend to Her Majesty that the amount of mesne profits from the date of dispossession of the share of the property ordered to be recovered to the date of restoration thereof be assessed in execution.

The costs of this appeal must be paid out of the estate of Rajah Narayya Appa Row, deceased, the original defendant and respondent.

The 19th December 1879.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Alluvial Land (Settlement of)—Title by Prescription—Possession—Ejectment—Possessory Suit—Limitation—Act IV of 1840—Act IX of 1847—Act XIV of 1859 s. 15—Code of Criminal Procedure, s. 318.

On Appeal from the High Court at Calcutta.

Wise and others

versus

Ameerunnissa Khatoon

and

Wise and others

versus

The Collector of Backergunge and others.

(Two Consolidated Causes.)

Possession for three years under an Act IV of 1840 award does not create a title by prescription.

Where, when a chur was settled by the Government with the defendants as an accretion to lands belonging to them, and on the expiration of that settlement the Government re-settled it with them, and included the lands now in dispute (which were found to have formed in the bed of the river) as part of the said chur in the new settlement: HELD that, even if the Government could not, in consequence of Act IX of 1847, include these lands with the chur without a new survey, they were entitled to take possession of them as lands which originally formed as an island, and were at their first formation surrounded by water which was not fordable, and to oust the plaintiffs, who were trespassers, and to put the defendants into possession.

HELD also that the defendants, having been put into possession by the Government who were entitled to the lands, and having been maintained in possession by the Magistrate under s. 318 of the Code of Criminal Procedure, if the plaintiffs had wished to contend that the defendants had been wrongfully put into possession, and that the plaintiffs were entitled to recover on the strength of their previous possession without entering into a question of title at all, they ought to have brought their action within six months under s. 15 Act XIV of 1859.

Mr. Leith, Q.C., and Mr. Doyne for Appellants.

No one for Respondents.

The judgment of the Judicial Committee, in which the facts are fully stated was delivered as follows by *Sir Barnes Peacock* :—

This is a suit brought by Mr. J. P. Wise, and other persons of the name of Bysack, against several defendants; first, the Government represented by the Collector of Backergunge; secondly, Ameerunnissa Khatoon; and thirdly, Krishna Chunder Chatterjee, for himself, and as guardian of the widows of Bykunt Chunder Chatterjee. Certain other persons as the representatives of Moulvi Wahed Ali and of Moulvi Abdool Ali were afterwards, on the application of the plaintiffs, added as defendants on the record.

The suit relates to certain plots of land, B., C., D., E., and F., marked in an Ameen's plan made previously to a settlement in 1868. The plaintiffs claim 10 annas of B. and C., the whole of D., and the whole of E. and F. They allege that the plots B., C., and D. were reformations of lands which belonged to them, and that E. and F. are accretions to D., or to B., C., and D. They also contend that, even if they failed to establish this title, they had, under the circumstances to be hereafter stated, obtained a title to what they claim in this suit by prescription. The case was tried before the Judge of Backergunge, and it was found by him, and that portion of his judgment was affirmed by the High Court, and it is not now disputed, that the plaintiffs altogether failed in making out their title by reformation. The only substantial question which remains is, whether they are entitled to recover upon the ground that they had obtained a title to the 10 annas of B. and C., and to the whole of D., by prescription. The first Court found that the plaintiffs had obtained such a title; but that decision was overruled by a judgment of the High Court from which the present appeal has been preferred. The long course of litigation with regard to the lots in dispute, and also with regard to a lot A., which is not now in dispute, is thus shortly described by the Judge, in his judgment, at page 121 of the Record. He said, "It seems necessary here to refer to the portion marked A., which, though not the subject of the present claim, has been the subject of similar litigation between the plaintiffs and the defendants 2 and 3. It will be seen on the map that A. is the northernmost portion of the series of churs of which B., C., D., E., and F. are the portions now in dispute. A., it is said, first formed as an island in 1261, and the plaintiffs took possession of it as having re-formed on the site of the diluviated kismuts, Chur Selimpore, etc. Defendant No. 2 claimed it as an accretion to Andar Chur, which is a part of Chur Kalkini, and was held by defendant in ijara from Government. A case was instituted under Act IV of 1840, which resulted in the plaintiffs being maintained in possession. Subsequently B. and C. formed in 1858 or 1859, and similarly in a case under Act IV of 1840, the plaintiffs were maintained in possession. In 1859 and 1861, defendants Nos. 2 and 3 and Abdool Ali"—2 and 3 being Ameerunnissa and Bykunt Chatterjee, who is now represented by the other Chatterjees—"brought suits in the Civil Court to set aside these Act IV awards. Defendant No. 2, in suit No. 85 of 1859, sued to establish her title to A.; Abdul Ali, in No. 366 of 1861, sued to establish his title to two annas of A.; and in No. 283 of 1861, defendant 3, or rather his predecessor in interest, Bykunt Chunder Chatterjee, sued to establish his title to six annas of A., B., C., D. The Principal Sudder Ameen, whose decisions were affirmed by the High Court (*see* 11 W. R., 34 and 127), decreed all three suits, except in regard to D. So that by these judgments the whole of A. was decreed to the defendants 2 and 3 and Abdul Ali, and six annas of B. and C. were decreed to defendant 3." The plaintiffs remained in possession of ten annas of B. and C., the whole of D., and the whole of E. and F. up to the year 1868, when they were ousted therefrom on behalf of Government by the Collector, who settled them with the defendants. The High Court, in their judgment upon appeal from the decision of the first Court, say (*see* First Supplemental Record, p. 4): "As regards the question whether the awards under Act IV of 1840 in favor of the plaintiffs, and the failure of the defendants Nos. 2 and 3 to set aside these awards by civil suits instituted by them, have given plaintiffs such a title as will enable them to recover possession, it was urged that

private individual he might have reduced into his own possession lands which had accreted to the estate and which undoubtedly were his. But lands to which he is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under s. 15 of Act XIV of 1859, which must be brought within six months from the time of that dispossession."

Their Lordships are of opinion that the High Court was right in holding that the plaintiffs have failed to prove a right by prescription. Act XIV of 1859, s. 1 cl. 7, enacts that, "To suits brought by any person bound by any order respecting the possession of property made under cl. 2 s. 1 Act XVI of 1838, or of Act IV of 1840, or any person claiming under such party for the recovery of the property comprised in such order, the period of three years from the date of the final order in the case." This, however, is not a suit brought by Ameerunnissa and the other defendants, but it is a suit brought against them. Act IV of 1840 had nothing whatever to do with title, it merely regarded possession. The magistrate was not to enquire into title, but merely to ascertain who was in possession *de facto*, and to retain him in possession. Their Lordships are of opinion that, independently of the title of Government to the lands which appear to have been originally formed as an island in the bed of the river, possession for three years under an order of a magistrate in a proceeding under Act IV of 1840 does not create a title by prescription.

The plaintiffs' suit was therefore properly dismissed as to B., C., and D. As regards plots E. and F., it was found by the first Court that they were not originally accretions to D., and that the defendant Ameerunnissa had satisfactorily established the fact that they belonged to her (Record, p. 128).

The plaintiffs, upon the appeal of the defendants to the High Court, objected to the decision of the first Court as to E. and F., upon the ground that they were entitled to them as accretions to B., C., and D.; but the High Court held that as they had found that Wise had no title to B., C., and D., his claim must fail as to E. and F. (Record, p. 137). The appellants having appealed to Her Majesty against the judgment of the High Court as to B., C., and D., appealed also as to E. and F., upon the ground that they were accretions to B., C., and D. (appellant's case, p. 26). But their Lordships, having affirmed the judgment of the High Court as to B., C., and D., it follows as a matter of course, upon the appellant's own contention, that the decree as to E. and F. must also be affirmed.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decree of the High Court.

The 4th February 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Hindoo Law (Mitacshara)—Minor's Interest in Expectancy—Alienation by
Guardian—Necessity.*

On Appeal from the High Court at Calcutta.

Baboo Dooli Chand and others

versus

Baboo Birj Bhookun Lal Awasti.

Defendant's father had sought to recover from the widows of the representative of the other branch of an alleged joint and undivided Hindoo family governed by the Mitacshara, possession of their late

husband's share of the property. The widows, however, were held entitled to succeed on proof of a partition under which their late husband held his share as separate property ; but defendant's father, who was only presumptively the reversionary heir next in succession to them, was declared entitled to succeed upon the death of the widows.

Defendant's father having become insane, his wife as natural guardian of defendant during his infancy executed a *kobala* (purporting to pass half of the defendant's interest, which was then a mere expectancy, the widows being still alive) in favor of plaintiffs who, on the death of the surviving widow, sought to recover from the defendant, then of age, the property that had descended to him from the other branch of the family.

Held that plaintiffs had failed to prove a justifying necessity for this conveyance, and that the suit must on this ground be taken to have failed, without the alternative of a remand, in the absence of explanation as to the non-production of evidence upon this material issue.

Their Lordships expressed their inability to affirm that a minor's interest in expectancy could be made the subject of a sale : still less of a sale wholly speculative, as any such sale must be, by a guardian acting, or purporting to act, on behalf of the minor.

This is an appeal by the representatives of two Hindoos, Baboo Himmuto Ram and Baboo Moorli Sahoo (who appear to have been jointly interested in a conveyance taken in the sole name of the former), against a decree of the High Court affirming the decree of the Lower Court, which had dismissed their suit. The respondent and defendant, Birj Bhookun Lal Awasti, is the representative of one branch of a family descended from a common ancestor, Deo Kishen Awasti ; and the object of the suit was to recover from him one-half of the property of Chintamun, who was formerly the representative of the other branch of the family, to which Birj Bhookun Lal Awasti succeeded on the death of the surviving widow of Chintamun. In the year 1848, and shortly after the death of Chintamun, Kanhya Lal Awasti, the father of the defendant, brought a suit, alleging that this family, descended from the common ancestor, Kishen Awasti, was a joint and undivided Hindoo family, governed by the law of the Mitacshara ; and seeking to recover the possession of Chintamun's share from his widows upon that title. His suit so far entirely failed. It was proved that there had been a partition under which Chintamun held his share as separate estate, to which his widows were entitled to succeed, Kanhya Lal Awasti being only presumptively the reversionary heir next in succession to them. The decree made was a somewhat extraordinary one. It did not dismiss the suit ; but, after affirming the rights of the widows, went on to declare the right of Kanhya Lal Awasti to succeed upon the death of the survivor of them ; and, further, directed that they should pay the costs of the plaintiff, whom they had substantially defeated. The only plausible reason for so singular a direction that suggests itself is that the widows may have raised a question which has been raised in other cases, to the effect that, under the Mitacshara law, a Hindoo widow taking by inheritance her husband's separate property, takes it absolutely and in the nature of *streedhun*. It does not appear on this record that such a contention was raised in the suit ; but there was no appeal against the decree, which must therefore be taken to stand. Shortly after it was passed Kanhya Lal became insane. His wife seems to have taken care of him and of his property, and to have acted as the natural guardian of her infant son. In that state of things she executed the *kobala* of the 17th July 1851, in favor of Himmuto Ram, upon which the alleged title of the plaintiffs depends. The widows of Chintamun lived for several years after the execution of that deed ; the last of them dying in 1870. Birj Bhookun, who was then of age, thereupon applied in the first instance for execution of the declaratory decree in favor of Kanhya Lal, claiming as the representative of his insane father. His application failed because it was ruled by the Courts that on the death of the surviving widow he, and not his father, who, though alive, was disqualified by insanity, was the heir of Chintamun next in succession. He then brought, in his own right, a suit against certain persons who claimed the property or portions of it under conveyances from the widows of Chintamun, and ultimately succeeded in recovering the whole estate, with, perhaps, one small exception.

It is stated in the 11th paragraph of the written statement of the first defendant, "that under the empire of the Mahomedans the ancient zemindary of Nuzvid was extensive, and was governed by its Chiefs with absolute power and independence; but under the policy of the British Government the same has become divested of its military character, and dwindled into a large peshcush paying zemindary."

This is doubtless a correct statement.

In the former state of things indivisibility and impartibility and descent to a single heir were the ancient nature of the tenure, and with good reason when the estate was subject to military services and under the government of a chieftain, and was in the nature of a raj or principality; but when the ancient zemindary was resumed and two new estates were created out of it, of which the zemindars ceased to be liable to military service, or to be independent chiefs, but held merely as ordinary zemindars, subject to the payment of a fixed assessment of revenue, there was no reason why the rule of impartibility or descendibility to a single heir, according to the rule of primogeniture, should be extended to the newly created estates.

There was no State policy which required that the new estate of Nuzvid should be indivisible, otherwise cl. 7 would not have been inserted in the sunnud. If Ramachandra had transferred by gift, sale, or otherwise any portion of his zemindary, such portion would not have been impartible or descendible, according to the rule of primogeniture to a single heir of the transferee, if a Hindoo or Mahomedan. Indeed it was expressly stipulated in the sunnud, that transfers in whole or in part should be valid, provided they should not be repugnant to the Hindoo or Mahomedan laws, which they would have been if they had been limited to the eldest son or other single heir of a Hindoo or Mahomedan transferee. There was no reason why the new zemindary should have been made impartible or limited to Rajah Ramachandra and his heirs according to the rule of primogeniture, when, so far as Government was concerned, he might have divided it by will amongst several devisees.

The limitation in para. 15 of the sunnud was to his heirs, by which, according to their Lordships' interpretation, his heirs according to the ordinary rule of Hindoo law were intended. Ramachandra did not at the date of the sunnud hold an estate descendible to a single heir according to the rule of primogeniture, and there is no reason why the limitation to his heirs should be construed to mean a single heir according to the rule of primogeniture, when the descent from his transferees would be regulated by the ordinary rules of inheritance. If the Government had intended to make the estate impartible, and to limit the succession to a single heir according to the rule of primogeniture, instead of to the heirs of the grantee, according to the rule of Hindoo law, there is no doubt they would have expressed their intention in unambiguous language. Their Lordships have nothing to do with the case of Venkata's new zemindary of Nidadavolu, and therefore abstain from any expression of opinion as to whether it was impartible or descendible to a single heir or not. Nor are they, nor were the Civil Courts, bound by any views of the revenue authorities as to the effect or construction of the grant or the intention of the Government. Nor has the decision of the Sudder Court in Narasimha's case any bearing upon the construction of the sunnud of 1802, or upon the rights of the parties to the suit. In the *Hunsapore Case* (12 Moore's Ind. Appeals, p. 9),* the zemindary was an impartible raj, which by family usage and custom descended to the oldest male heir, according to the rule of primogeniture, subject to the obligation of making babooana allowances to the junior members of the family for maintenance. It was seized and confiscated by the British Government in 1767, in consequence of the rebellion of the Rajah, who was expelled by force of arms. The Government, having kept possession until

1790, granted it in that year to a younger member of the family, on whom subsequently they conferred the title of Rajah. There was no fresh sunnud, and the only question raised was, what was the nature of the estate granted; whether it was a fresh grant of the family raj with its customary rule of descent, or merely a grant of the lands formerly included in the raj, to be held as an ordinary zemindary. In that case, the estate, whilst in the hands of the Government, had never been broken up, and it was held that it was the intention of the Government to restore the zemindary as it existed before the confiscation, and that the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*. There the estate was transferred in its entirety, but in this case the estate was divided into two distinct zemindaries, and a new sunnud granted allowing the same to be alienated in part or in whole, and making it inheritable by a person and his heirs and assigns for ever, that person being one who had never held an estate descendible to his eldest male heir.

The word heirs used in the sunnud must, in their Lordships' opinion, be construed to mean the heirs of the grantee, according to the ordinary rules of inheritance of the Hindoo law.

With reference to the effect of the sunnud of 1802, some reliance was attempted to be placed on an agreement said to have been entered into between Venkata Narasimha and his brother, Rajah Ramachandra, dated 17th July 1795, but their Lordships do not think that it was legally proved, and therefore reject it. In considering the effect of the sunnud of the 8th December 1802, reference may be had to the letter of Mr. John Read, the Collector of Masulipatam, to the Secretary of the land revenue settlement division, dated 25th July 1802, in which he submitted a plan for the division of the ancient zemindary of Nuzvid, and offered an opinion as to the respective claims of Venkata Narasimha and of Ramachandra, preparatory to the introduction of the permanent settlement (Record, p. 169). In that letter, of which their Lordships are of opinion that the official copy of the copy filed with the Board of Revenue (which was an official record) was under the circumstances admissible in evidence, Mr. Read says:—

“A perusal of the late Collector's correspondence will show that Ramachandra Row's claim to participate in the zemindary has been long and steadily maintained, so late, indeed, as the 17th July 1795. The views of Venkata Narasimha Appa Row and Ramachandra Row underwent the discussion of their relatives and adherents. In consequence, an agreement was exchanged, providing for the division of the estate, effects, and zemindary of their deceased father, conformable to the usage in such cases.

“No doubt remains of the execution of this agreement, although I cannot find it received the sanction of the Collector. The elder Appa Row pretends to state that the document was forcibly taken, and has presented what he terms a corrected plan for the division of the zemindary. The charge of forcible exchange I believe to be incorrect, and the agreement, to which Venkata Narasimha Appa Row appeals, is no more than a loose memorandum in the handwriting of the Rajahmundry Peishkar.”

But even without that letter their Lordships have no doubt whatever as to the proper construction of the sunnud of 1802, and that the zemindary thereby created for the first time was not impartible or descendible otherwise than according to the ordinary rule of the Hindoo law.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgments and decrees of both the Lower Courts, and to order that the appellant do recover one-sixth part or share of the villages included in the zemindary of the six pergunnahs of Nuzvid, in the Kondapalli Circar, together with his costs in both the Lower Courts in proportion to the value of that property.

It was found by the First Court that the Kamatan lands and gardens in

All these facts are stated by the plaintiffs in their plaint; which accordingly admits both the possession and the title of Birj Bhookun, but seeks to recover from him half the property that descended to him from Chintamun by virtue of the transfer alleged to have been made to them by the deed of the 17th July 1851. Under these circumstances, the plaintiffs, of course, had to establish, first, that the deed under which they claim did purport to pass half the interest of Birj Bhookun; and, secondly, that, having been executed as it was by his mother and guardian, it was a transaction within the rules which enable a guardian effectually to alienate the property of an infant ward. A further question was raised in the suit, *viz.*, whether the interest of Birj Bhookun at the date of the deed could be the subject of such a conveyance, inasmuch as it was then a mere expectancy.

It being essential for the defendants (plaintiffs?) to prove that there was a justifying necessity for this conveyance, the first thing which strikes their Lordships is the total absence of proof upon that point. It seems to them that on this ground alone the present appeal must fail. It has been argued by Mr. Doyne that there may have been some miscarriage of the Judge, by reason of which neither Court has dealt with this issue, but has disposed of the case upon the other points raised in the cause. It is true that one of the grounds of appeal to the High Court is that the proper issues had not been framed. But it appears to their Lordships that, though the first issue is not perhaps as happily expressed as it might have been, it does distinctly raise the question whether there was a justifying necessity for the sale in question. On the other hand, it nowhere appears upon the record that the Lower Court was not prepared to try that issue, or had reserved it for future trial in case its dismissal of the suit upon the other grounds should be found to be erroneous. They have further to observe that, when they look to the record of what was done in the case of the plaintiffs, they find evidence of an intention to prove some justifying circumstances other than those which are stated on the face of the deed to have been the grounds and reasons for the transaction. The latter are, first, the expediency or necessity for bringing against the widows in possession a suit for waste, a suit which could only be brought by the aid of Himmud Ram. That suit was afterwards brought, and it failed. Therefore, as far as the event went, it seems to have been a suit which can hardly be said to have been for the benefit of the infant or of his estate. The other is a suggestion that Kanhya Lal had incurred debts to Himmud Ram, that Himmud Ram had said that he would bring a suit, and that there was risk that the infant's estate would thereby be damaged. But the passage at page 14 of this record which states what the plaintiffs were about to prove, and the purpose for which they asked that their witnesses should be summoned, points to an alleged necessity of a different character. They there state: "The witnesses named under this heading shall prove that Mussummat Badamon Koer was the guardian of Birj Bhookun Awasti"—that is a question on which there is no point raised;—"that Kanhya Lal, the father of Birj Bhookun Awasti, was insane"—that, further, was an admitted fact; "that Birj Bhookun Awasti was under age"—that seems to be also an admitted fact; "that besides the aforesaid Mussummat there was no other lawful guardian; that the income from the estate was very trifling; that the Mussummat aforesaid was in need of maintaining, supporting, and educating her minor son, for which reason she proposed the sale to the ancestor of the plaintiffs; that the ancestor of the plaintiffs, having ascertained the necessity, negotiated the sale with the aforesaid Mussummat; and other particulars." They then give the names of the witnesses who are to prove those facts. Then we find at p. 16 a statement that certain witnesses there named, some of whom had been mentioned at p. 14, had appeared in Court, but had been allowed to go away; and that the plaintiffs could not get them without warrants to be issued upon them in order to bring them in. The Judge made an order for the issue of the warrants, and there is nothing to show why these witnesses were not afterwards pro-

duced and examined. The record, therefore, shows that the plaintiffs not only proposed to prove a different case from that which on the face of the deed appeared to have been the cause and justification for the alienation of the minor's interest, but entirely failed to prove the new case set up.

In these circumstances, their Lordships are of opinion that the suit must on this ground be taken to have failed, and that they would be exercising a very unsound discretion if, without more explanation why evidence upon this material issue was not produced, they were to send the case back, and remand for a new trial a claim to property which seems to have been already the subject of much vexatious litigation. It lay upon the plaintiffs to excuse their non-production of these witnesses, and it appears to their Lordships they have wholly failed to do so.

The conclusion to which their Lordships have thus come renders it unnecessary to consider the grounds upon which the Courts in India have proceeded. The point on which the Lower Court in part proceeded, and which has only been treated as doubtful by the High Court, namely, whether such an interest could be the subject of a sale at all, is of general importance, and one which their Lordships, who do not sit here to determine abstract questions of law, would be unwilling to determine in a case in which no decree in favor of the plaintiffs can be passed. They are certainly not prepared to affirm that such an interest can be made the subject of a sale, still less that it can be made the subject of a sale, highly speculative as any such sale must be, by a guardian acting or purporting to act on behalf of an infant. The decision of this Board, which has been cited by the Judge of the Lower Court, is not precisely in point; but it goes far to show that the principle of English law which allows a subsequently acquired interest to feed, as it is said, the estoppel, does not apply to Hindoo conveyances.

With reference to the construction of the deed, their Lordships deem it sufficient to say that there is, in their opinion, much on the face of it which favors the construction put upon it by the High Court, namely, that what it dealt with was the supposed rights of Kanhya Lall, and through him of his infant son, under the decree of 1848; but that, inasmuch as the appeal must be dismissed on the other grounds which have been stated, it is unnecessary either to affirm or disaffirm that construction.

On the whole, they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

The 6th February 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Construction—Mining Lease—Additional Land.

On Appeal from the High Court at Calcutta.

The New Beerbhoom Coal Company Limited

versus

Boloram Mahata and others.

The stipulation in a mining lease "if you take possession, according to your requirements, of extra land over and above this pottah, we shall settle any such lands with you at a proper rate" was held to

entitle the lessee to a lease of the additional land only if required for the purposes of the original lease, but not for the purpose of selling it.

This was an appeal from a judgment of the High Court of Calcutta of the 25th April 1878, affirming a decision of the local tribunal at Burdwan.

Mr. Cowie, Q.C., and Mr. Macnaghten for Appellants.
Mr. Leith, Q.C., and Mr. Doyne for Respondents.

The suit was brought by the appellants for the specific performance of an alleged agreement to grant a mining lease of some waste lands in the district of Raneeunge. The facts of the case are fully stated in the judgment of the Judicial Committee, which was delivered as follows by *Sir Barnes Peacock* :—

The proper decision of this case depends upon the correct construction of the contract of the 13th December 1858, between the Mahatas and Mr. Erskine. The contract is set out at page 14 of the Record; but it is agreed that the translation made by the Judge at page 134 of the Record may be taken as the correct one. The contract was as follows: "Mouzah Mahatadihi, in Chakla Panchkoti (Pachete), in Pergunnah Shergurh, is our ancestral rent-paying bromuttur land. Out of this talook the share of one co-sharer, Ramdhun Mahata, 2 annas, and that of Uma Churn, 1 anna 6 gundahs 2 cowris 2 krants, being in all 3 annas 6 gundahs 2 cowris 2 krants, is (already) a mokurruree of yours. Putting aside that interest, then out of the remainder, forming a kismut, 12 annas 13 gundahs 1 cowri 1 krant, a piece not to comprise crop-bearing land, that is to say, a piece of land quite uncultivable and waste land, a piece to cover in all 51 beeghas, is leased to you under this pottah, for quarrying coal, for building stores, for garden, for orchard, for road making, and for other uses. The boundaries thereof are on the east, etc." (describing them). "This land, amounting to 51 beeghas within those boundaries, is leased to you at the rent of Rs. 25-8 and a suitable bonus. You are to quarry coal, and till garden, and erect building, and so on, and pay the above rent every year and month as per schedule annexed below; and you will carry on your factory according to use and wont. If you default you are to pay interest according to law. The rent is not to be liable to increase or decrease at any time. You will be allowed no deduction in respect of drought or flood, or for uncultivableness. You will build a factory according to any plan you choose, and possess the same. Within that aforesaid mouzah we will not give a pottah to any factory person;" that is to say, "we shall not let" (literally, give settlement) "to anybody." It is not necessary with reference to their Lordships' view of the case to decide whether this really was a contract not to give a pottah to any person, or a contract not to give a pottah to any other factory person. The plaintiffs, however, in their plaint have treated it as a contract not to give a pottah to any person whatever. If so, that might render the contract bad in restraint of alienation; but it is unnecessary to determine that question. Then it goes on:—"If you take possession," or more literally "take possession," and then, "according to your requirements, of extra land over and above this pottah, and we shall settle any such lands with you at a proper rate. Thereat we make no objection."

It is contended on the part of the plaintiffs that this was a contract which Mr. Erskine or his heirs could assign to any one, and that the person to whom he assigned it would be at liberty to require the Mahatas to settle the land with them at a reasonable rate. It may be assumed for the present purpose that Erskine had the power to assign the contract to any one; and it may also be assumed that the Bengal Coal Company, as the purchasers from the Mahatas of the adjoining land, with notice of the contract, were also bound by it. But then the questions arise, whether it was the intention that Erskine or any one to whom he might assign it should be at liberty to take the whole of the mouzah for any purpose whatever, whether for quarrying coal or not; and whether the Mahatas bound themselves to

grant to Erskine all the cultivable as well as uncultivable land in the mouzah. The construction which the plaintiffs have put upon the contract is, that Erskine was entitled, at any time and for any purpose, to take possession and to compel the Mahatas to grant him a lease of the whole of the residue of the mouzah at a reasonable rate. The words are: "If you take possession, according to your requirements, of extra land." Now what is the meaning of the words—"according to your requirements"? Does it mean "according to your requirements for any purpose," or "according to your requirements having regard to the lease of the 51 beeghas and the purpose for which it was granted"? Assuming that the words, "You are to quarry coal," and "You are to build a factory," were not obligatory, still they show that the object of Erskine in taking the lease was that he might quarry within the 51 beeghas, that he might erect a factory, and carry on mining operations. Then comes the stipulation, which must be read in the sense that if, using the 51 beeghas for the purpose for which you have taken them, you should require adjoining land as incidental to the lease, then we agree to grant it you at a reasonable rate. Could Erskine have assigned the lease of the 51 beeghas to one person, and then sold his interest with regard to the adjoining land to another person, so as to separate the two? Their Lordships are of opinion that he could not. It appears to them that the true construction of the contract was, that if Erskine or his assigns should require additional land for the purpose of carrying out the objects for which the lease was granted, then the Mahatas would settle as much of the adjoining land with them as might be necessary for the purpose of such requirements. It is unnecessary to make any distinction between the waste land and the cultivable land in that view of the construction, because the land was not taken possession of by the Company as requiring extra land for the purposes of the lease, but merely for the purpose of selling it. The Beerbhoom Company, to whom Erskine had assigned the agreement, ask the Court to compel a specific performance of it, because they had entered into a contract of sale to the Bengal Iron Company for a sum of money which they say would give them a profit of Rs. 26,000 odd. They say in their plaint, "Having got this agreement, we afterwards negotiated with the Mahatas for a lease of the adjoining land (not that the Mahatas agreed to grant a lease) upon the terms that we were to pay Rs. 1:8 for the waste land, and Rs. 3 for the cultivable land." And then they ask the Court to grant them specific performance of the agreement by compelling the Mahatas to grant them a lease at those rates; or if the Court will not order a lease at those rates, then at such rates as the Court shall think reasonable.

Their Lordships are of opinion that the Judge of the First Court came to a correct conclusion upon the 6th issue, on which he found that, apart from the 51 beeghas, the assignees could not compel the Mahatas to grant a lease of the remaining lands of the mouzah. Their Lordships are not bound by, nor do they concur in, the reasons which the learned Judge gave for that decision. The High Court affirmed the decision, but not for reasons which their Lordships consider to be correct. They affirmed it upon the ground that it was impossible to determine what was a reasonable rate. Their Lordships cannot think that in the present case the Court, upon a proper enquiry, would have been unable to determine it. There might have been considerable difficulty in fixing the rate; but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome. Their Lordships therefore, without concurring in the reasons of either of the Lower Courts, have come to the conclusion that the Beerbhoom Company were not entitled to compel the Mahatas to settle the remainder of the land at reasonable rates, and they will therefore humbly advise Her Majesty that the decision of the High Court be affirmed, with the costs of this appeal.

The 20th February 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Hindoo Law—Adoption (by Widow without Husband's Authority)—Assent
of Kinsmen—Undue Influence—Adoption of Child of Half-Sister's
Daughter.*

On Appeal from the High Court at Madras.

Karunabdhi Ganesa Ratnamaiyar and others

versus

Gopala Ratnamaiyar and others.

(Two Consolidated Appeals.)

Where there was no sufficient evidence to show that a Hindoo widow had applied to a kinsman to give his assent to her adopting his son without the authority of her late husband, but rather that she had applied to him to give his son to be adopted by her under an authority which she had from her husband when she had no such authority ; and where the kinsman did not give his consent to an adoption merely, but stipulated with the widow that, if she adopted his son, he was to become the guardian of the child, by which arrangement not only would he, as a member of the joint family, really get, during the minority, the management of and the interest in five-eighths of the estate, instead of being entitled, in the absence of an adoption, to only one-fourth of the property ; but the adopted son was to take no interest in that portion of the estate which the assenting kinsman then claimed as his separate property : **Held** that the assent was not one which rendered the adoption valid and binding as against the kinsman's brothers.

Quære.—Whether the adoption of a child of a half-sister's daughter is valid.

These appeals, which were consolidated by order of Her Majesty in Council, were preferred against two decrees of the High Court of Madras of the 10th and 27th April 1877, confirming judgments of the District Court of Trichinopoly.

Mr. Mayne for Appellants.

Mr. Leith, Q.C., and *Mr. Doyne* for Respondents.

The principal question arising in the suit was as to whether the adoption of the appellant, who is the eldest brother of the respondents, by the widow of one Subbarayar was valid to confer on him the *status* of an adopted son of the latter, and thus to divert wholly to him that portion of an estate which otherwise would have been divided between his brothers and himself. The Courts below decided against the appellant's claim. The facts of the case are fully set out in the judgment of the Judicial Committee, which was delivered as follows by *Sir Barnes Peacock*:—

The validity of the adoption in question in this appeal is disputed upon several grounds : first, that the widow of Subbarayar had no authority from her husband to adopt ; secondly, that she had not got the assent of the sapindas to the adoption ; and lastly, that Subbarayar, her deceased husband, could not have married the mother of the adopted boy, that is, his half-sister's daughter, and, consequently, that the adoption of the child was invalid.

Both Courts found that the widow had no authority from her husband to adopt, and their Lordships will not disturb that finding. The first Court held that Subbarayar could not legally have married his sister's daughter, but the High Court entertained a different opinion upon that point. It is unnecessary for their Lordships to express any opinion upon it, and they therefore abstain from doing so ; but, at the same time, they feel bound to say that they are not satisfied with the reasons which the learned Judges of the High Court have given for holding that Subbarayar could have married the mother of the boy, she being the daughter of his own half-sister.

The case turns upon the question of the assent which was given by Saromi Aiyar to the widow to adopt. Their Lordships do not consider it necessary to give any express opinion as to whether Saromi Aiyar could alone have given a valid assent if it had been given to her as a widow having no authority from her husband to adopt, and had been given without his mind having been influenced by other and undue considerations, because their Lordships are of opinion that, looking to the circumstances of the case, there is no sufficient evidence to show that the widow applied to Saromi Aiyar to give his assent to an adoption to be made by her without the authority of her husband, but rather that she applied to him to give his son to be adopted by her under an authority which she had from her husband. The Judges of the High Court expressly say: "But if we endeavor to ascertain whether Rangaumal, as a widow not having authority from her husband, sought for and obtained his kinsman's authority to adopt a son to him, the evidence appears to give no certain answer. According to several of the witnesses, the widow spoke and acted as one already possessed of authority from her husband which she was about to execute, and consent was asked to its execution in favor of Karunabdhī Ganesa Ratnam. There is little, if any, satisfactory evidence to show that an authorisation was sought as from a kinsman having full power to grant or withhold permission."

Their Lordships are of opinion that that remark was well founded, and that there is no evidence to show that the widow applied to Saromi Aiyar to give his assent to her adopting because she could not adopt without his consent; but that the evidence shows she applied to him to give her his child in order that she might adopt him in pursuance of an authority which she had from her husband, which she represented herself to possess.

It is said that, although it is alleged in the widow's part of the agreement that she wished to adopt a son in pursuance of a permission given to her by her husband, there is no such statement as that in the agreement executed by Saromi Aiyar; but when the agreement of Saromi Aiyar is looked at, he expressly refers to the agreement which had been signed by the widow. He says: "I, as guardian, shall, according to the agreement executed by you," etc. Therefore he refers to the agreement which is said to have been executed by the widow, and adopts the statements made in it, namely, that she was proposing to adopt a son in pursuance of a permission given by her husband. The application to Saromi Aiyar was not to give his consent to an adoption which the widow could not make without the assent of the sapindas, but it was an application to give his son to be adopted in conformity with an authority which she had received from her husband.

But, independently of that, it appears that Saromi Aiyar's mind must have been influenced by the arrangement which he made with the widow. Saromi Aiyar does not give his consent to an adoption merely, but he stipulates with the widow that if she adopt he is to become the guardian of the child. He says: "I, as guardian, shall, according to the agreement executed by you, look after all the real and personal properties due therein to the share of your child, and deliver them as soon as your adopted son attains proper age." The widow also says:—"And whereas the said child is a minor, and you, as the managing member of the joint family, are looking after all the moveable and immoveable properties, etc., you, as guardian, shall look after all the real and personal properties due therein to the share of my said child until he attains proper age, and then deliver the same to him with an account of incomes and expenses."

In the absence of an adoption, Saromi Aiyar would have been entitled upon partition to only one-fourth of the property—he being a member of a joint family with his brothers—and his brothers would have been entitled to the other three-fourths; but if a valid adoption should be effected, the adopted son of Subbarayar would become entitled to half the property, viz., the half-share which belonged to the deceased husband of the widow; and the brothers, instead of each being

entitled to one-fourth, would be only entitled to an eighth. Saromi Aiyar himself would, of course, lose a portion of the share, which would pass to the adopted son; but then he stipulated that he should remain guardian of the adopted son, so that until he should attain his full age no partition between himself and the adopted son could have been enforced, because he was the guardian. The widow could not have asked for a partition in the name of her son, because he had stipulated that Saromi Aiyar should be his guardian. The consequence was that by the arrangement made with the widow he really got during the minority the management of, and the interest in, as a member of the joint family (which, if a partition with his brothers should take place, would consist of himself and the adopted son), five-eighths of the estate. The brothers might have separated, but still the infant who was adopted could not have separated from Saromi Aiyar without bringing a suit against the latter for a partition; and to such a suit the guardianship for which Saromi Aiyar had stipulated as part of the consideration for giving his consent to the adoption would have presented exceptional obstacles.

There is another matter by which his mind was probably influenced. It is stipulated in the deed that "my adopted son has nothing to do with the village of Erikkolam in the talook of Musori obtained by you, the same being the acquisition of your maternal grandfather." By reason of this stipulation the adopted son was to take no interest in that portion of the estate which was then claimed by Saromi Aiyar as his separate property, but is now found to be a portion of the joint family property.

Their Lordships, looking at all the circumstances under which the assent was given, are of opinion that the assent was not one which rendered the adoption valid and binding as against the brothers; and their Lordships will therefore humbly advise Her Majesty that the decision of the High Court be affirmed, and that the appellants pay the costs of this appeal.

The 21st February 1880.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Construction—Contract to Supply Produce—Accounts—Duration of Contract—Partnership at Will—Ambiguous Stipulation (qualified by Recital).

On Appeal from the High Court at Madras.

Pallikelagatha Marcar and another

versus

John Gothfried Sigg and another.

Where by an arrangement come to between the parties, part of the balance of account stated as due to the plaintiffs by the defendants, was to be carried to what was styled the "block account," and the remainder to what was styled the "interest account," by which was meant an account bearing interest, whereas the "block account" was to carry no interest, and was to be liquidated by returns only on future contracts for produce, calculated according to a stipulated scale; and the agreement fixed no time for its duration or for the liquidation of the debt: HELD that there was no ground for the contention that the parties bound and intended to bind themselves to carry on their dealings upon the footing of it until the whole debt, or at all events that portion of it which was carried to the block account was liquidated in the manner thereby provided, but that on the true construction of the agreement either party could determine it when it was found to be working unsatisfactorily, having in this respect the same right as parties under a contract for a partnership at will, for though they were not strictly partners, their contract was like one between persons engaged in successive joint advances, the defendants supplying the produce at a profit to the plaintiffs, with a further profit on its export to Europe, and undertaking to apply a portion of their profits in liquidation of their liability on former transactions.

The construction of an ambiguous stipulation in a deed may be governed or qualified by a recital

but if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled, because it may go beyond what is expressed in the recital. Applying this distinction to the operative part of the instrument in this case, it was held that the security thereby constituted was intended to cover the general balance that might become due from the defendants to the plaintiffs upon all the accounts between them.

This was an appeal from a judgment of the High Court of Madras of the 21st February 1878, affirming a decree of the District Court of South Malabar.

Mr. Benjamin, Q.C., and Mr. Mayne for Appellants..

Mr. Herschell, Q.C., Mr. Scoble, Q.C., and Mr. Cowell for Respondents.

The facts are fully stated in the judgment of the Judicial Committee, which was delivered as follows by *Sir James Colville* :—

The respondents (the plaintiffs in the suit out of which this appeal has arisen) are merchants, carrying on business at Winterthur, in Switzerland, under the style of Volkart Brothers. Their house had subordinate branches or agencies in India for the purposes of their trade with that country. Of these, the head or principal one was at Bombay, and under the management of a Mr. Kapp; the other was at Cochin, where the transactions in question took place, and was managed, up to some time in February 1874, by a Mr. Spitteler, and after that date by a Mr. Jung, who had previously been his assistant.

The appellants, the defendants in the suit, are native merchants at Cochin, trading under the style of P. Marcar, the second defendant being the active partner of the firm.

The history of the transactions between the plaintiffs, through their agents at Cochin, and the defendants may be conveniently divided into three periods, the first ending with the annual settlement of accounts up to the 30th June 1872; the second beginning from that time and ending with the execution of the agreement L, on the 2nd January 1874; and the third, which comprehends the transactions under that agreement, ending with the institution of the suit on the 10th December 1875.

The first is material only in so far as it shows what was the course of dealing between the parties whilst there was no substantial (if any) dispute between them. Their transactions were of two kinds. The first and more important class consisted of purchases, chiefly of native-grown coffee, oil, and pepper, made by the defendants from the producers and delivered to the plaintiffs' agent at Cochin, for shipment to their firm in Europe. These were almost invariably made upon contracts for future delivery at a stipulated price, of which the following, made on the 23rd September 1872 (Record, p. 178), may be taken as an example. The material parts of it are as follow :—

“Contract with P. Marcar, of Cochin, for 1,000 cwts. Malabar native coffee, at Rs. 30½ per cwt., delivery on or before the end of January 1875.—I, the undersigned P. Marcar, of Cochin, agree and bind myself to deliver to Messrs. Volkart, of Cochin, on or before the end of January next, one thousand cwts. Malabar native coffee,” to be packed, garbled, and delivered as therein mentioned, “at the price of thirty and a half rupees per cwt. net. . . . On account of which agreement, I have this day received from Volkart Brothers the sum of Rs. 50, the balance to be paid as agreed. In case of non-fulfilment of this agreement, I bind myself to pay to Messrs. Volkart Brothers, as penalty, Rs. 3 for each cwt. short delivered.”

It is to be observed that the Rs. 50 mentioned in this form of contract was rather in the nature of earnest money to bind the contract than the measure of the advance made to enable the defendants to perform it. Such advances were almost invariably made, but they seem to have been made on general account, the particular amount of advance attributable to each particular contract being, apparently, settled orally under the provision expressed in the words “to be paid as agreed,” and deducted from the price when that was adjusted on the delivery of the produce.

That this was so appears by the receipts for advances, the adjustment of particular contracts, and the copies of "purchase accounts" set out in the Record.

The other class of transactions consisted of consignments to Europe by the defendants on their own account, made through the firm of Volkart Brothers. There were thus cross accounts between the plaintiffs and defendants, viz., the purchase account and the consignment account, which were kept separately under these titles, and besides these there appears to have been an "interest account," the nature of which it is difficult precisely to define, but which was certainly different from the "interest account" to be spoken of hereafter. These three accounts would naturally result in a general account current between the two firms, which Mr. Jung swears was regularly kept. The date as on which these accounts were balanced, and ought to have been settled, was the 30th June in each year. But such settlement, at all events of the general account current, does not appear to have been very regularly made, since the account K (p. 71), which purports to show the balance of the general account current on the 30th June 1873, comprehends items which ought to have been included in the account for the preceding year, and was not finally adjusted until March 1874. It may, however, be collected from the purchase account A (p. 117), the consignment account B (p. 122), and the interest account D (p. 124), that the general balance due from the defendants to the plaintiffs on the 30th June 1872 was about Rs. 168,867. 8. 10.

The price of native coffee rose in the latter part of 1872 and 1873. On the 24th January 1873, Mr. Spitteler, who then managed the Cochin agency, obtained from the defendants security in the shape of the letter I, p. 134, and the deposit of the title deeds therein mentioned. The true construction of this letter, which is one of the principal questions in the cause, will be afterwards considered. In February 1873, the price of coffee having risen to Rs. 40 per cwt., it became manifest that the defendants could not fulfil their contracts with defendants for deliveries in 1873 without heavy loss. In these circumstances, Mr. Spitteler made to them further and extraordinary advances, amounting to Rs. 500,000 in the whole, by payments which, in the defendants' case, are stated to have been made on the 12th, 13th, and 19th February, and the 6th March 1873. It became a matter of controversy in this suit what were the object, nature, and effect of this transaction. The defendants have set up that they threatened to abandon their contracts on the terms of repaying the particular advances attributable to them, and of paying the stipulated penalty of Rs. 3 per cwt.; that they were persuaded by Mr. Spitteler to forego this intention, and to accept the advances, on the understanding that the money was to be employed in buying coffee at the market price on account of Volkart Brothers, on whom the losses incurred in this operation were to fall. Mr. Spitteler, on the other hand, has deposed that, when the advances were made, the coffee deliverable on the contracts for 1873 had been all, or nearly all, actually or constructively delivered (an assertion hardly borne out by the terms of the contracts or other evidence in the cause), and that the advances were made in order to enable the defendants to pay for the coffee, and thus to obtain the command of the market for the following season.

The best evidence of what was understood by the parties to be the nature of the transaction between them is that afforded by their written statements made at the time. These have been admitted, without objection, on the Record. Mr. Spitteler, advising his principals in Europe of these advances, when they amounted to only Rs. 300,000, wrote, on the 19th February 1873 (p. 168), as follows:—

"Coffee. On the coast Rs. 40 to Rs. 40½ are readily paid, but most of the dealers find it already now impossible to get produce, and it is already pretty distinctly and openly said that E. Baudry & Co. have received notice from their contractor, Baboo, according to which a great part of their contracts will remain unfulfilled. The reason we can explain easily. Marcar has not only 5,000 cwts. over his contracts already had delivered to him, but his friend Ramon has still about

20,000 cwts. in his possession, which are in the first place reserved to Marcar. As he actually requires money for these payments, we have agreed with him that he should not sell for one month, without our sanction, either to natives or exporters, but should keep in his possession the whole quantity for the chance of orders. There against we advanced him three lacs, and he has to make good to us all interest, back commissions, etc., in case we should not find any employment for the remaining coffee, otherwise we shall bear these charges ourselves, but shall pay Marcar a corresponding lower rate than market rate. Through this arrangement we have enabled Marcar partly to recoup himself for the sustained loss, whereas we, on the other side, reserve ourselves a good chance to do some further considerable business this season. We have no doubt, under the exceptional circumstances, you will approve of our having done so, especially as we hold in our possession security for the greater part of the amount."

In the letter of the 19th July 1873 (p. 140), which the second defendant wrote to Mr. Solomon Volkart in the course of the subsequent negotiations, he says,—

"Last year I entered into several coffee contracts for coffee delivery, amounting to 40,000 cwts., at different rates, averaging Rs. 31. 14. 9 per cwt. f. o. b., and have suffered considerable loss in them. I little expected that the price of coffee would have risen so high in a few days, and that, too, at a figure which no merchants experienced at any time. My friends, as usual with them, held a large portion of coffee. I was, however, unable to arrange a fixed price, owing to their exorbitant demands, and, although aware of the failures of the Brazil and Java crop, I little anticipated that price would grow beyond 30 to 31, being the highest limit native coffee was ever raised to; and I forbode the certainty of recession. With these impressions, I entered into the contracts with your firm. The first few parcels which arrived in the market were met with ready buyers at Rs. 30½ per cwt., for ungarbled, besides a payment of Rs. 3 per cwt. for expenses of conveyance, there being a marked increase of price daily, particulars of which were duly communicated to your Mr. Spitteler. I saw the necessity of paying for the coffee at market price to my parties in order to fulfil my contracts with you, as well as securing the remaining coffee in their hands, who would otherwise have resorted to others, thus entailing on me serious difficulties to bring them round again for future operations, with the view of covering the loss which threatened me on all sides. With these circumstances, I was compelled to receive the advances from Mr. Spitteler, who foresaw that if I were to pay penalty for short delivery, as stipulated in the agreement, there would have appeared to my favor Rs. 400,000, as compared with market price, against Rs. 121,000, being penalty at Rs. 3 per cwt., with certain and sure loss to the firm. I, however, considered my credit in your office, the position you hold in the commercial circles, and the difficulties in which you would have been involved, and taking courage in the confidence you repose in me, did all that I possibly could towards the fulfilment of my agreement, trusting entirely, as I now do firmly trust, that, with a little assistance and time from you, I should be able to make up the loss."

It is unnecessary to quote more of this letter. Its whole tone is that of a debtor admitting his liability for the advances in question, but pleading with his creditor for indulgence in consideration of the circumstances in which, and the motives for which, that liability was incurred. The account which it gives of the substance of the transactions is not inconsistent with that of Mr. Spitteler, though differing from it in some details, and particularly in the suggestion that, but for the consideration due to the plaintiffs, and for the prospect of future business, the defendants might have escaped from their contracts of 1872-73 with less loss, by paying the stipulated penalty of Rs. 3 per cwt. Looking to that letter and to the other evidence in the cause, their Lordships have no difficulty in coming to the conclusion that not only was the sum of five lacs so advanced to the defendants as much a debt due from them to the plaintiffs as any of the ordinary advances made

on the purchase account (a fact found by both the Indian Courts and now hardly disputed), but that the defendants fully recognized and admitted that liability in 1873. The first suggestion of their contention to the contrary would seem to have been made in their letter of the 26th November 1875 (p. 160), when the differences between them and the plaintiffs, which resulted in the institution of this suit, were at their height.

The plaintiffs, on being advised of these exceptional advances by Mr. Spitteler's letter of the 19th February 1873, lost no time in telegraphing their surprise and dissatisfaction, and seem to have contemplated immediate proceedings for the recovery of the amount from the defendants. Thereupon ensued a long correspondence, and a negotiation, of which it is sufficient to state that it extended over many months, that it was conducted in India, on the part of the plaintiffs, not only by Mr. Spitteler, but by Mr. Kapp, the manager of the Bombay agency, and Mr. Sigg, a partner in the European house, who was sent out for that purpose, and that it ended in the execution of the agreement L, on the 2nd January 1874. In the course of this negotiation, and on the 25th October 1873, the defendant gave to the plaintiffs the further security contained in the letter J and the schedule thereto, and various arrangements, of which it is unnecessary to say more at present, were proposed and rejected. Of the final arrangement, embodied in the document L (the construction of which will have to be hereafter more particularly considered), it is now only necessary to state that it proceeded on this basis. The balance due to the plaintiffs by the defendants was stated to have been, as on the 1st July 1873, Rs. 678,012. 10. 1, but was afterwards found to have been only Rs. 613,007. 6. 5, as shown by the account K. Of this balance, Rs. 300,000 were to be carried to what was styled "the block account," and the remainder to what was styled "the interest account," by which was meant an account bearing interest. "The block account" was to carry no interest, and was to be liquidated by returns only on future contracts for produce, such returns to be calculated according to a stipulated scale. This arrangement was to be partly retrospective, in that a sum of Rs. 53,056. 18 was to be carried to the credit of the "block account" as for returns on transactions between the 1st July 1873 and the 1st January 1874, and various sums, amounting to Rs. 145,357, were to be credited to the defendants on the "interest account," as due to them in respect of transactions during the same period. And, lastly, the agreement contained an express stipulation that the balance of interest to accrue due on "the interest account," which was to carry interest on both sides of the account, should be paid in cash on the 30th June in each year.

The subsequent transactions between the European and the Native firms, all proceeded on the basis of the arrangement embodied in L. It is unnecessary to examine these in detail. It is sufficient to state that during this last period of the dealings between the plaintiffs and defendants their relations seem to have been somewhat strained, but did not become actually hostile before the month of August 1875. On the 10th of that month the Cochin agency wrote a letter to the defendants, enclosing an account headed "interest account," and demanding payment of a sum of Rs. 35,119. 14. 9, as presently payable under the terms of letter L, for interest due on "the interest account" up to the 30th June 1875, and for short proceeds. The defendants paid on account Rs. 10,000 in September, and the further sum of Rs. 583. 3, on the 3rd November, the latter sum being all which on their mode of stating the account they admitted to be their due. Their letter, remitting this last sum, is at p. 151, and the account enclosed in it at p. 13 of the Record. On the 10th November 1875 the plaintiffs, after giving credit for these sums, and for another small payment of Rs. 146. 3. 10., and admitting some errors in their previous account, reduced the balance, of which they again demanded present payment, to Rs. 15,768. 3. 7.

On the same day they wrote another letter to the defendants, apparently in answer to some offer of produce, in which they said:—

"We beg to say that, as already verbally told your Mr. Marcar, we cannot entertain the idea of entering into fresh engagements with you, until such time as the balance of interest and short proceeds has been settled satisfactorily, and in accordance with the agreement of 2nd January 1874. We hereby request you peremptorily to hand over such amount, viz., Rs. 16,014. 6. 7. with interest due up to date to bearer."

The difference between this sum and that demanded in the letter of the same date is the sum of Rs. 146. 3. 0, of which the latter admits the receipt by a cheque.

The sum to which the amount in dispute was thus reduced was made up of the sum of Rs. 12,789. 1. 11, which being the difference between interest at 6 per cent. and interest at 9 per cent. upon the balance of "the interest account," the defendants claimed to be allowed under the provisions of L; and of that of Rs. 2,979. 1. 8, as to which, though they admitted it to be due for short proceeds, they insisted that it was not then payable, but ought to be carried to their debit in "the interest account." Further correspondence, of a more or less angry character, passed between the parties, till on the 8th December 1875 the plaintiffs wrote to the defendants (p. 45) as follows:—

"In reply to your letter of the 7th instant, we beg to state that you are well aware that we consider that you have entirely broken your engagements with us for the liquidation of your block account, both in regard to the offers you have made and in carrying out your contracts, and also in regard to the returns, the benefit of which you ought to have given us. In reference to the interest account, you have refused to pay us the interest due us on the 30th June last, and you have entirely neglected to make any attempt to pay us the large balance due us on this account. Under these circumstances, we are compelled to put the case into Court, and any further discussions will be useless. We must, therefore, decline to take notice, at present, of the tissue of erroneous statements you have put forward in your last letters."

In reply to this the second defendant wrote on the same day a letter of remonstrance (p. 166), denying the imputed breaches of plaintiffs' agreement, expressing his willingness to go on under it, showing that the dispute as to the interest might be settled "by means otherwise than legal," and concluding as follows:—

"Under these circumstances, take notice that, I hold you responsible to me for all damages arising from your withdrawal from a contract which up to yesterday I showed a ready disposition to carry out myself; that from this date I repudiate your further right to fall back upon that agreement; and that I shall bring such action against you for the recovery of compensation for loss sustained by your breach of contract as I may be advised to take."

The plaint was filed on the 10th December 1875. It sought to recover the sum of Rs. 180,897. 5. 2, the admitted balance on the block account without interest; and the sum of Rs. 224,882. 8. 7 as the balance due "on the interest account" with interest on such balance from the 7th December 1875. The balance thus claimed on "the interest account" included the Rs. 15,768. 3. 7, of which immediate payment had been demanded in November. The plaint also prayed for a declaration that the instruments of mortgage I and J created and were mortgages of the interest of the defendants in the properties mentioned in the schedule, and that, if necessary, an account might be taken of what was due by the defendants to the plaintiffs on the said mortgages.

The issues finally settled in the suit were,—

(1.) Whether the mortgage instruments of 21st and 25th October 1873, I and J, are valid and subsisting mortgages for the balances that may be found due by defendants to the plaintiffs, or for any part thereof.

(2.) Whether on the 30th June 1873, there was a balance of Rs. 613,097. 6. 5 due by defendants to plaintiffs.

(3.) Whether the defendants have committed any breach of the agreement of the 2nd January 1874, and, if not, whether the plaintiffs are entitled to sue for the balances due on the block account and the interest account.

(4.) Whether plaintiffs are entitled to bring their suit before submitting to arbitration the dispute as to Rs. 12,789. 1. 11 on account of interest.

(5.) A similar issue as to the before mentioned sum of Rs. 2,979. 1. 8, the remainder of the sum claimed by the plaintiffs as a cash payment payable as on the 30th June 1875.

The District Judge, Mr. Wigram, in a very careful and able judgment, disposed of these issues as follows :—

Upon the 1st, he found that, on the true construction of instruments of mortgage I and J, they and the deeds deposited with them constituted the security for the general balance due from the defendants to the plaintiffs.

Upon the 2nd, he found that that balance was on the 30th June 1873 the sum of Rs. 613,007. 6. 5.

Upon the 3rd, he found that the agreement of the 2nd January (L) was, upon the true construction of it, revocable at will by the plaintiffs, but that, if it were not so revocable they had failed to prove any breach of it on the part of the defendants which justified the rescission of it.

As to the 4th and 5th issues, he found that the plaintiffs were not entitled to sue for the disputed amount of interest until that dispute had been settled by arbitration ; but that there was no such objection to the claim for the Rs. 2,979. 1. 8, the amount, and the defendants' liability for it, in some way or another, not being in dispute.

The result of his judgment was that the plaintiffs were entitled to a decree for Rs. 392,990. 12. 10, and to a declaration that, if that amount was not paid within three months, the plaintiffs were entitled to sell the right, title, and interest of the defendants in the properties mortgaged to them under the Exhibits I and J, and a decree was made accordingly on the 16th July 1877.

From this there was an appeal, and, so far as it related to the 4th issue, a cross appeal, to the High Court, which dismissed both appeals, and confirmed the decree of the Lower Court in its integrity. The judgment of the High Court appears, from the somewhat scanty note of it, to have proceeded, so far as it related to the 3rd issue, upon the supposed proof of actual breaches of the agreement L on the part of the defendants, and not upon the revocability of that agreement at the will of the plaintiffs.

In dealing with this appeal, their Lordships are relieved from any further consideration of the 2nd and the 4th issues. What has been already said sufficiently indicates their entire concurrence in the finding of the two Indian Courts upon the former. And there is now no cross appeal against the finding in favor of the defendants upon the latter.

The questions, therefore, for determination are reduced to the following :—

1st. Whether the finding upon the 1st issue is correct ; a question which depends upon the construction to be put on the document I, since that governs also the effect of J.

2ndly. Whether the plaintiffs were entitled to rescind wholly or in part the agreement embodied in document L, without proof of an actual breach of it by the defendants sufficient to justify such rescission ; and

3rdly. If they were not so entitled, whether there is sufficient proof of any such breach.

4thly. Whether there is error in the decree, in so far as it declares the plaintiffs at liberty to sell the mortgaged premises, if the defendants should not pay the amount decreed within three months.

The contention of the defendants is that the construction of I is to be governed by the first paragraph in it, which, speaking in the name of the 2nd defendant, says,—

"As I have been and am now accustomed to contract with you for the supply of country produce and other merchandise, and in the course of these transactions there is frequently a considerable amount of money outstanding to my debit in the way of advances, etc., made upon the contracts, and you very naturally would like some security, I agree to the following propositions, etc."

They insist that this statement, being in the nature of a recital, limits the security to advances made upon contracts for future deliveries of produce, and consequently must exclude from it the advances, to the amount of five lacs, which constitute so large a portion of the balance found due to the plaintiffs, particularly if Spitteler's statement, to the effect that when those advances were made all, or almost all, of the defendants' contracts with the plaintiffs up to that time had been fulfilled, is to be taken to be correct.

The construction of an ambiguous stipulation in a deed may undoubtedly be governed or qualified by a recital; but on the other hand, if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.

The distinction is recognized and the authorities on this subject collected in the case of *Walsh v. Trevanion*; 15 Q. B. 750.

What then is the effect of the operative part of this instrument? It says,—

"You shall hold them (the deeds) as a lien for the current outstandings due at any time from me to you upon our contracts, and you shall have power over the property as a pukka mortgagee would have, only you must agree not to sell any of it until you have given me full twelve months' notice from *the time we shall come to a settlement of accounts to pay up*, or from the time demand shall have been made by you of the amount claimed by you; but if I fail, then you may sell, at my expense, for the best price you can get, any of the properties successively, *till you have satisfied my account current, out of the proceeds*, giving me a strict account of what you sell." And the next paragraph contains the following sentence: "And upon my payment of *all balances due*, you will at once return to me all the documents now deposited with you, and cancel this letter."

The conclusion which their Lordships draw from the above passages taken together, and examined by the light which the proved relations of the parties at the time throw upon them, is, that the security was intended to cover the general balance that might become due from the defendants to the plaintiffs upon all the accounts between them. The words "upon our contracts," which the defendants insist can only be taken to mean the particular contracts for the delivery of produce referred to in the paragraph in the nature of a recital, do not appear to their Lordships to be necessarily repugnant to this construction. Such contracts may have been chiefly in the minds of the parties, but the words themselves are wide enough to embrace all their transactions. And what follows strongly favors the wider construction. There is to be no sale until twelve months after one of two events, *viz.*, a settlement of accounts or a demand. The first case implies a settlement of accounts in order to ascertain the amount due. How could that be ascertained unless all the different accounts were brought into a general account current, and a balance struck thereon? Let it be supposed that "the purchase account" taken alone showed a large balance due for advances. It can hardly have been the intention of the parties that the property should be sold to pay that balance; if, on the other hand, a balance was due from the plaintiffs to the defendants on "the consignment account;" and this explains the following sentence, "If I fail, then you may sell, etc., until you have satisfied *my account current*." The "account current" would include both accounts. And this intention is made still more clear by the subsequent stipulation that the event on which the deeds shall be returned and the latter cancelled is the payment of *all balances due*. Again, let it be assumed that there was no account open between the parties except "the purchase

account." The advances were entered generally to the debit of the defendants in this account, as on the dates on which they were made, in round sums. Neither this, nor any other account that has been produced showed what particular advance was made on each particular contract. The five lacs were entered in this account in the same manner as the sums previously advanced. It can hardly have been intended that if it should prove necessary to realize the securities, the account so kept was to be analysed and recast in order to ascertain which of the sums so debited were secured, and which were due upon open account.

The learned Counsel for the defendants have relied upon their refusal to execute S. S. S., one of the abortive proposals made in the course of the negotiations for a settlement between February 1873 and January 1874. Whatever may have been the motive of the refusal (and this has not been very satisfactorily proved), parol evidence of what took place a considerable time after the execution of I can hardly affect the construction of that document. If it could have any such effect, the evidence of what took place during the long negotiation which ended in the execution of L, would, taken as a whole, rather lead their Lordships to the conclusion that both parties were negotiating under the belief and upon the assumption that the whole debt then due was covered by the mortgage securities.

Upon the whole, therefore, their Lordships have come to the conclusion that the Judge's finding on the first issue before him was correct, and that the whole of the before-mentioned sum of Rs. 613,007. 0. 5 was, and that the balance of it now recoverable is, secured by the mortgage securities in question.

Their Lordships have now to determine the more difficult question of the construction and effect of the document L (p. 91).

The contention on the part of the plaintiffs is that it was revocable at their will, as found by the District Judge. The contention of the defendants is that, unless rescinded by mutual agreement, or upon a breach of its stipulations by one party justifying its rescission by the other, it was to subsist in full force until the liquidation under it of both the "block" and the "interest" account, or, at all events, of the block account; and further that, if in the events that have happened, the plaintiffs are entitled to sue for and recover the balance due on "the interest account," they cannot sue for or recover the balance due on "the block account," as to which they have agreed that it was to be liquidated by "returns only."

The circumstances under which the agreement was entered into have already been partially stated. That they afford no ground for the suggestion that the settlement in question proceeded upon the compromise of a doubtful claim, or of a disputed debt, is a conclusion in which their Lordships have already intimated their concurrence. On the other hand, it is clear that, although the arrangement was on the face of it in ease and for the benefit of the defendants, the plaintiffs found, or thought they found, their own advantage in it. Had they shown no forbearance, had they driven the defendants to extremity, they would probably have lost great part of the large sum then due to them, and they would certainly have lost the advantage which they expected to reap from the employment of the defendants, who were supposed to have acquired the command of the market, in their future operations in native produce. The agreement actually made is extremely loose. It fixes no time for its duration, or for the liquidation of the debt. It was, no doubt, purposely left vague upon this point; since one of the grounds on which the second defendant says he objected to execute S. S. S. was that it bound him to pay a certain amount by a fixed time.

The only specified date from which any inference as to the intended duration of the arrangement can be drawn is the 30th June 1875. From that it may fairly be inferred that the parties contemplated dealing on the footing of the agreement up to that time at least. But all beyond that time is left indefinite.

The defendants, however, contend that it follows, by necessary implication from the terms of the document, that the parties bound and intended to bind them-

selves to carry on their dealings upon the footing of it until the whole debt, or, at all events, that portion of it which was carried to the block account, was liquidated in the manner thereby provided. The passages on which they mainly reply are,—

1st. The statement that “the following conditions have been agreed upon by both parties for the repayment by P. Marcar of the money due to Volkart Brothers.”

2nd. The provision as to the rebate of interest, which contains these words,—
“The same reduction of interest to be made subsequently *until the entire settlement of this account* should P. Marcar continue to afford the same satisfaction.”

3rd. The provision that “the block account shall be liquidated *by returns only on all contracts*,” etc.

Their Lordships are clearly of opinion that the extreme contention of the defendants that the whole debt was to be repaid under the agreement, which was, therefore, to subsist until that liquidation had taken place, cannot be maintained. The “interest account” stands upon a different footing from the “block account.” It was to remain as a debt carrying interest, and that interest was to be paid annually, but no precise stipulation as to the mode of liquidating the principal is to be found in the agreement, unless it is to be inferred from the 5th paragraph that, for the future as for the past, sums of money to become due to P. Marcar for cash, goods, consignments, etc., were to be carried to their credit. There was, however, no provision for the continuance of the consignment business, which would presumably be the principal source of such credits. Hence, even if the agreement was intended to subsist, and did in fact subsist, until the block account had been liquidated by the returns, there might have remained at that time a balance due on the interest account which the plaintiffs would have been entitled to sue for and recover.

And it further appears to their Lordships that, as regards the balance due on the “interest account,” the utmost that can be implied from the agreement against the plaintiffs is a covenant not to sue for it until after the 30th June 1875.

The question, then, under consideration, is reduced to the “block account,” and the effect of the words “shall be liquidated by returns only,” etc. Now, even as to this account, the provisions are extremely loose, and such as could not be duly worked unless the contracting parties continued to act with the highest good faith, and on a perfect understanding with each other. Nevertheless, they seem advisedly to have abstained from making express provisions either for the continuance or for the due working of the agreement, each trusting to the honor, and, probably, still more to the self-interest of the other. Such an agreement is conceivable if it was intended to endure so long only as both parties desired it to continue. But, for the effectual working of an irrevocable agreement for the liquidation of the block account in a particular way, it would be necessary to imply covenants and obligations for which the parties have failed, apparently from the difficulty of agreeing upon them, to make express provision. For example, no express provision is made as to the extent of the business to be done; the rates at which one party is to offer, and the other to accept, produce; the result upon the letter of the agreement being that, if either were disposed to act unreasonably, he would have the means of postponing the liquidation of the account indefinitely. And if the parties have thus abstained to insert express provisions for the fair and reasonable working of their supposed agreement, can the Court, which is called upon to enforce it, supply them? Their Lordships are of opinion that it cannot do so. Among the reasons stated by Lord Denman, *C.J.*, in delivering the judgment of the Court in *Aepdin v. Austin*, 5 Q. B. 671, are the following, which appear to be particularly applicable to this case; he says:—

“Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all conditions by

which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued during the three years, and yet neither party might have been willing to bind themselves to that effect, and it is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as, upon a full consideration, the Court may deem fitting for completing the intentions of the parties, but which they, purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

These considerations have led their Lordships to the conclusion that the stipulations, even as to the block account, were binding only during the continuance of the arrangement for the conduct of future business, and that, on the true construction of the agreement, either party had power, at least after the 30th June 1875, to determine it, should it be found, as undoubtedly it was found, to be working unsatisfactorily. They had in this respect the same right as parties under a contract for a partnership at will. Indeed, though they were not strictly partners, their contract was like one between persons engaged in successive joint adventures, the defendants supplying the produce at a profit to the plaintiffs, who realized a further profit on its export to Europe, and the former undertaking further that a portion of their profits should be applied in liquidation of their liability on former transactions. Their Lordships conceive that on this construction full effect can be given to all the express stipulations contained in L, and, further, that in the events which have happened the plaintiffs have not lost their right to sue for and recover the balance due to them either on "the block" or on "the interest account." In truth, had they broken any covenant, express or implied, the remedy of the defendants would seem to have been an action for unliquidated damages, the measure of which would not necessarily be the balance due on the block account.

Their Lordships' construction of L renders it unnecessary to consider whether, assuming the agreement to be irrevocable, the plaintiffs have established a breach of it on the part of the defendants which would justify the rescission of it, a question which, regard being had to the conduct of the parties with respect to the alleged breaches, might not be free from difficulty. Upon the last point their Lordships find that there is no error in that part of the decree which empowers the plaintiffs to realize their securities in case the defendants should fail to pay the sum due within three months from the date of decree. They are of opinion that a sufficient demand, within the meaning of the letter I, was made immediately before the institution of the suit, and was so understood by the defendants to have been made. Such seems to be the result of the letters of the 8th December 1875. The allowance of three months for the payment of the sum decreed to be due to the plaintiffs on the mortgage securities was therefore in ease of the defendants. Their Lordships will humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

The 27th February 1880.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Kritima Adoption—Evidence—Possession.

On Appeal from the High Court at Calcutta.

Mussamut Basmati Kowari

versus

Baboo Kirut Narain Singh.

Where the question was whether or not an adoption in the Kritima form had been proved, their Lordships inclined to think the evidence against the adoption somewhat more credible than that in its favor, coupled with the circumstance that the widows appear to have remained in possession of the estate after the death of their deceased husband, and had paid income-tax on the property, and that after the death of the junior widow, on the application of the other widow for a mutation of names, the authorities were satisfied that she was in possession.

This was an appeal from the decision of a Divisional Bench of the High Court of Calcutta of the 26th February 1875, reversing a decree of the Subordinate Judge of Bhaugulpore.

Mr. Leith, Q.C., and Mr. Doyne for Appellant.

Mr. C. W. Arathoon for Respondent.

The facts of the case are sufficiently stated in the judgment of the Judicial Committee, which was delivered as follows by *Sir Robert Collier*.:—

In this case the sole question was, whether or not an adoption in the Kritima form had been proved. Ram Persad Narain had one whole brother, and two half-brothers. He died on the 1st March 1872, leaving two widows, one of whom had a daughter about five or six years of age. The other widow had had sons, but they had died in infancy. It may not be altogether immaterial to observe, with regard to the probabilities of the case, that if the daughter of the deceased should have a son, that son would be able, though perhaps not quite as efficaciously as an adopted son, to perform the ceremonies which are supposed to be of benefit to his soul.

The plaintiff in this case is Sri Narain Singh, the son of Kirut Narain Singh, the whole brother of Ram Persad, and he seeks to obtain possession of the property of Ram Persad, as against the widow, on the ground that he, being of the age of 14, was adopted by Ram Persad two days before Ram Persad's death. The widow denies the adoption. The question is one entirely of fact. The case was heard before the Subordinate Judge, who is himself a Hindoo, and who appears from his judgment to have given a very intelligent attention to the evidence. The effect of his judgment is, that he does not believe the plaintiff's case. It does not, indeed, appear that he gives very much more credence, if any, to the witnesses for the defendant, but he rightly observes that the onus of proof is thrown on the plaintiff, who alleges the adoption; and says that, in his opinion, the plaintiff has not made out his case. The Subordinate Judge comments upon both descriptions of evidence,—the documentary and the oral. The documentary evidence for the plaintiff consisted chiefly of two sets of papers or accounts, one called the hustabood papers, the other the jumabundi papers. The learned Judge, being probably more conversant with these papers than an European, comes to the conclusion that neither set of papers is trustworthy; and their Lordships do not find that the High Court differ from him on this subject—at all events, they do not state that they differ from him. The learned Judge of the First Instance also

intimates a general disbelief of the witnesses of the plaintiff. He gives one or two further reasons for his judgment, consisting of certain probabilities of the case, that on which he dwells most being this: That, according to the evidence of the plaintiff, the adoption was made by Ram Persad two days before his death, and one day before a certain impurity which he was under in consequence of the death of a relative had expired; that it would have been more consistent with Hindoo usage if he had waited till the next day (and he was well enough to do so with safety), when this impurity would have passed away; but the learned Judge does not intimate that the adoption was necessarily invalid in point of law because performed during the time when Ram Persad was in a state of impurity. Their Lordships cannot help observing that the High Court do not seem altogether to have understood the view of the Subordinate Judge on this point; for they discuss the question whether the adoption was invalid in consequence of its having been made when Ram Persad was in this state of impurity, a proposition which was not affirmed by the learned Judge below.

The question being one of the credibility of witnesses, their Lordships think that a good deal of weight ought to be attached to the consideration that the Subordinate Judge had the opportunity of seeing and hearing these witnesses. Their Lordships have now to consider what judgment the High Court ought to have pronounced, and they have come to the conclusion that the High Court have not given sufficient reasons for reversing the judgment of the Court below. The main reasons are stated in this paragraph, wherein the Acting Chief Justice observes: "Looking at the whole of the case, I think that the evidence given on behalf of the plaintiff is more distinct and more reliable in its general character than that given on behalf of the defence. I think that the story told is *prima facie* a natural and a probable one; and it is to be recollected that the defendant herself, on her cross-examination (although she denied his having ever expressly stated that he intended to adopt), admits that her husband used to express regret at the death of his children, and at his not having a son to leave behind him." Their Lordships on referring to the evidence, do not find that the lady used precisely these words, but said no more than that her husband and herself had been grieved when their children had died; and their Lordships cannot think that the slightest importance in this case is to be attached to such a statement. With regard to the observation of the High Court as to the general character of the evidence being more reliable, they observe that it is difficult to come to a satisfactory conclusion on the general trustworthiness of written evidence against the opinion of a Court which has heard and seen the witnesses; but, further, if their Lordships were called upon to express an opinion as to the trustworthiness of the evidence, they would, on the whole, be disposed to pronounce the evidence against the adoption somewhat more credible than that in its favor. One circumstance in the case appears to them to incline the preponderance, if the scales were at all evenly balanced, in favor of the defendant, *viz.*, that the widows appear to have remained in possession of the estate after the death of Ram Persad. There is a document certainly unimpeached in the cause, a receipt for income-tax dated on the 2nd July 1872, whereby it appears that the two widows paid a sum of Rs. 104 in respect of income-tax on this property. It appears to their Lordships that this payment of income-tax on their part is inconsistent with the case of the plaintiff, who alleges that he had been adopted, and that they, consequently, had merely a title to maintenance; and that, if his case were true, he, and not they, would have been entitled to the possession of the estate, and liable to the payment, amongst other things, of this tax.

Further, it appears that after the death of the junior widow, which took place in September, the widow who is now the defendant applied for a mutation of names; that upon that occasion the officer of the Collectorate was satisfied that she was in possession, and his decision, which was appealed against to the Com-

missioner, was affirmed by the Commissioner upon the ground that she was actually in possession, the Commissioner attaching a good deal of importance to this document, which has been before referred to. It is stated on behalf of the plaintiff, that he was actually placed on the guddi on the 25th July 1872, when he was recognised by both the widows, and his case appears to be that, if the widows had possession up to that time, he then obtained possession, and the widows subsequently dispossessed him; but of that there is no evidence whatever, and their Lordships cannot help thinking, on the whole of the case, that the widows have all along been in possession. On the whole they have come to the conclusion that the High Court was wrong in reversing the judgment of the Court below.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment of the High Court be reversed, and the judgment of the Subordinate Judge be affirmed, with the usual order as to costs.

The 28th February 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, and Sir Robert P. Collier.

Re-attachment after Judgment (Effect of)—Priority—Mortgage—Act VIII of 1859 ss. 239, 240—Non-observance of Formalities (Time for Objecting)—Appeal to Privy Council—Onus Probandi—Possession.

On Appeal from the High Court at Calcutta.

Ram Krishna Das Surrowji

versus

Surfunnissa Begum and others.

Although, where property has been attached before judgment, it is usual to re-attach it after judgment, that proceeding implies no abandonment of the first attachment which gives the priority of lien. Accordingly, where there was a valid and substantial attachment at the date of a mortgage, that alienation, unless it can be shown not to fall within the provisions of s. 240 Act VIII of 1859, was null and void as against the attaching creditor and those who claim under him.

The objection as to the non-observance of the formalities enjoined by s. 239 was not allowed to be taken for the first time upon appeal before the Privy Council, it involving a question of fact.

Quære.—Whether, under the circumstances of this case, it was not for the plaintiff, who was seeking to oust the defendant from possession, to prove the non-observance of the formalities in question, rather than for the defendant, who was in possession, to prove affirmatively that they had been observed.

Mr. Doyne and Mr. Cowell for Appellant.

Mr. Cowie, Q.C., and Mr. Graham for Respondents.

Sir James Colville delivered the following judgment :—

In this case the appellant sued on a mortgage title, completed, as he alleged, by foreclosure under Reg. XVII of 1806 s. 8, to recover possession of the property in suit from the respondent, who held it as purchaser at an execution sale in a suit against the mortgagor. The mortgage deed was in the English form, with a power of sale. Inasmuch as it was sought to be enforced in the mofussil, the procedure prescribed by the Regulation has been applied to it as if it were a mere bye-bil-wafa, or deed of conditional sale. The suit is the ordinary suit which in such cases the mortgagee who has foreclosed is obliged to bring in order to recover possession of the mortgaged premises, with this difference only, *viz.*, that it is brought against the purchaser under the execution sale as well as against the mortgagor, and that the former is the substantial defendant.

In such a suit the plaintiff has to make out his title to dispossess the other party, and any objection which can be taken either to the original mortgage title or to the proceedings in foreclosure may be taken.

The respondent was one of a firm of builders who, in December 1872, sued one Surfunnissa Begum, as the daughter of Moonshi Busloor Ruheem and the representative of his estate by virtue of a certificate under Act XXVII of 1860, for the amount claimed as due to them for work done partly in the lifetime of Busloor Ruheem and partly after his death. On the 10th December 1872 they applied for and obtained, under ss. 84 and 85 of the Civil Procedure Code, an attachment before judgment, in order to secure the property. Mr. Doyne took objection to the regularity of the issue of that attachment, complaining that there was no proof of the proceedings which are enjoined by s. 81 and the subsequent Sections having been adopted. But, in their Lordships' opinion, it must be taken that, as between Surfunnissa Begum and the plaintiffs in this former suit, there was a valid and subsisting attachment at the date of the execution of the mortgage, and that this is virtually admitted by the consent order of the 23rd January 1873, which was made when part of the property which had been attached was released from the attachment on the payment of part of the plaintiffs' demand, and it was arranged that the attachment should continue as to the particular property which is the subject of this litigation.

In these circumstances Surfunnissa Begum, on the 20th May 1873, executed the mortgage under which the plaintiff claims; and the principal question raised by this appeal is whether that alienation of the property was not by reason of the attachment, null and void as against the attaching creditors and those deriving title under them. The decree in that suit was made on the 13th September 1873, and the proceedings in execution began on the 18th of the same month; and it has been suggested on the part of the appellant that, inasmuch as one of these proceedings consisted in an attachment after judgment, it must be presumed that the actual sale in execution proceeded under this subsequent attachment, and that the respondent cannot claim the benefit of the former attachment. Upon this point, the learned Judges of the High Court say:—"The attachment never was removed, and the property remained unaffected by this mortgage (so far as the person at whose suit the attachment issued) at the time it was attached and sold in execution of the decree." Their Lordships must, therefore, assume that, although where property has been attached before judgment it is usual to re-attach it after judgment, that proceeding implies no abandonment of the first attachment, which gives the priority of lien. There is no trace here of any express abandonment. If this be so, and there were, as their Lordships think there was, a valid and subsisting attachment at the date of the mortgage, that alienation, unless it can be shown not to fall within the provisions of s. 240, was null and void as against the attaching creditor and those who claim under him. Hence, the determination of this appeal depends very much upon the point which has been ingeniously raised and argued by the learned Counsel for the appellants, and particularly by Mr. Cowell. It is said that s. 240 does not govern the case, for the following reasons. That Section runs thus: "After any attachment shall have been made by actual seizure or by written order as aforesaid, and in the case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise," and so on, "shall be null and void." It is contended that the words "after it shall have been duly intimated and made known in manner aforesaid" incorporate into the 240th the provisions of the 239th Section, which says, "In the case of lands, houses, or other immoveable property the written order shall be read aloud at some place on or adjacent to such lands, houses, or other property, and shall be fixed up in some conspicuous part of the Court house; and when the property is land or any interest in land, the written

order shall also be fixed up in the offices of the Collector of the zillah in which the land may be situated." Their Lordships entertain some doubt whether, under the circumstances of this case, it was not rather for the plaintiff, who was seeking to oust the defendant from possession, to prove the non-observance of the formalities in question, rather than for the defendant, who was in possession, to prove affirmatively that they had been observed. However that may be, they are clearly of opinion that the point raised is one which cannot be taken here upon appeal for the first time. It is one which ought to have been taken in the Court below, and their Lordships can find no trace of its having been so taken. No such trace is to be found in the judgments, or in the evidence, or in the reasons which are stated in the petition presented to the High Court for leave to appeal to Her Majesty in Council. On the contrary, the first of those reasons seems rather to assume the regularity of the attachment, and to suggest that it had ceased to be a valid and subsisting attachment at the time the mortgage was made. It is in these words: "That their Lordships ought to have held that, even if the said property was legally attached before judgment, such attachment had ceased to be a valid and subsisting attachment under s. 85 of the Act." In the case which has been cited from the "Weekly Reporter," volume 10, p. 264, it is clear from the judgment of Mr. Justice Macpherson, who is one of the Judges who decided the present case, that there it had been positively proved that those proceedings which were enjoined by the Act had not taken place. Their Lordships think this is clearly an objection which ought to have been taken in the Court below, and not raised for the first time here, because it involves a question of fact; and if it had been taken before the High Court and argued, the Judges of that Court might have directed a further enquiry into the matter, under the powers which its procedure gives them. Upon this record they think the judgment of the High Court was right, and will therefore humbly advise Her Majesty to affirm that judgment and to dismiss this appeal. The costs of this appeal will follow the result.

The 5th March 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Hereditary Office of Desai—Partibility—Declaratory Decree—Maintenance—
Onus Probandi—Custom.*

On Appeal from the High Court at Bombay.

Adrishappa bin Gadgiappa
versus
Gurushidappa bin Gadgiappa.

The Privy Council, in upholding a decision of the High Court that property appertaining to the hereditary office of Desai was partible, accompanied it by a declaration that the decree was to be without prejudice to the defendant's right to such emoluments or allowances for the performance of the duties of the Desaiship as he might be entitled to under any law in force.

The onus of proving impartibility lies upon the Desai by showing a special tenure or a family or district or local custom sufficiently strong to rebut the operation of the general law.

This was an appeal from a judgment of the High Court of Bombay of the 28th July 1875, reversing a decision of the Political Agent of the Southern Mahratta country.

*Mr. Graham and Mr. Kenelm Digby for Appellant.
Mr. Leith, Q.C., and Mr. Mayne for Respondent.*

Sir Robert Collier delivered as follows the judgment of the Judicial Committee, in which the facts of the case are sufficiently stated :—

In this case a suit was instituted by two younger brothers against their elder brother, all being members of a joint Hindoo family, whereby the younger brothers claimed two-thirds of the inam village of Konoor, which is admitted to be that part of a Deshgat Watan, or property held as appertaining to the office of Desai, which lies within what is, strictly speaking, British territory; the rest of the Watan being within the territory of the feudal chief of Jamkhandi, in the southern Mahratta country. The elder brother insisted that, inasmuch as he held the office of Desai, and this property belonged to his office, he was entitled to hold it as impartible, subject to the customary right of his brothers to receive allowances by way of maintenance. The action was brought in the year 1861, in the Court of the political agent, and through a lamentable delay, as their Lordships cannot help thinking it, of successive political agents, was not decided in first instance until the year 1874. The effect of the decision of the Political Agent, whose judgment was for the defendant, may be stated to be this: that the property appertaining to a Desaiship must be assumed *prima facie* to be impartible, and that sufficient evidence had not been given of its partibility. This judgment on appeal was reversed by the High Court, who laid down a different rule or rather presumption of law. The effect of the judgment of the High Court was, that there is no such general presumption in favor of the impartibility of estates of this kind as to shift the burden of proof in the manner which the Political Agent supposed; that in such cases the burden of proof is upon the Desai, who seeks to show that the property devolves upon him alone, in contravention of the ordinary rule of succession, according to the Hindoo law. The High Court further came to the conclusion that no sufficient evidence had been given by the defendant either of family custom or of district custom to prevent the operation of the ordinary rule of law whereby the property would be partible. The question in the cause, in a great measure, depends upon which of these two views of the law is right. Their Lordships are of opinion that the High Court was right; that there is no general presumption, as has been contended for on the part of the appellants, which shifts the burden of proof; and that it lies upon the defendant, who seeks to show that the estate is impartible, to give evidence of the special tenure of the Watan, or of either family custom or of district or local custom sufficiently strong to rebut the operation of the general law. Their Lordships have also come to the conclusion that the High Court was right in the opinion which they formed that the evidence given in this case was insufficient.

The High Court intimate that the contention with respect to a family custom was abandoned in the argument before them; but be that as it may, their Lordships are of opinion that no such family custom has been proved. A pedigree has been put in whereby it appears that, as far back as the year 1780, the Watan, which had been resumed at that time by the Native Government, was conferred on or restored to one Gurushidappa; but inasmuch as Gurushidappa appears to have been an only son, that devolution of the property throws no light upon the question in dispute. From Gurushidappa it appears to have devolved, in 1814, upon his only son Gadgiappa. Subsequently, in 1836, the Desaiship devolved upon Adrishappa, the present defendant. It would appear that his family, consisting of himself and his two brothers, remained joint until the year 1854, when, for the first time, a dispute arose, and the younger brothers claimed the shares which they claimed subsequently in this suit. It appears to their Lordships that this state of things throws very little light upon the controversy; it certainly does not support the contention of the defendant that he was entitled to the possession of the property as impartible, giving his brothers only maintenance.

An official document has been put in, bearing date 1800, being an official account of certain Desaiships then under sequestration by the Government, whereby it would appear that a sum of Rs. 150 per annum, payable out of the Watan, had been allotted to one Kadappa, who seems to have been a distant cousin of Gurushidappa. It further appears that that allowance has continued up to the present day to be enjoyed by a descendant of this Kadappa; and that a similar allowance is enjoyed by another member of the family, descended from a common ancestor with the parties to this cause. That circumstance, however, of itself, and without further explanation, does not appear to their Lordships sufficient to maintain the contention of the defendant. These two members of the family, who are said to be still living and to receive the allowances, might have been called, and they might, if the case of the defendant is correct, have shown the origin of their allowances, and possibly that there had been some previous custom in the family whereby the eldest son took the property, subject to allowances to his younger brothers, or to other members of the family. Even such evidence, it may be remarked, if forthcoming, would presumably have related to a period anterior to the re-grant of the Watan to Gurushidappa in 1780. But, in the absence of any such evidence, their Lordships are not disposed to attach much weight to this mere entry in the account. Beyond that there is no evidence.

Their Lordships, therefore, are of opinion that the High Court was right in determining that there was no evidence in this case of family custom one way or the other.

With respect to the custom of the district, although the evidence may show that tenures of this kind are more frequently impartible than partible, it is not, in their Lordships' opinion, of that conclusive character which is necessary to establish a general district custom. They are of opinion that the High Court was justified in finding that no sufficient evidence of such a district custom had been given.

Their Lordships may observe that in the year 1854, upon the brothers quarrelling, the case came before the chieftain of Jamkhandi in respect of that part of the Watan which is in his territory. He, in the first instance, decided in favor of the defendant; but subsequently, some years after, upon receiving evidence, which he appears not to have done before, decided in favor of the plaintiffs. That decision, although it was subsequently set aside by the Secretary of State on the ground that, for the special reason stated in his despatch, the chief had no jurisdiction in the matter, may be invoked by the plaintiffs as, at all events, some evidence in their favor.

On the whole, therefore, their Lordships have come to the conclusion that the High Court was right in the view which they took of the law and of the burden of proof, and of the proof itself, and that their decision *quoad* the partibility of this property should be confirmed.

A difficulty which their Lordships have felt in the case, and to which the High Court have not adverted, is the following: The defendant held the hereditary office of Desai, and the Watan is admittedly property appertaining to the office; and it appears to have been the policy of the Indian Government that Desaiships should be maintained, and that the Desai himself should be enabled to perform the functions of his office, be they greater or less, properly and in a manner suitable to his position as a subordinate officer, and to some extent a representative, of the Government. This policy has been recognised and enforced by various Acts of the Legislature, the latest being apparently Act No. III of 1874 of the Legislative Council of Bombay. The provisions of that Statute seem to be in some degree retrospective.

Hence, although the decision of the High Court is in substance right, their Lordships think that it should be accompanied by a declaration that the decree is to be without prejudice to the defendant's right to such emoluments or allowances for the performance of the duties of the Desaiship as he may be entitled to under

any law in force. And, accordingly, they will humbly recommend to Her Majesty that such a declaration be added to the decree of the High Court ; but that, subject thereto, the said decree be affirmed. They also direct that the costs of this appeal be taxed ; that the amount of such costs, when taxed, be added to the costs of the cause, and paid with them out of the estate.

The 5th March 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Bills of Exchange (Hoondees)—Accommodation Acceptor (Liability of)—Payment of
Interest in Advance—Consent.*

On Appeal from the High Court at Calcutta.

Gour Chunder Roy

versus

Protap Chunder Dass.

An accommodation acceptor was held to be not released from liability by the drawer's payment of interest in advance with his (the accommodation acceptor's) knowledge and consent.

This was an appeal from a decision of the High Court of Calcutta of the 16th May 1878, reversing a decree of the Subordinate Judge of Dacca.

Mr. Cowie, Q.C., and Mr. Doyne for Appellant.

Mr. Leith, Q.C., and Mr. Graham for Respondent.

The respondent is a merchant and zemindar at Dacca ; and in February and May 1875 he cashed for the appellant two bills of exchange (hoondees) for Rs. 10,000 each drawn by Mr. N. P. Pogose, an Armenian resident there. In September 1855, the bills being overdue and unpaid, two fresh bills were drawn in substitution of them by Pogose on and accepted by the appellant payable 90 days after date and endorsed to the respondent. They were dishonored on maturity and notice to that effect was given to the appellant and Pogose. Subsequently an arrangement was come to that the respondent should accept the overdue interest and also six weeks' interest in advance to cover the period at which Pogose was expected to return to Dacca and be in a position to take up the bills. The interest was accordingly paid. In July 1876, the bills continuing unpaid, the respondent brought the present suit against the appellant and Pogose. The Dacca Court ordered a decree against Pogose for the full amount, but dismissed the suit against the appellant on the ground that he had been merely a surety and had been released by Pogose's payment of interest in advance. The High Court reversed that decision, and decreed that the appellant was liable to the respondent as the payment of interest in advance had been with his concurrence and approval. Hence the present appeal.

Their Lordships, without calling on the Counsel for the respondent, proceeded to deliver the following judgment:—

Accepting the facts found by both the Courts in India, their Lordships agree with the High Court that the liability of the appellant, as accommodation acceptor of the hoondees, depends on the answer to be given to the question whether he knew of and consented to the advance interest being taken. The High Court has

answered the question in the affirmative, and their Lordships entirely agree in that conclusion. Monohur Laha's evidence alone is sufficient to establish the fact that the defendant did know of and consent to the payment of the advance interest; and he was a witness called by the appellant. Nor do their Lordships think that the testimony of the witnesses adduced by the plaintiff is, though exceptions may be taken to parts of it, altogether inconsistent, as has been argued, with that of Monohur Laha. That which relates to a conversation between the plaintiff and defendant in the billiard-room of the former, upon which there was no cross-examination, is quite consistent with all that Monohur Laha has deposed to. Again, the probabilities of the case appear to their Lordships to be all in favor of the conclusion of the High Court. Pogose, the drawer of the hoondees and the party primarily liable upon them, was absent from his place of business; his affairs were evidently in a very shaky condition; and although it was possible that when he came back again he might be able to make some arrangement for the payment of the hoondees, he had no present means of meeting them. In these circumstances it is hardly conceivable that the plaintiff would enter into a transaction the effect of which would be to relieve the only solvent party from liability upon the hoondees. On the other hand, it was much to the interest of the defendant to take the chance of the re-establishment of Pogose's credit, and therefore to assent to such an arrangement as was actually made.

Their Lordships, therefore, will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal, with costs.

The 9th March 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Limitation—Act XIV of 1859 s. 20—Jurisdiction—Proceeding to Enforce Decree.

On Appeal from the High Court at Allahabad.

Hira Lall

versus

Budri Dass and others.

A proceeding taken *bonâ fide* and with due diligence before a Judge whom the party *bonâ fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction and deals with the case accordingly, is a proceeding to enforce a decree within the meaning of s. 20 Act XIV of 1859.

Mr. Graham for Appellant.

No one for Respondents.

The facts of the case are fully stated in the judgment of the Judicial Committee, which was delivered as follows by *Sir Barnes Peacock* :—

The question in this case is whether the judgment creditors, who on the 14th January 1867, obtained in the Court of the Judge at Agra a decree against the respondents, were on the 9th April 1874 barred by limitation from executing it. It appears that on the 3rd December 1868 the Judge sent the decree to the Subordinate Judge of the district to be executed by him, and that on the 3rd April 1869 the Subordinate Judge struck the execution case off the file. On 9th April

1874 the case was re-instituted in the Court of the Judge by the petition which has given rise to the question now to be determined.

Between the 3rd April 1869, when the Subordinate Judge struck the case off his file, and the 9th April 1874, proceedings were from time to time taken by the decree holders in the Court of the Subordinate Judge to enforce the decree, but the question is whether those proceedings were sufficient to prevent the operation of the Limitation Act XIV of 1859 s. 20.

It appears that on the 18th February 1870 an application was made by the decree holders to the Subordinate Judge to set off a debt of Rs. 1,300, which they owed to a debtor of the respondents, against so much of the amount due to them under the decree, and at page 6 of the Record it will be found that the Subordinate Judge made an order that the application should be granted, that the decree holders should file a receipt for Rs. 1,300, and that the case should be struck off the pending file. On the 18th February 1870, therefore, the Subordinate Judge made an order by which a portion of the debt to the extent of Rs. 1,300 was satisfied. Subsequently on the 8th January 1872 an application was made to the Subordinate Judge to send a certificate of the decree to the political agency at Indore in order that the decree might be executed there, whereupon he made an order that the Judge should be requested to send the record of the execution of decree; but inasmuch as an interval of more than one year had elapsed since the last order it was necessary, under s. 216 Act VIII of 1859, to serve the judgment debtors with a notice, in order that they might, if they could, show cause why the decree should not be executed against them. Accordingly a notice was sent to them in a registered cover by post, they living out of the jurisdiction of the Court, but it was returned, as the judgment debtors were not found. That was on the 2nd April 1872. The Subordinate Judge held that that was not a sufficient service upon the defendants, and ordered the case to be struck off the file of pending cases. On the 3rd May 1872 he made an order: "That a notice be sent to the judgment debtors by post in a registered cover, fixing the 18th day of May as the date for showing cause, and that the case be brought forward on the said date." On the 30th May 1872, the Nazir of the Court made the following report: "In this case a notice in a registered cover was sent by post to the judgment debtors. The cover has been returned to-day by the post, open. The cover has a slip attached thereon, in which it is written, in Hindi, that Buddri Nauth, treasurer (that is one of the judgment debtors), refuses to take it. Therefore, the cover in question is submitted, with this petition." On the 3rd June 1872, the case again came before the Subordinate Judge, upon which he made the following order: "The case having been brought forward, it appears that a notice in a registered cover was sent by post to the judgment-debtor at Indore, but, the judgment-debtors not having received the cover, it was returned. The judgment-debtors not having taken the cover containing the notice, it must be considered as having been served." It is therefore ordered: "That a report be endorsed on the decree, and made over to the decree holders' pleader, that he may sue out execution in a competent Court, and recover the amount of his decree, and that the case be struck off the pending file."

Afterwards, on the 24th December 1873, upon a report of the Mohurrer that the record was not in the office, the Subordinate Judge made another order that the record should be sent for from the Judges' Court. Subsequently, on the 9th January 1874, in a proceeding from which it appears that the record had been received and perused, the Subordinate Judge "ordered that the certificate prescribed by ss. 285 and 286 Act VIII of 1859, and copy of the application for execution of decree, be sent to the agent at the Indore Cantonment." On the 9th April 1874 the case was re-instituted in the Court of the Judge by petition, stating that the Subordinate Judge had not lost control of the case until the 3rd June 1872, that the decree holders had a certificate on which they had not acted, and

they prayed the Court that under s. 237 certain 4 per cent. promissory notes for Rs. 25,000 due to the judgment-debtors in the Indore Agency Cantonment Treasury might be attached. It appears that after some demur on the part of the Assistant Political Agent to execute the decree, he was ordered to execute it; and he did execute it by attaching a sum of Rs. 13,097, belonging to the judgment-debtors, and that money was sent to the Judge at Agra by means of a bill. On the 13th May 1876, the Judge, having received the money from the Indore Agency, ordered that the Rs. 13,097:7:9 be given over to Meer Jaffar Hosen, pleader for the decree holder, agreeably to a power given to him, and a receipt be taken from him. Before the money was handed over, however, an application was made to the Judge, which will be found at page 30 of the Record, in which the defendants made the following objection, amongst others: "1. That the decree holder's decree is beyond time." Thereupon the Judge on the 18th May 1876 made the following order: "The objections are such as may be entertained, and may possibly be determined in favor of the debtors. It appears, therefore, undesirable that the decree holder should get the money till they have been disposed of. Let payment be stayed on the debtors giving security to pay interest at 8 annas per mensem per cent., in the event of the money being ultimately awarded. If the cheque received from foreign territory have been already made over to the decree holder, an injunction may be issued to the bank on which it is drawn, not to cash it till further orders." Then comes the decision of the 31st May 1876, by which the Judge held that the proceedings in the Court of the Subordinate Judge were *ultra vires*, and did not prevent the running of limitation. He held that the transfer of the case to the Subordinate Judge was not authorised by law, and that when the Subordinate Judge removed the case from his files he could not take it up again without a fresh transfer. He also considered that the decree holders had not shown due diligence in the case and doubted whether any of the proceedings were *bond fide*. He, therefore, held that he was constrained to grant the prayer of the objectors, and to award them costs.

The execution creditors appealed to the High Court, and that Court upheld the decision. The Judges, however, stated that they saw no reason to think that the appellants had not exerted themselves *bond fide* to obtain their due. In that view their Lordships concur. But the High Court considered that the transfer to the Subordinate Judge, even if the Judge had power to make it, merely authorised him to take up and dispose of the application then pending and not the subsequent applications which were made to him. They further stated that they affirmed the order of the Judge with great reluctance.

There can be no doubt that the applications to and orders of the Subordinate Judge if he had had jurisdiction would have been sufficient to prevent the operation of the Statute of Limitations, and their Lordships are of opinion that, under the circumstances of the case, they had that effect, even if he had no jurisdiction. Section 14 Act XIV of 1859 enacts: "In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant or some person whom he represents *bond fide*, and with due diligence, in any Court of Judicature, which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which on appeal shall have been annulled, for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from any such computation." It was, therefore, the object of the Legislature, at least with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating *bond fide* and with due diligence before a Judge whom he may suppose to have had jurisdiction, but who yet may not have had jurisdiction. The question is, whether the same principle may not be applied to the construction of s. 20

Act XIV of 1859, with regard to executions. Section 20 says: "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment decree or order of such Court unless some proceeding shall have been taken to enforce such judgment decree or order, or to keep the same in force, within three years next preceding the application for such execution." The Act does not say some proceeding in a Court having jurisdiction, and their Lordships are of opinion that a proceeding taken *bond fide* and with due diligence before a Judge whom the party *bond fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of s. 20.

In this case the Subordinate Judge did believe he had jurisdiction. Applications were made to him, and he made orders which would, if he had had jurisdiction, have been proceedings within the period of limitation. If the judgment-debtors had appeared before the Subordinate Judge, and had objected to his jurisdiction, he must have decided whether he had jurisdiction or not; and if he had decided that he had jurisdiction, even though he had not, the proceedings would have been proceedings within the meaning of s. 20. They ought equally to be so, though the judgment-debtors did not appear or object to the jurisdiction.

There is one case which should be referred to, and that is the case of *Roy Dhunput Singh v. Madhomatee Dabia*, reported in the 11th Bengal Law Reports, page 23.* There "An execution sale was stayed by consent for two months, and the execution suit was struck off the file. During that period the execution creditor applied to the Court to restore the execution suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in another suit, alleging that he (the executing creditor) had attached them; but it turned out that he had attached them in another suit. Held, the application being *bond fide*, that the period of limitation began to run from the date of the disposal of the application by the Court." In delivering their judgment at page 31, the Judicial Committee said: "It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree holder. It seems to their Lordships that these circumstances really affect only the *bona fides* of the proceedings. If their Lordships could infer from these facts that the petition was a colorable one, not really with a view to obtain the money; if they could come to that conclusion, in point of fact the proceeding would not be one contemplated by the Statute; but their Lordships cannot come to that conclusion." They therefore came to the conclusion that the proceeding, although abortive, was a proceeding within the meaning of s. 20 Act XIV of 1859.

On the whole, therefore, their Lordships have arrived at the conclusion, and will humbly advise Her Majesty, that the decree of the High Court was erroneous, and that it be reversed; that in lieu thereof an order be made reversing the order of the Judge of Agra, of the 31st May 1876, and ordering that the Rs. 1,309 : 7 : 9, with such interest as they may be entitled to under the order of the 18th May 1876 be paid to the decree holder; and that the appellants have the costs in all the Lower Courts subsequent to the petition of objection of the 18th May 1876, and the costs of this appeal.

* 18 W. R. 76; 2 Suth. P. C. R. 615.

The 13th March 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Hindoo Law of Inheritance—Widow—Unchastity—Forfeiture—Act XXI of 1850.

On Appeal from the High Court at Calcutta.

Moniram Kolita

versus

Kerry Kolutany.

Under the Hindoo law, as administered in the Bengal school, a widow who has once inherited the estate of her husband is not liable to forfeit that estate by reason of unchastity.

Quære.—As to the effect of Act XXI of 1850, if the widow had been degraded or deprived of her caste in consequence of her unchastity.

This was an appeal from a decree of the High Court at Calcutta of the 9th April 1873 reversing the decree of the local tribunal at Sibsagar, in the province of Assam.

Mr. Cowie, Q.C., and Mr. Doyne for Appellant.

No one for Respondent.

In this suit a very important question was raised affecting the entire Hindoo community. Ghimbara and Atma, both now deceased, were Hindoo brothers, and they lived within the jurisdiction of the Assam Courts, and subject to the law of the Bengal school. The appellant is the son of Atma, and the respondent is the childless widow of Ghimbara's son. On the death of her husband the respondent inherited the lands in suit, and obtained a deed to that effect from the Collector. According to the Hindoo law, the appellant, on her (the respondent's) death, would be entitled to succeed to the property; but it seemed that since her husband's death she had lived with a man and had a child by him. On this becoming known, the appellant in 1870 instituted a suit against her to recover the lands. The Original Court ordered a partition of the property, one-half to go to the appellant and the other to the respondent for her lifetime, and stated that it was not competent for her to alienate it by sale or gift, and that, as she had no issue by her deceased husband, her son by another man could not be treated as her son. Against this decision the appellant protested in the Court of the Deputy Commissioner at Sibsagar, alleging that the respondent was living under the protection of a paramour, and that there was no law allowing the unchastity of a Hindoo widow unless at the cost of the entire deprivation of her estate. The Court decided in favor of the appellant for the whole land sued for, holding that the respondent had forfeited it in consequence of the unchaste life she had been leading. The respondent, upon that, appealed to the High Court at Calcutta, asserting that, the succession having once devolved upon her, and the property vested in her, she could not be divested of it in consequence of her subsequent unchastity. A Divisional Bench of the High Court,* consisting of Bayley and Dwarkanath Mitter, JJ. (the latter being an erudite native Judge), expressed their concurrence in the decision of the Deputy Commissioner; but, in consequence of a previous conflicting decision of their own tribunal,† they referred the case to a Full Bench as to whether, under the Hindoo law, as administered in the Bengal school, a widow who had once inherited the estate of her husband was liable to forfeit it by reason of unchastity. The question so referred came on for argument before Couch, C.J., and nine other Judges.‡ Of these, seven, including the Chief Justice, were of opinion

* 19 W. R. 367.

† 14 W. R. O. J. 23.

‡ See 19 W. R. 367.

that, under the Hindoo law of the Bengal school, a sonless widow who had once inherited the estate of her deceased husband was not liable to forfeit it by unchastity. The three other Judges were of an opposite opinion.

The question raised being one of great interest and importance to the Hindoo community, special leave was given by the Judicial Committee to appeal to Her Majesty in Council.

Mr. Cowie, Q.C., and Mr. Doyne now contended, in substance, that the decree of the High Court was erroneous, and that they should have held that a sonless widow who, by reason of her chastity, had obtained her husband's estate, was entitled to continue in its possession and enjoyment only so long as the qualification of chastity itself, and, according to the Hindoo belief, the important spiritual benefit accruing therefrom to her deceased husband, should continue.

Though there was no appearance for the respondent, the decisions of the seven Judges of the High Court in her favor on the intricate point of law raised were frequently cited, out of fairness, both by their Lordships and the appellant's Counsel, it being obviously desired that the case should be argued and decided apart from the mere personal dispute between the parties—the property at suit being very insignificant—but from the larger point of view by which the law of succession affecting the whole Hindoo community was affected. The case was heard before their Lordships on the 29th November 1879, when they stated, at the close of the argument, that they would take time to consider their humble advice to Her Majesty upon the matter.

On the 13th March 1880 *Sir Barnes Peacock* delivered the following judgment:—

This is an appeal from a decision of a Full Bench of the High Court of Judicature at Calcutta. It was admitted by virtue of a special order of Her Majesty in Council, whereby the appellant had leave to appeal in the form of a special case upon the following questions, *viz.* :—

1st. Whether, under the Hindoo law, as administered in the Bengal School, a widow who has once inherited the estate of a deceased husband is liable to forfeit that estate by reason of unchastity; and,

2nd. Whether the forfeiture, if any, is barred by Act XXI of 1850?

The appeal was admitted on account of the importance of the questions submitted for determination and the great interest which the Hindoo community take in it.

The case came in the first instance upon special appeal before a Division Bench, consisting of Mr. Justice Bayley and Mr. Justice Dwarkanath Mitter, who were of opinion that the defendant had, by reason of unchastity, forfeited her right in her husband's property, but in consequence of a contrary ruling of the High Court, referred the two questions above mentioned to a Full Bench, with their remarks thereon.

The Full Bench consisted of the Chief Justice and nine other Judges, and the majority held that the widow, having once inherited the estate, did not forfeit it by reason of her subsequent unchastity. Three of the Judges, however, *viz.*, Mr. Justice Kemp, Mr. Justice Glover, and Mr. Justice Dwarkanath Mitter, dissented from the opinions expressed by the majority of the Court. The case is fully reported in the 13th Bengal Law Reports, p. 1.*

The subject has been very elaborately discussed by the Chief Justice and the other Judges of the Full Bench, and it has also been fully argued before their Lordships on behalf of the appellants. The respondent did not appear.

The opinion of Mr. Justice Mitter, who was himself a learned and accomplished Hindoo lawyer, and those of the other two Judges who were in the minority, are entitled to very great weight, but, having considered and weighed

all their arguments, their Lordships are unable to concur in the opinions which they expressed.

The earliest case in which the subject was fully discussed in the High Court is the case of *Matangini Debi v. Srimati Jagkali Debi*, 5 Bengal Law Reports, 463,* which was the cause of the reference.

That case was originally tried before Mr. Justice Markby, who delivered a judgment in which he showed much research and great knowledge of the subject. The case was appealed to the High Court, and heard before the then Chief Justice and Mr. Justice Macpherson, who affirmed the judgment of Mr. Justice Markby.

Their Lordships will, in the first instance, advert to the judgments of the dissentient Judges, and in particular to the opinion expressed by Mr. Justice Mitter, on referring the case, and to his judgment after the argument in the Full Bench. Reasoning from the general notions of the Hindoo commentators touching the frailty and incapacity of women, and the necessity for their dependence upon and control by some male protector, and, from the origin and nature of a widow's interest in the property which she takes in succession to her husband, he arrived at the conclusion that she is, as he expresses it, "a trustee for the benefit of her husband's soul"; that inasmuch as, by reason of unchastity subsequent to her husband's death, she becomes incapable of performing effectually the religious services that are essential to his spiritual welfare, she ceases to be capable of performing her trust, and must therefore be taken to have broken the condition on which she holds the property, and to have incurred the forfeiture of her estate. It may be remarked that the other two dissentient Judges differ from Mr. Justice Mitter's view of the nature of a Hindoo widow's estate, and, therefore, from a good deal of the reasoning upon which his conclusion is founded. But, however that may be, their Lordships entirely concur with the Chief Justice and the majority of the Judges in rejecting the somewhat fanciful analogy of trusteeship.

Mr. Justice Glover's judgment is founded upon the express texts, and upon the ground that by reason of unchastity a widow becomes incapable of performing those religious ceremonies which are for the benefit of her husband's soul. He draws a distinction between a widow and a son, and says (Report, p. 55)† :—

"The theory of the Hindoo law of inheritance is the capability by the heir of performing certain religious ceremonies which do good to the soul of the departed, and he takes who can render most service. The sons down to the third generation could do most, offer most oblations, and confer greatest benefits, therefore they are first in the line of heirship. The widow comes next, as being able to confer considerable, though less, benefits, and it is only because she is able to do this that she is allowed to take her husband's share.

"It would seem, therefore, to be a condition precedent to her taking that estate that she should be in a position to perform the ceremonies, and offer the continual funeral oblations, which are to benefit her deceased husband in the other world; and in this respect her position is very different from that of a son. The son confers benefits upon his father from the mere fact of being born capable of performing certain ceremonies. His birth delivers him from the hell called *put*; and whether in after-life he offer the funeral oblations or no, he succeeds to his father's inheritance from the fact of being able to offer them. With the widow it is not so; she can only perform ceremonies and offer oblations so long as she continues chaste, and directly she becomes unchaste, from that moment her right to offer the funeral cake ceases."

These reasons do not appear to be sufficient to support the learned Judge's conclusion that a widow forfeits her estate when she ceases to be able to perform the necessary religious ceremonies. It is admitted that she may by law hold the estate without performing them, and that she may give, sell, or transfer the estate to another for her own life. Nor does there appear to be any sufficient reason for

* 14 W. R. O. J. 23.

† 19 W. R. 397.

the distinction attempted to be drawn between a son or other heirs and a widow with reference to the forfeiture of the estate when the person who has succeeded to it has become incompetent to perform the duties which he or she ought to perform. The proprietary right of a son by inheritance from his father is expressly ordained, because the wealth devolving upon sons benefits the deceased (Dayabhaga, cap. 11 s. 1 v. 38), and the right of succession of other heirs to the property is also founded on competence for offering oblations at obsequies (18th verse), see also verse 32. But a son, even if by the mere fact of his birth he delivers his father from the hell called *put*, is, according to the Dayabhaga, excluded for certain causes from inheritance in the same manner as other heirs (see the Dayabhaga, cap. 5, paragraphs 4, 5, and 6); but, if he once succeeds, the estate is not divested for anything less than degradation, though causes which would have excluded him if they had existed before succession arise after the estate has descended. This is admitted by Mr. Justice Mitter, Record, p. 7.

Their Lordships will proceed to consider the principal texts upon which the learned Judges who were in the minority founded their judgments.

Mr. Justice Mitter, in his judgment, p. 40,* says :—

"Of all the authorities above referred to, the Dayabhaga of Jimuta Vahana, the acknowledged founder of the Bengal school, is undoubtedly the highest; and it is therefore to the Dayabhaga that I shall first direct my attention. I do not wish, however, to go over all the texts quoted and relied upon by the author of that treatise in discussing the widow's right of succession. I will refer to two of those texts only,—namely, the texts of Vrihat Menu, cited in v. 7 s. 1 Ch. xi. of Mr. Colebrooke's translation of the Dayabhaga; and that of Catyayana, cited in v. 56 of the same section and chapter. These two verses are as follows :—

- (1.) The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share."
- (2.) Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it."

With regard to the former of the texts above cited, although the present participle is used, it clearly refers only to the conduct of the widow up to the time of her husband's death, and not to her conduct subsequently. It cannot mean up to the time of her presenting the funeral oblation; for, notwithstanding the order of the words, the meaning of the text is, that having obtained the husband's share, the patni or widow should perform those ceremonies conducive to the spiritual benefit of her husband and herself, which can be accomplished by wealth and which a female is competent to perform. See The Vira Mitrodaya, cap. 3 pt. 1 s. 2, and the Smriti Chandrika, cap. 11 s. 1 vs. 13, 16, and 20. In this view the text would run thus,—“The widow of a childless man having kept unsullied her husband's bed, and persevered in religious observances, shall obtain his entire share, and present his funeral oblation.”

Mr. Justice Glover points to the words “persevering in religious observances,” to prove that the whole text applies to a period subsequent to the husband's death, and as referring to a continually abiding condition, because he assumes that a wife cannot perform religious observances during her husband's life, and that, therefore, those words must have relation to a period after her husband's death. But the assumption does not appear to be correct, for in the Smriti Chandrika, cap. 11 s. 1 verse 17 the meaning of the words “persevering in religious observances” is thus explained, “practising religious ceremonies even during the lifetime of the husband, with the husband's permission,” etc., whence the inference is drawn, in verse 18, that a patni to inherit her husband's estate must be a pious woman. And again in verse 12, a virtuous woman is “one that

lives with her husband, associating with him in the performance of rites ordained by Cruti and Smruti, and observing fastings and other religious ceremonies."

The second of the texts relied upon is that of Catyayana.

It is important to see for what purpose the text was cited, and with that view to refer to the verses immediately preceding those in which the text is cited, for there is nothing more likely to mislead than to read a single paragraph from the Dayabhaga or Mitacshara alone without studying the whole chapter, and in some cases, even, without studying several chapters of the same treatise.

In cap. 11, s. 1, the author of the Dayabhaga, verse 54, sums up his argument in support of the widow's right to succeed to the entire property of her husband, for which purpose he had cited the text of Vrihat Menu. He says:—

"By the term 'his share' is understood the entire share appertaining to her husband, not a part only" (the translator adds the words "sufficient for her support").

And then in verse 55 he concludes:—

"Therefore the interpretation of the law is right as set forth by us," viz., that "the widow's right must be affirmed to extend to the whole estate of her husband" (v. 6).

He then proceeds, in verse 56, to deal with the mode of enjoyment, and to show that notwithstanding a widow takes the entire estate, she is not entitled to make a gift, sale, or mortgage of it, to the exclusion of her husband's heirs. He says:—

"But the wife must only enjoy her husband's estate after his demise; she is not entitled to make a gift, mortgage, or sale of it."

And then, in support of that proposition, he refers to the second text cited, and proceeds:—

"Thus Catyayana says:—'Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her death let the heirs take it.'"

Mr. Justice Mitter in his judgment remarks, at p. 41,* that the author of the Dayabhaga cited that text, not for the purpose for which he cited that of Vrihat Menu, viz., that of establishing a widow's right to succeed to the entire estate of her deceased husband, but for that of defining the nature and extent of the interest which devolves upon her by virtue of that right.

In his remarks made on referring the case, however, he reasons upon it as an isolated text, and says (Report, p. 16) †:—

"This passage shows clearly, not only that the widow's right is a mere right of enjoyment, the word 'enjoyment' being understood in the sense explained above, but that the exercise of that right is absolutely dependent on her 'preserving unsullied the bed of her lord.' The participial form of the word 'preserving,' i.e., continually preserving, which is also the form used in the original (*palayanta*), proves conclusively that the injunction is one in the nature of a permanently abiding condition, which a widow is bound at all times, and under all circumstances, to satisfy; and the right of enjoyment conferred upon her being expressly declared to be subject to such a condition, every violation of it must necessarily involve a forfeiture of right."

Mr. Justice Glover also, at page 57,‡ expresses a similar opinion, and he refers to the present participle "preserving" as denoting continuance, and as referring to the time after the widow has taken the property originally, and, he adds besides, if the words "keeping unsullied" refer only to past time, what is to be made of the other part, which he assumes to import a condition, viz., "living with her venerable protector." "She cannot," he says, "live with him until she is a widow, and while she lives with him she is to keep unsullied her husband's bed." It is by treating the words "living with her venerable protector" as con-

* 19 W. R. 391.

† Id. 373.

‡ 19 W. R. 397.

stituting a condition that he endeavors to add force to his argument that the words "keeping unsullied the bed of her lord" also express a condition. But that argument fails, inasmuch as it has been expressly held by the Privy Council, in the case of *Cossinaut Bysack v. Hurrosoondery*, Vyavastha Darpana 97, and 2 Morley's Digest, 198, that the words "abiding with her venerable protector" do not create a condition of forfeiture in case of her refusing to abide with him. Referring to that decision, Mr. Justice Mitter says that it lends in an indirect way considerable support to his view, inasmuch as that particular case was decided expressly upon the ground that the widow had not changed her residence for unchaste purposes. Their Lordships, however, are of opinion that the words "abiding with her venerable protector" do not, under any circumstances, create a condition or a limitation of a widow's right to enjoy the property of her husband to the period during which she abides with her protector. They agree with the Chief Justice in the opinion which he expressed at p. 82, that neither the words "preserving unsullied the bed of her lord," nor the words "and abiding with her venerable protector," import conditions involving a forfeiture of the widow's vested estate; but even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of Catyayana's text taken by itself, as what are the conclusions which the author of the Dayabhaga has himself drawn from them. It is to that treatise that we must look for the authoritative exposition of the law which governs Lower Bengal, whilst on the other hand nothing is more certain than that, in dealing with the same ancient texts, the Hindoo commentators have often drawn opposite conclusions. Now how has Jimuta Vahana dealt with this particular text? It has been seen for what purpose he cited it; but how does he comment on it in the rest of the section in which it occurs? He comments on the words "venerable protector" (v. 57); he defines who are intended to take after the demise of the widow under the term "the heirs" (vs. 38 and 59); glances at her duty to lead an abstinent, if not an ascetic, life, and to avoid "waste" (vs. 60 and 61), and deals with her power of alienation, and the limitations upon it (vs. 62, 63, and 64). But he nowhere says one word from which it can be inferred that, in his opinion, the text implied continued chastity as a condition for the duration of her estate, or that a breach of chastity subsequent to the death of her husband would operate as a forfeiture of her right. It can scarcely be supposed that a commentator so acute and careful as Jimuta Vahana, if he had drawn from the text of Catyayana the inference that a widow was to forfeit the estate if she should become unchaste after her husband's death, would not have stated that inference clearly by saying, in verse 57, "let her enjoy her husband's estate during her life, or so long as she continues chaste," instead of using only the words "during her life" and stating that "when she dies" the daughters and others are to succeed.

The right to receive maintenance is very different from a vested estate in property, and therefore what is said as to maintenance cannot be extended to the case of a widow's estate by succession. However, the texts cited in regard to maintenance show that when it was intended to point out that a right was liable to resumption or forfeiture clear and express words to that effect were used. Jimuta Vahana in cap. 11 s. 1 verse 48 of the Dayabhaga refers to a text of Narada, in which he says, "Let them allow a maintenance to his women for life, provided they keep unsullied the bed of their lord. But if they behave otherwise the brother may resume that allowance." How different are those words from those used in the text of Catyayana.

Mr. Justice Mitter, in order to get rid of the argument that a daughter becoming a sonless widow or unchaste after having succeeded to the estate of her father does not forfeit the estate, argues that the texts to which he refers are applicable to a daughter as well as to a widow, and he refers to verse 31 s. 2 cap. 11

of the Dayabhaga to show that the text of Catyayana is applicable to all women. (See Report, pp. 45 and 46, 48 and 49.)*

It seems clear, however, that though an unchaste daughter is excluded from inheriting her father's estate, or an unchaste mother that of her son, it is not by virtue of either of the above-mentioned texts of Vrihat Menu or that of Catyayana. Those texts have reference to the bed of the deceased owner of the estate. The words, "his funeral oblation," and "his share," and "the property," have reference to the oblation, the share, and the property of the lord or husband mentioned in the preceding parts of the text, whose estate is to be inherited, and not to the husband or lord whose estate is not to be inherited, such as the husband or lord of a daughter or mother, as the case may be, of the deceased owner, who, in default of a widow, may be next in succession to inherit his estate.

Verse 31 s. 2 c. 11 only extends to other women the rule applicable to a wife, that a gift, sale, or mortgage of the estate is not to be made, and that after her death the heirs of the deceased owner are to take, and not that part of the rule which is included in the words "keeping unsullied the bed of her lord." This is made clear by s. 30, in which it is said:—

"Since it has been shown by a text cited (s. 1 verse 56) that on the decease of the widow in whom the succession had vested, the legal heirs of the former owner who would regularly inherit his property if there were no widow in whom the succession vested, namely, the daughters and the rest, succeed to the wealth; therefore, the same rule (*concerning the succession of the former possessor's next heirs*) is inferred *à fortiori* in the case of the daughter and grandson (meaning a daughter's son), whose pretensions are inferior to the wife's."

Then comes s. 31, which is in the words following:—

"The word 'wife' in the text above quoted (s. 1 v. 56) is employed with a general import, and it implies that the rule," (meaning the rule referred to in cap. 11 s. 2 and par. 30,) "must be understood as applicable generally to the case of a woman's succession by inheritance."

Their Lordships have dwelt at some length upon the two texts that have been considered, since it is upon them that the arguments of the dissentient Judges are mainly founded. For the reasons above stated, they are of opinion that these texts, neither expressly nor by necessary implication, affirm the doctrine that the estate of a widow, once vested, is liable to forfeiture by reason of unchastity subsequent to the death of her husband.

The judgments of the High Court have so exhaustively reviewed the later authorities upon this question that their Lordships do not think it necessary to go through the same task. It is sufficient to say that in their opinion those authorities, though in some degree conflicting, greatly preponderate in favor of the conclusion of the majority of the Judges of the High Court.

In their Lordships' view it has not been established that the estate of a widow forms an exception to what appears to be the general rule of Hindoo law, that an estate once vested by succession or inheritance is not divested by any act which, before succession or incapacity, would have formed a ground for exclusion of inheritance.

The general rule is stated in the *Vira-Mitrodaya*, a book of authority in Southern India (see 12 Moore's Ind. Appeals, 466),† and Mr. Colebrooke's preface to the *Dayabhaga*, and which may also, like the *Mitacshara*, be referred to in Bengal in cases where the *Dayabhaga* is silent. It is there said, in par. 3 of the chapter on Exclusion from Inheritance (cap. 8), "Amongst them, however, an out-cast (*patita*) and addicted to vice (*upa pataki*) are excluded if they do not perform penance, and then in par. 4" the exclusion again of these takes place if their disqualification occur previously to partition (or succession), but not if subsequently to partition (or succession), for there is no authority for the resumption of allotted

* 19 W.R. 339.

† 10 W. R. P. C. 31; 2 Suth. P. C. R. 160.

shares. In par. 5 it is said that the masculine gender in the word "outcast," etc., is not intended to be expressive of restriction, and that the law of exclusion based upon defects excludes the wife or the daughters, female heirs, as well.

Mr. Justice Jackson has ably pointed out the great mischief, uncertainty, and confusion that might follow upon the affirmance of the doctrine that a widow's estate is forfeited for unchastity, particularly in the present constitution of Hindoo society, and the relaxation of so many of the precepts relating to Hindoo widows. The following consequences may also be pointed out.

According to the Hindoo law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship (as to which see the *Shivagunga Case*, 9 Moore's Ind. Appeals, 604*) does not take a mere life estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant in tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband (*Id.* 604). The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death. (Moore's Ind. Appeals, 400.†)

If the widow's estate ceases upon her committing an act of unchastity, the period of succession will be accelerated, and the title of the heirs of her husband must accrue at that period. Suppose a husband dies leaving no male issue, and no daughter, mother, or father, but leaving a chaste wife, a brother, a nephew, the son of the surviving brother, and other nephews, sons of deceased brothers. The wife succeeds to the estate, and the surviving brother is her protector. (See *Dayabhaga*, cap. 11 s. 1 v. 57.) If he survive the widow, he, according to the Bengal school, will take the whole estate, as sole heir to his deceased brother, and the nephews will take no interest therein, for brothers' sons are totally excluded by the existence of a brother (*Dayabhaga*, cap. 11 s. 1 v. 5; *id.* cap. 11 s. 6 vs. 1 and 2). The surviving brother may be advanced in years; the widow may be young. The probability may be that she will survive him. If her estate were to cease by reason of her unchastity, the benefit which he would derive from her fall would give him an interest in direct conflict with his moral duty of shielding her from temptation. But, further, the widow has a right to sell or mortgage her own interest in the estate, or in case of necessity to sell or mortgage the whole interest in it. (*Dayabhaga*, cap. 11 s. 1 v. 62.) If her estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of his estate if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage.

Again, if the surviving brother should die in the lifetime of the widow, all the nephews would succeed as heirs of their deceased uncle; but if the son of the surviving brother could prove that the widow's estate had ceased, by reason of an act of unchastity committed in the lifetime of his father, and that consequently the estate had descended to his father in his lifetime, he would be entitled to the whole estate as heir to his father, to the exclusion of the other nephews. Thus the period of descent to the reversionary heirs of the husband might be accelerated by an act of unchastity committed by the widow; the course of descent might be changed by her act, and persons become entitled to inherit as heirs of the husband, who, if the widow had remained chaste, would never have succeeded to the estate; and others who would otherwise have succeeded would be deprived of the right to inherit.

* 2 W. R. P. C. 31; 1 Suth. P. C. R. 520.

† *Sic.*

In the case of *Sremathi Matangini Debi v. Srimati Jagkali Debi*, 5 Beng. Law Reports, 490,* the following remark was made by the then Chief Justice. He said:—

“In the case of *Katama Natchier v. The Rajah of Shivagunga* (9 Moore I. A. 539)† it was held that a decree in a suit brought by a Hindoo widow binds the heirs who claim in succession to her; but that can only be in a suit brought by her so long as she holds a widow's estate. It would cause infinite confusion if a decree in a suit brought by a widow could be avoided, if it could be shown that she had committed an act of unchastity before she commenced the suit. But if the rule contended for is correct, and the estate which a widow takes by inheritance is merely an estate so long as she continues chaste, all the acts which a Hindoo widow could do in reference to the estate might be avoided by raking up some act of unchastity against her. Inconvenience would not be a ground for deciding a case like the present, if the law were clear upon the subject; but it is an argument which may be fairly adduced, when the authorities in favor of the opposite view are merely the expressions of opinion by Hindoo law officers, or by European or modern text writers, however eminent, or even decisions of a Court of Justice, when they are in conflict with the decisions of other Courts of equal weight.”

Upon the whole, then, their Lordships, after careful consideration of this question, and of the authorities bearing upon it, have come to the conclusion that the decision of the majority of the Judges was the correct one, and it is important to remark that the High Court at Bombay, in the case of *Privali v. Bhiku*, 4 Bombay High Court Reports, p. 25, and the High Court in the North-Western Provinces, in the case of *Bhagwanli v. Ruor Man Tinari*, 2 Ind. Law Reports, 145, have given judgments to the same effect as that of the Full Bench at Calcutta in the present case.

The widow has never been degraded or deprived of caste. If she had been, the case might have been different, subject to the question as to the construction of Act XXI of 1850; for upon degradation from caste before that Act, a Hindoo, whether male or female, was considered as dead by the Hindoo law, so much so that libations were directed to be offered to his manes as though he were naturally dead. See Strange's Hindoo Law, 160 and 261, Menu, cap. 11 s. 183. His degradation caused an extinction of all his property, whether acquired by inheritance, succession, or in any other manner. (Dayabhaga, cap. 1, paras. 31, 32, and 33.) The opinion of Mr. Colebrooke in the *Trichinopoly Case* is founded on the distinction between mere unchastity and degradation.

It is unnecessary to determine what would have been the effect of Act XXI of 1850, if she had been degraded or deprived of her caste in consequence of her unchastity.

Their Lordships, for the above reasons, will humbly advise Her Majesty to affirm the judgment of the High Court.

The 13th April 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Zur-i-peshgee Mortgage—Collusive Mokurruree Lease—Mesne Profits—Sale in Execution.

On Appeal from the High Court at Calcutta.

* 14 W. R. O. J. 31.

† 2 W. R. P. C. 31; 1 Suth. P. C. R. 520.

Gunesh Lal Tewaree
versus
Sham Narain and others.

In December 1851, the Rajah of Ramnuggur executed a zur-i-peshgee mortgage of certain villages in favor of appellant's predecessors. The respondents' predecessor set up a mokurruree lease of one of the villages, alleged to have been granted to him by the Rajah prior to the mortgage. The appellant's predecessors sued to set aside that lease as collusive, and to recover that village with mesne profits, and obtained a decree to that effect in 1860. Before execution of this decree was taken out, the Rajah obtained a judgment for some debt against appellant's predecessors, in execution of which he attached and sold their interest in the zur-i-peshgee lease.

HELD that the appellant was entitled to recover the mesne profits of the property up to the date of the sale, the right to these profits not having passed to the purchaser of the zur-i-peshgee rights.

This was an appeal from a decision of a Divisional Bench of the High Court of Calcutta of the 24th August 1876, affirming a decree of Mr. Da Costa, the Subordinate Judge at Sarun.

Mr. Doyne for Appellant.
Mr. C. W. Arathoon for Respondents.

Sir Montague Smith delivered as follows the judgment of the Judicial Committee, in which the facts of the case are fully stated :—

This was an application by Gunesh Lal Tewaree, the appellant, as the representative of Muddun Mohun Tewaree and Kalee Pershad Tewaree, who had obtained a decree against the respondents, to execute that decree so far as relates to the recovery of the mesne profits of a mouzah, called Koorkoorha, awarded by it. The judgment is dated the 2nd June 1860, and was the result of an action which had been brought by the Tewarees against the predecessors of the respondents. The facts are shortly these: Perhlad Sen, who was the Rajah of Ramnuggur, executed, on the 23rd December 1851, a zur-i-peshgee mortgage to the Tewarees of certain mouzahs, including mouzah Koorkoorha, for a sum of Rs. 49,453. Shortly after the mortgage, one Binda Lall, the predecessor of the respondents, set up a mokurruree lease of mouzah Koorkoorha, which, as he affirmed, had been granted to him by the Rajah prior to the zur-i-peshgee mortgage. The suit was brought by the Tewarees to set aside that mokurruree on the ground that it was colorable, and put forward by Binda Lall in collusion with the Rajah to defeat the zur-i-peshgee, so far as related to mouzah Koorkoorha. The judgment of the 2nd June 1860, the execution of which is in question, states that the claim was for the recovery of "the entire 16 annas of mouzah Koorkoorha, the property let out in zur-i-peshgee lease on the basis of a zur-i-peshgee lease, dated 23rd December 1851." The decree was that the plaintiffs do recover possession of the entire 16 annas of the mouzah, and that the mokurruree pottah be set aside. Then there is this award with reference to mesne profits: "That the amount of mesne profits from 1262 Fusli to the date of recovery of possession, with interest on the principal amount of each year from the following year up to date of realisation, be awarded to the plaintiffs from the defendant Binda Lall." This was the decree of the Principal Sudder Ameen. There was an appeal from it to the High Court, and ultimately an appeal from the High Court to this country, and those appeals went on concurrently with another litigation which was initiated by the Rajah to set aside the zur-i-peshgee lease altogether on the ground that it had been improperly obtained; and in this litigation also there was a series of appeals, ending in an appeal heard before this Committee.* In the result the Rajah failed in his suit, and the Tewarees succeeded in theirs, maintaining the decree of the 2nd June 1860, on which the present execution proceedings are founded.

Prior, however, to any proceedings taken to execute this decree, the Rajah

obtained a judgment for some debt against the Tewarees, and in the suit in which he obtained that judgment he, by the usual proceedings, attached and sold their interest in the zur-i-peshgee lease. The purchaser under that sale was his own Ranee, and it is said that she purchased benamee for him. However that may be, no question now arises as to the validity of that purchase. It must be taken that the Ranee purchased what she professed to have purchased under that decree. The single question in the case is, whether the mesne profits awarded by the decree of the 2nd June 1860, passed by that sale.

We have nothing on this record but the certificate of sale. The preliminary proceedings do not appear. The certificate of sale is at page 36, and is as follows: "And a petition being put in for the sale of his estate, a sale notification was issued pursuant to an order of this Court, and the estate aforesaid publicly sold at auction on the 7th December 1874, A.D. Whatever title, right, and concern the judgment debtor had in the said estate have been purchased by Mussumat Maharani Bind Basini Debi, inhabitant and proprietor of Ramnuggur, Pergunnah Majhwa, for Rs. 15,500, and she has deposited the entire consideration money. Therefore this certificate is granted to Maharani Bind Basini Debi, the auction purchaser of the estate aforesaid: and it is hereby proclaimed that whatever title, right, and concern the said judgment debtor had in the estate aforesaid have become extinct from the 7th December 1874, the date of sale, and vested in Maharani Bind Basini Debi, the auction purchaser. Hereafter this certificate will be considered as a valid deed in respect of transfer of the right, title, and interest of the judgment debtors." Then there is this description of what is sold: "The right and title under the original deed of zur-i-peshgee lease, dated the 23rd December 1851, for Rs. 42,453 in respect of 15 mouzahs,"—naming them, and including Koorkoorha. It may be observed that the purchase money is only Rs. 15,500, and the zur-i-peshgee was given to secure a sum of Rs. 42,453. Upon the application made by the appellant for the execution of the decree of 1860, so far as it awarded mesne profits, the respondents, who represent the judgment debtor, Bindi Lall, set up this sale as an answer, contending that the right to the mesne profits had passed by virtue of it to the Ranee, the auction purchaser. But the decree which had been obtained by the Tewarees was not sold, and presumably was not attached; what was sold is that which appears on the certificate, namely, the right and title under the deed of zur-i-peshgee, and the right of the judgment debtor is declared to have become extinct only from the 7th December, 1874. This being all that was sold, their Lordships think that the right to the mesne profits under the decree was not the subject of sale. It was no more the subject of sale than any profits of the estate which the mortgagee had received prior to that sale would have been. The title to the mesne profits is derived from the decree. The defendants in that suit were wrongdoers, and the action was brought by the mortgagee against them as wrongdoers. The right to the mesne profits, therefore, depends wholly upon the decree; and if the decree had been sold, the purchaser, as assignee of the decree, would, no doubt, have been entitled to them. The High Court have based their judgment on the erroneous assumption that the rights under the decree were sold. Their Lordships think that is not the effect of the sale. The High Court refers to the judgment of the Subordinate Judge. The Judges say: "The Subordinate Judge has held that the decree cannot be executed, and that all the rights of the judgment creditor in that decree have been transferred to the purchaser of the zur-i-peshgee rights, including the right to execute the decree obtained originally by the appellant before us." Then their own judgment is: "We also think, with him, that the whole of the rights of the decree-holder (appellant before us) under the decree which he obtained have passed, with the zur-i-peshgee rights on which the decree was based, to the purchaser of those rights." Their Lordships think that this is an erroneous view of the sale. If it had been meant to attach and sell the decree, that might have

been done. What was done was to sell the existing rights of the judgment debtors under the zur-i-peshgee.

For these reasons their Lordships think the judgments of both the Courts below are wrong. They will, therefore, humbly advise Her Majesty to reverse them, and to remit the case with a declaration that the appellant is entitled to execute the decree of the 2nd June 1860 for the mesne profits up to the 7th December 1874, the date of the sale to the Maharani, with interest, and is also entitled to the costs of the proceedings in both the Courts in India. The appellant will also have the costs of this appeal.

The 4th May 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Sale in Execution—Prior Decree—Constructive Possession.

On Appeal from the High Court at Calcutta.

No. 46 of 1876.

Grish Chunder Chuckerbutty and Rajmohun Roy

versus

Jibaneswari Debia.

No. 47 of 1876.

Grish Chunder Chuckerbutty and Rajmohun Roy

versus

Biseswari Debia.

Where the purchasers at a sale in execution on the 16th July 1850 bought, among other things, the right, title, and interest of the judgment debtors in a decree of the 11th November 1843, and it appeared that the judgment debtors had obtained from the Civil Court Ameen constructive possession (i.e., possession marked out by sticks and posts) of certain lands which, according to his view, they were entitled to under the decree of the 11th November 1843 : **HELD** that what was sold at the execution sale was the unexecuted portion only of the decree of the 11th November 1843.

This case was reduced during the argument to a point of law which becomes intelligible upon the statement of a few facts.

Brojo Kishore and Ram Kishore were brothers, joint in estate, of whom Ram Kishore died some time before 1835, leaving two sons, Ram Kumar and Nobo Kumar. In the year 1835 an estate, consisting of an 8-anna share in a talook called Newaz Ali, and belonging to one Abdul Sumud, was bought in the name of Ram Kumar, but with the joint funds of the family. Brojo Kishore died in 1836, having, shortly before his death, separated from the other branch of the family. He left two widows, each of whom adopted a son, one adopted son being Ishan Chunder and the other Mohesh Chunder. Upon or some time after the death of Brojo Kishore, Ram Kumar set up an exclusive title to the purchased estate; and the representatives of Brojo Kishore, who at that time were the adopted sons, in the year 1839 brought a suit against Ram Kumar and his brother Nobo Kumar for the purpose of having their title declared and obtaining possession of Brojo Kishore's moiety of this property, and obtained a decree awarding to them that possession on the 11th November 1843. Both the plaintiffs in that suit afterwards died, Ishan Chunder being now represented by his widow Jibaneswari, the respondent in one of these appeals, and Mohesh Chunder by his adoptive mother

Biseswari, the respondent in the other appeal. After their death, and in or about 1848, the representatives of Ram Kishore obtained a decree against the two last-named widows, as the then representatives of Brojo Kishore, in respect of a money demand against Brojo Kishore. They proceeded to the execution of that decree. The usual notice and proclamation of sale were made, and on the 16th July 1850 the appellants bought, in pursuance of the usual proclamation, among other things, the right, title, and interest of the judgment debtors in the decree of the 11th November 1843. The question in the cause is, what passed by the sale of that decree?

It is necessary to state that in the year 1837 the whole talook of Newaz Ali, which was subject to a number of disputed claims, was attached by an order of the Civil Court, and remained in the possession of an officer of the Collector until the year 1866. But notwithstanding this, the Court, upon the representatives of Brojo Kishore obtaining their decree in November 1843, attempted to give the decree holders, at all events, constructive possession of a certain number of the mouzahs, part of their share of the purchased estate, and for that purpose deputed an Ameen to ascertain what belonged to them. The Ameen made a lengthened investigation, and, after hearing both parties and going over the ground, he marked out by sticks and posts certain lands which, according to his view, the decree holders were entitled to, and he gave them or professed to give them possession of those lands, and he also required the ryots to sign kuboolats with respect to these lands. These proceedings came before the Court, and were approved by the Court. It is undoubted, therefore, that the Court intended to deliver possession as far as it could, and believed that it had the right to deliver possession effectual for the execution of the decree to the decree holders of a certain number of mouzahs. The question is whether the representatives of Ram Kishore, buying the decree on the 16th July 1850, bought with it those mouzahs with respect to which it had been executed in the manner described, or only so much of the property to which it relates with respect to which it remained unexecuted?

The attachment continued until 1866, when it was discharged. Thereupon Jibaneswari brought her suit for the purpose of obtaining possession of her share of those mouzahs of which, as she alleged, possession had been given in execution of the decree of the 11th November 1843. Biseswari also brought a suit for the purpose of obtaining her share of the same mouzahs. These suits involve the same question, and the same judgment applies to both of them. The defendants alleged their right to the whole of that which had been bought of Abdul Sumud. The First Court in India found in favor of the plaintiffs in the two suits with respect to the greater part of the property. That decision was affirmed by the High Court upon the grounds on which it was given, the main ground of both decisions being that, in point of fact, possession was delivered of the mouzahs in question before the sale of the 16th August 1850, as far as it could be delivered considering the Government attachment to which the whole talook was subject, and that the delivery of the possession, such as it was, was effectual to execute the decree.

Their Lordships have felt some difficulty about this case; but, on the best consideration they are able to give it, they do not see their way to reversing the decision of the High Court. It has been contended, with a good deal of force, that no actual possession could have been given while the whole talook was under attachment. At the same time, the Court appear to have undertaken to execute the decree, to give such possession as could be given, and to have adopted proceedings which they deemed proper for that purpose, and possession has been given in the manner described of the mouzahs now in question. That being so, the question is, what was sold by the description of "the right and interest of the judgment debtors in the decree"? Was it that of which possession had been given in the manner described, or was it only of that portion of the decree which

remained to be executed? Their Lordships, on the whole, think it must be taken that what was put up for sale, what was intended and what was understood to be sold, must have been the unexecuted portion only of the decree. Under these circumstances, although the case is not unattended with difficulty, their Lordships will humbly advise Her Majesty that the decision of the High Court be affirmed. Inasmuch as the respondents have not appeared by Counsel, there will be no costs of this appeal.

The 11th May 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Hindoo Law (Mitacshara)—Joint Family Property (Moveable and Immoveable)—Partition—Father—Jurisdiction (of Supreme Court)—Res Judicata—Act VIII of 1859 s. 2.—Limitation—Act XIV of 1859 s. 1 cl. 13, and s. 14—Declaratory Decree—Estoppel—Coparcener—Testamentary Disposition of Share—Consent of Co-sharers.

On Appeal from the High Court at Bombay.

Lakshman Dada Naik

versus

Ramchandra Dada Naik.

In 1861 it was decided by the Supreme Court at Bombay that the respondent could not sue his father and brothers for a declaration of his rights in and an immediate partition of ancestral property, inasmuch as he had no right to compel his father in his lifetime to make a partition of moveable, though it may be ancestral, property, and that the Supreme Court had no jurisdiction to make a partition of the immoveable property, which was beyond the limits of its territorial jurisdiction. **HELD** that this decision did not amount to an adjudication between the brothers as to their rights in the joint ancestral property on their father's death, so as to bar the present suit for that partition under s. 2 Act VIII of 1859.

Without deciding whether, in applying limitation under cl. 13 s. 1 Act XIV of 1859, in the case of a joint family governed by the Mitacshara law, the person on whose death the property which is alleged to be joint has descended must be taken to be the father, or grandfather, or some ancestor farther back, their Lordships were not prepared to affirm that the father might not be held to be that person in this case where the claim was twofold, *viz.*, to establish plaintiff's right as a coparcener not only as to his original share in the joint estate, but also as to the moiety of the father's interest to which he became entitled on the father's death by right of survivorship, and to have a partition on that basis.

Held that limitation could not apply to the suit for the partition of immoveable property, because not only had plaintiff all along been in the enjoyment of part of that property, but he could, under s. 14, exclude from computation the time occupied in the prosecution of the suit of 1861, nor had there been a total exclusion from the joint family estate as a whole; whilst as regards the moveable property the appellant (defendant) was estopped by the proceedings of 1861 from setting up limitation as a bar to the respondent's claim.

According to the Hindoo law as received at Bombay, a coparcener cannot, without the consent of his co-sharers, dispose of his undivided share by will.

This was an appeal from a judgment of the High Court of Bombay of the 2nd August 1876, affirming a decree of the Subordinate Judge at Belgaum in the Bombay Presidency.

Mr. Leith, Q.C., and Mr. Doyne for Appellant.

Mr. Cowie, Q.C., and Mr. Mayne for Respondent.

The parties are brothers, and the suit was brought by the respondent for a partition of family property, and to set aside a will whereby his father, Dada

Mahadev Naik, who was possessed of considerable wealth, had absolutely disposed of the whole of the undivided ancestral estate in favor of the appellant, his second son, thereby disinheriting his elder son, the respondent. The Courts below decided that the will was illegal, and decreed to the respondent one half of the family property; and the question at issue was whether that view of the law was correct or not, and whether under the Mitacshara law a Hindoo who has two sons undivided from him can bequeath the whole or almost the whole of the family moveables to one son to the exclusion of the other.

Sir James Colville delivered judgment as follows:—

The appellant in this case is the second, and the respondent the eldest, son of one Dada Mahadev Naik, who died on the 13th July 1872. Dada Mahadev Naik was a son of Mahadev Narayan Naik, who died in 1847, leaving another and eldest son called Hurba, and seven grandsons, four of whom were sons of predeceased sons, and three, namely, the respondent, the appellant, and a younger son, Keshav, were the sons of Dada Naik. All these persons after the death of Narayan Naik constituted a joint and undivided Hindoo family, of which Dada Naik, his eldest brother Hurba being dumb and therefore incapacitated, became the manager. By virtue, however, of subsequent partitions and other family arrangements the other members of the larger family became separate from Dada Naik and his three sons, who, in the year 1857, were the only members of the joint and undivided family with which their Lordships have to deal.

The family property consisted of a family house at Shahapoor, in the Southern Maratha country, and of an ancestral business which was carried on partly there, and partly in a kotee at Bombay, which appears to have been managed by gomasthas. About the year 1858 great dissensions arose between the respondent and his father, the former claiming a right to take a larger share of the management of the business than his father was disposed to allow him. It is unnecessary to enter into the particulars of these disputes, but the result of them was that in 1858 the father and his two younger sons left the family house, the respondent remaining there; and afterwards they, in the year 1864, built for themselves with the family funds another house at Belgaum.

Between the two last dates, and in March 1861, the respondent instituted a suit in the late Supreme Court of Bombay against his father and brothers, praying for a declaration of his rights in, and an immediate partition of, the ancestral property. The father demurred to the bill, and on the 13th August 1861 his demurrer was allowed. The effect of those proceedings their Lordships will afterwards consider.

In 1868 Keshav Naik, the youngest son, formally separated himself from the joint family, taking Rs. 45,000 odd as his share in the joint estate, or the balance of it. The deed of release executed by him on the 16th November of that year is at p. 260 of the Record, and it may be observed that it treats the old family house at Shahapoor as still part of the joint family estate.

The father afterwards made a will dated the 30th October 1871, whereby, after giving his account of what had taken place in the family, he treated his eldest son, the respondent, as having received already more than his share of the estate, gave him only the house at Shahapoor and Rs. 500, and gave all the rest of the property to his second son, the appellant. He died, as has been before stated, in July 1872.

In the following October the respondent brought this suit against his brother, the appellant. By it he claims to be entitled to one half of the joint business and estate as it stood at the death of his father. Various defences were set up by the appellant, and the issues as finally settled were the following:—

“1. Whether the suit is barred by s. 2 Act VIII of 1859”—that is, whether the decision of the Supreme Court on the demurrer amounted to *res judicata*. “2. Whether the suit is barred by cl. 13 s. 1 Act XIV of 1859”—that is, whether it

was barred by limitation under that Statute. "3. Whether the property in suit is the deceased Dada Naik's ancestral or self-acquired property. 4. If the former, whether plaintiff has taken or received so much out of it as could be considered more than what he was entitled to for his share? 5. If the latter, whether the deceased Dada Naik made the original of exhibit No. 16, and to what sum is the plaintiff entitled under it? 6. Whether the property left by the deceased Dada Naik is correctly estimated? 7. Whether the plaintiff is restricted in getting his share on any other ground, as alleged by defendant?"

It was admitted at the Bar that the findings of the Courts as to the 3rd, 4th, 5th, 6th, and 7th of these issues cannot now be questioned. It must, therefore, be taken that the property in question was ancestral; that the respondent, the plaintiff, has not received his full share of it; that the *factum* of the will has been established; and that there is nothing but the will and the two pleas in bar, the first and second issues, to defeat the plaintiff's claim. Again as to the will, it is now conceded that under the Mitacshara law, as received in Bombay, by which this family is governed, a father cannot by will make an unequal distribution of ancestral property, whether moveable or immoveable, between his sons. It has, however, been contended that inasmuch as under the Mitacshara law a father and his sons are during his life joint co-parceners in family estate, and that it has now been decided by the Courts in the South and West of India that one co-parcener may, by act of *inter vivos*, make an alienation of his share which is binding on the others, it follows that he may dispose of his share by will. The result of this contention, which will be afterwards considered, is, if it is well founded, to reduce the property to be divided between the brothers to two-thirds of the joint property as it stood at the death of the father. The pleas in bar go, of course, to the whole claim.

Now, as to the first of these pleas, their Lordships have already intimated that it cannot be supported. It appears to them that all that was decided by the Supreme Court of Bombay in 1861 was that the respondent could obtain no relief on his then bill, inasmuch as he had no right to compel his father in his lifetime to make a partition of moveable, though it might be ancestral, property; and that the Supreme Court had no power to make a partition of the immoveable property which was beyond the limits of its territorial jurisdiction. There is nothing, in their Lordships' opinion, which amounts to an adjudication between the brothers as to their rights in the joint ancestral estate on their father's death.

The plea of limitation is founded on the 13th clause of s. 1 of Act XIV of 1859, which is as follows:—

"To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property, and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate, the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended, or on whose estate the maintenance is alleged to be a charge, or from the date of the last payment to the plaintiff, or any person through whom he claims, by the person in possession or management of such property or estate on account of such alleged share, or on account of such maintenance, as the case may be."

In considering the application of this enactment to the present suit, we may leave out all that relates to suits "for recovery of maintenance," and treat it as confined to a suit "to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property." The Section gives two periods from which the twelve years may be calculated; one is "the death of the persons from whom the property alleged to be joint is said to have descended," and the other is "the date of the last payment to the plaintiff, or any person through whom he claims, by the person in the possession or management of such property or estate."

It is contended that in this case, which is governed by the Mitacshara law, the person on whose death the property which is alleged to be joint has descended must be taken to be, not the father, in which case, of course, there would be no ground at all for the application of the Statute of Limitation, but the grandfather, on whose death the father and his sons all became co-parceners in the property. It is possible, indeed, that on this construction it might be necessary to go back one or more generations beyond the grandfather in order to ascertain from whom the property descended; but for the present purpose it may be assumed that the property descended from the grandfather as the first acquirer of it.

Their Lordships agree with many of the observations made by Mr. Justice Holloway and Mr. Justice Collett in the case reported in the 3rd Madras High Court Reports, p. 99, as to the difficulty of applying this part of the clause in question to a joint family consisting of a father and sons governed by the Mitacshara law, though such difficulty would not exist in the case of a like family governed by the law of Lower Bengal. They are not prepared, however, to affirm that in this particular case the father may not be held to be "the person from whom the property alleged to be joint is said to have descended" within the meaning of the Act. The claim is twofold. It is to establish the right of the plaintiff as a co-parcener not only as to his original share in the joint estate, but also as to the moiety of the father's interest to which he became entitled on the father's death by right of survivorship, and to have a partition on that basis. So far as the father's interest is concerned, the succession opened only on the father's death. Nor is it altogether clear upon the authorities how far the principle of inheritance as well as that of survivorship applies to such a succession by sons to their father. It may be observed, too, that this construction would receive some support from the arguments addressed to their Lordships upon the effect to be given to the will which proceeded upon the father's right of dispositions over his undivided share. Their Lordships, however, do not think it necessary to decide, and do not decide, the question of limitation upon this construction of the clause in question.

Again, their Lordships think there is considerable force in the argument which the learned Counsel for the respondent have founded on the possession by the respondent since 1858 of the family house at Shahapore. How do the facts on this part of the case stand? The respondent was, unquestionably, a member of the joint family, with the full rights of a co-parcener, up to 1858. There is no suggestion of a formal partition between him on the one side and his father and brother on the other. He has ever since 1858 been in possession of the house at Shahapore, which has, nevertheless, been treated on the occasion of the family arrangement which resulted in the separation of the youngest son, and to which the appellant was a party, and also by the father when he made his will, as continuing to be joint family property. The contention of the appellant and of his father seems to be embodied in the 4th issue in the suit, *viz.*, that the respondent had taken and received so much out of the joint family property as would be considered more than what he was entitled to as his share, and so must be taken to have lost his rights as a co-parcener, as he would have done upon a formal partition. This issue has, however, been found by both Courts in favor of the respondent, who must, therefore, be taken to be entitled to his full rights as a co-parcener, except so far as he may be barred from asserting them by the Statute of Limitation. Now, so far as the immoveable property of the family is concerned, there seems to be no ground for the application of the Statute. Not only has the respondent all along been in the enjoyment of part of that property, *viz.*, the house at Shahapore, but under the 14th Section of the Act, he is entitled to exclude from the computation of the period of limitation the time occupied in the prosecution of the suit of 1861, inasmuch as the decision of the Court, *quoad* the immoveable property, proceeded on the ground of want of jurisdiction over it. There is, there-

fore, no bar in this case to a suit for the partition of the immoveable property of the family. Nor has there been a total exclusion from the joint family estate, as a whole, if that, as suggested by Mr. Justice Holloway in the case above referred to, is necessary to lay the ground for the application of the Statute at all.

It is argued, however, on the part of the appellant that the claim is substantially a claim to share in the ancestral business and other moveable property, and that the right to do so has been barred by reason of the respondent having received no payment thereout since 1858. Their Lordships will assume that the claim as to the moveable may thus be treated as distinct from that as to the immoveable property of the family, and that no payment out of the former has been established. They are, nevertheless, of opinion that the appellant is in this case estopped by the proceedings of the Supreme Court of Bombay from setting up the Statute as a bar to the respondent's claim. They treat the order of the 30th August 1861, whether founded on a correct or an erroneous view of the law, as an adjudication, binding on the parties to that suit, that the respondent was not entitled to sue in his father's lifetime for a partition of the moveable property, and consequently could not assert his rights in that property until his father's death. It would be in the highest degree unjust to allow the appellant, who has had for years the benefit of that judgment, to insist that it did not suspend the running of the Statute of Limitations because it was erroneous in point of law, and the respondent ought to have appealed from it. There seems to their Lordships to be no warrant in law for such a contention. For the above reasons they are of opinion that the plea of limitation cannot be maintained.

The only remaining question of which their Lordships have to dispose has been raised for the first time at the hearing of this appeal, and they have not the advantage of having the judgment of either Indian Court upon it. It has been ingeniously argued that partial effect ought to be given to the will by treating it as a disposition of the one-third undivided share in the property to which the father was entitled in his lifetime. The argument is founded upon the comparatively modern decisions of the Courts of Madras and Bombay which have been recognized by this Committee as establishing that one of several co-parceners has, to some extent, a power of disposing of his undivided share without the consent of his co-sharers.

Those cases have established that such a share may be seized and sold in execution for the separate debt of the co-sharer, at least in the lifetime of the judgment debtor, and that it may be also made the subject of an alienation by a deed, executed for valuable consideration. The Madras High Court has gone further, and ruled that an alienation by gift or other voluntary conveyance *inter vivos* will also be valid against the non-assentient co-parceners. And, assuming this latter proposition to be law, the learned Counsel for the appellant have insisted that it follows as a necessary consequence that such a share may be disposed of by will, because the authorities which engrafted the testamentary power upon the Hindoo law have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act *inter vivos* he may give by will.

To this argument there are two answers. Their Lordships have to apply to this case the law as it is received at Bombay. The decisions of the High Court of Bombay, notably those reported in the 10 B. H. C. R., p. 131, and the 11 B. H. C. R., p. 76, have ruled that a co-parcener cannot without the consent of his co-sharers either give or devise his share; that the alienation of it must be for value; and if this be law, the whole argument in favor of the testamentary power over the undivided share fails.

Again, the High Court of Madras, though admitting that a co-parcener can effectually alienate his share by gift, has ruled that he cannot dispose of it by will (see the case reported 8 Madras H. C. R. p. 6). Its reasons for making this dis

inction between a gift and a devise are, that the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship vested in them at the moment of his death, there remains nothing upon which the will can operate. This principle was invoked in the case of *Suraj Bunsî Koer v. Sheopershad Singh*, L. R. 6 I. A., p. 88,* and was fully recognized by their Lordships, although they decided the particular case, which was one of an execution against a mortgaged share, on the ground that the proceedings had then gone so far in the lifetime of the mortgagee as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers. It follows from what has been said that the weight of positive authority at Madras as well as at Bombay, is against the proposition of the learned Counsel for the appellant.

Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share without the consent of his co-sharers beyond the decided cases. In the case of *Suraj Bunsî Koer* above referred to they observed: "There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family (governed by the Mitacshara law); and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition." The question, therefore, is not so much whether an admitted principle of Hindoo law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence. Their Lordships do not think it necessary to decide between the conflicting authorities of the Bombay and the Madras High Courts in respect of alienations by gift, because they are of opinion that the principles upon which the Madras Court has decided against the power of alienation by will are sound, and sufficient to support that decision. The appellant has, therefore, failed also upon the question which he has raised as to the effect of the will.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The costs of the appeal must follow its result.

Their Lordships wish to throw out for the consideration of the parties how desirable it is for both of them to come, either in one or other of the ways indicated by the High Court or in some other manner, to an amicable settlement of their differences upon the basis of this decree. It is obvious that if they persist in fighting out the case to its bitter end, by taking the accounts directed by the High Court hostilely, they are likely seriously to impair, if not destroy, the ancestral business which is the chief subject of dispute.

The 12th May 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Res Judicata—Act VIII of 1859 s. 2—Description—Variation
(between Plaintiff and Schedule).*

On Appeal from the High Court at Calcutta.

* See ante p. 131.

Baboo Het Narain Singh
versus
 Baboo Ram Pershad Singh and another.

A decree in a former suit was held to be no bar under s. 2 Act VIII of 1859 to the present suit for possession of mouzah M.B., merely because in the schedule to the plaint in the former suit mouzah B, which was the subject of that suit, was described as "mouzah B, usli with dakhili, that is, mouzah B and mouzah M.B.," whereas in the body of the plaint it was described simply as mouzah B; the description in the body of the plaint, and not that in the schedule, being that upon which the Court was called upon to adjudicate.

Mr. Cowell for Appellant.

Mr. Doyne and *Mr. C. W. Arathoon* for Respondents.

Sir Barnes Peacock delivered the following judgment, in which the facts of the case are sufficiently stated:—

This is a suit brought by the plaintiffs for an adjudication of their right to and possession of eight annas out of the entire sixteen annas of mouzah Mokundpore Bhatta. The only question is whether the suit is barred by s. 2 Act VIII of 1859; and that depends upon the construction of a decree which was given in suit No. 357 of 1865. In that suit Chuttersal Singh, the father of the appellant and the son of Pertab Narain Singh, was the plaintiff. His claim was founded upon a mortgage which Nagbansi Kowar, the widow of Gunga Pershad Singh, had executed in favor of Pertab Narain Singh of a portion of the property, including eight annas of mouzah Bhatta, which had descended to her as the widow and heiress of her husband. The suit was brought against the widow alone for the purpose of recovering possession of the mortgaged property after foreclosure of the mortgage, and to have a mutation of names. The present plaintiffs, who were the reversionary heirs of Gunga Pershad Singh, intervened in the suit, and a decree was given against them for the plaintiff. In a schedule to the plaint in that suit mouzah Bhatta is described as "mouzah Bhatti, usli with dakhili, that is, mouzah Bhatti Kurun and mouzah Mokundpore Bhatta;" but in the body of the plaint it is described simply as mouzah Bhatta. There was another mouzah, called Hakumpore, which was also included in the mortgage; it is described in the plaint in that suit as "mouzah Hakumpore, original with dependency." There appears to be a very good reason why mouzah Bhatti was not described in the body of the plaint as usli and dakhili when mouzah Hakumpore was described as mouzah Hakumpore, original with dependency, because, upon referring to the mortgage, which is to be found at pages 17 and 18 of the Record, it will be found that the mortgage was of "mouzah Bhatta," not "mouzah Bhatta, usli with dakhili," and of "mouzah Hakumpore, original with dependency." The plaint in the suit followed the description in the mortgage deed.

It was very correctly pointed out by the first Court that the property sought to be recovered was distinctly enumerated in the body of the plaint, and that there was no mention in it that the claim had reference to the description in the schedule. The description in the body of the plaint, and not that in the schedule, was that upon which the Court was called upon to adjudicate; and, in so adjudicating, the Court ordered, "That a decree be passed in favor of the plaintiff; that the shares of the disputed mouzahs do come into the possession of the plaintiff." It is found, as a fact in the present suit, that mouzah Bhatta Kurun and mouzah Mokundpore were not usli and dakhili, but that they were two separate and distinct mouzahs; that they were purchased originally by an ancestor of the plaintiffs about 100 years ago, eight annas of the one mouzah and sixteen annas of the other. Being, then, two separate and distinct mouzahs, the mortgage deed did not describe them as usli and dakhili, but conveyed only the eight annas share of mouzah Bhatta. It has been found by both the Lower Courts that the mortgage deed did not include the two mouzahs, that the plaint did not include the two,

and that the decree did not include the two ; and it is not contended now by the learned Counsel for the appellant, which he could not well do after the finding of the two Lower Courts, that the mortgage did include the two mouzaha. The question then comes simply to this, Was the decree given in favor of Chuttersal Singh for mouzah Mokundpore Bhatta as well as for mouzah Bhatta Kurun? It seems clear that the former suit was not intended to include, and did not include, anything which was not included in the mortgage, and that the decree in the former suit did not affect Mokundpore Bhatta, which is the subject of the present suit, and consequently that the former suit was no bar to the present. Their Lordships, in the course of the argument, expressed their opinion, in concurrence with the judgment of the High Court, that the plaintiffs were not precluded by s. 11 Act XXIII of 1861 from maintaining the present suit.

Under these circumstances, their Lordships will humbly advise Her Majesty that the decree of the High Court be affirmed. The appellants must pay the costs of this appeal.

The 10th June 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Res judicata.

On Appeal from the High Court at Calcutta.

Belchambers, Executor of Tiery,

versus

Ashootosh Dhur.

The Privy Council held that the respondent was barred from bringing the present suit by the decision of their Lordships in the former suit.

This was an appeal from a decree of a Divisional Bench of the High Court of Calcutta of the 25th April 1878, reversing that of the Subordinate Judge of the twenty-four Pergunnahs.

Mr. Leith, Q.C., and Mr. Doyne for Appellant.

Mr. Graham, Q.C., for Respondent.

The subject-matter of the litigation was the disputed ownership of 8,050 beegahs of Soonderbund Lands, and the main question involved in deciding it was one of boundary which separated the property of the respondent from that in which the appellant Mr. Belchambers was interested as the executor of the late proprietor, Mr. Lewis Tiery, who was an official in the service of the Nawab Nazim of Bengal. But besides the issues of fact, there arose a point whether or not the land in question was included in a previous decision of the Judicial Committee in 1873, and if so, whether the respondent's claim to it was not therefore barred. The local tribunal decided against the respondent ; but the High Court, consisting of Garth, C.J., and M'Donnell, J., reversed that judgment. Hence the present appeal.

Sir Robert Collier gave judgment as follows :—

This suit involves a question whether a portion of land, consisting of 8,050 beegahs, belongs to lot 104 or lot 100, which are conterminous lots of land in the Soonderbunds, the northern boundary of one being the southern boundary of the other.

The plaintiff, Ashootosh Dhur, hereafter called Dhur, the owner of lot 100, claimed the disputed land as part of that lot. The defendant, as the representative of a Mr. Tiery, who appears originally to have been a manager of the Nawab Nazim, claims the disputed land as a part of lot 104. The High Court, reversing the decision of the Lower Court, found in favor of the plaintiff, and from that decision an appeal has been preferred to Her Majesty in Council.

The appellants contend that on two grounds, independently of the merits of the case, the action is not maintainable. The first is *res judicata*; the second is the Statute of Limitations. Their Lordships have only heard an argument upon the first point, but they have come to so clear a conclusion upon that that it becomes unnecessary to hear the rest of the case. The question of *res judicata* arises in this way :—Mr. Tiery, in 1852, acquired lot 104. Inasmuch as no question has ever been raised with regard to his title to it, it is enough to say that he became grantee of it under the Government at that time, and he appears from the beginning to have claimed the 8,050 beegahs as part of that lot, to have cultivated and built upon them, and to have improved them and rescued them from the jungle. In the year 1851 the Nawab Nazim, claiming then to be the owner of lot 100, granted a gantidari lease of it to one Bharut Chunder Roy. In 1853 one Nazir Ali, about whom their Lordships have had very little information, but who appears to have been a kind of agent or manager of the Nawab, claiming, it does not appear how or why or by what title, the same lot 100, granted another gantidari lease of it to Nund Lall Ghose. Nund Lall Ghose, in the year 1859, instituted a suit against Mr. Tiery on the ground that Mr. Tiery, trespassing beyond his bounds, had appropriated the 8,050 beegahs, which in fact were parcel of lot 100. That failed in the first Court, but succeeded in the second; and Ghose, on the 14th August 1862, obtained a judgment in his favor, which judgment was appealed against to Her Majesty in Council. But in the meantime Bharut Chunder, who had obtained the gantidari lease which has been before spoken of, in 1851, of lot 100, brought an action against Ghose, Ghose's lessor, and Tiery—suing Tiery, not indeed as the owner of lot 104, but as a manager of the Nawab—for the purpose of obtaining possession of lot 100. Tiery disclaimed any interest in lot 100, and was dismissed from the suit. Bharut Chunder succeeded in both Courts, and obtained judgment for lot 100, with one or two other lots which are not material, on the 30th August 1862; so that Ghose apparently derived no great advantage from his judgment which he had obtained a fortnight before, inasmuch as it was decided in that judgment of the 30th August that he had no title to lot 100. An appeal was preferred by Tiery to the Queen in Council from the decision before stated of the 14th August 1862. Great delays arose in the prosecution of that appeal from various causes. It is enough to say that Tiery died; that he was succeeded by his widow, who married; that she subsequently died, and finally the estate and interest of Tiery devolved upon Belchambers, who is the present appellant. But there probably was another cause for the delay; namely, that Nund Lall Ghose, the respondent, had no interest in pressing on the appeal, because it had been held that he had no title to the lot to which it was alleged that the 8,050 beegahs appertained. During this time Bharut Chunder failed to pay his rent; and upon a suit being brought against him and judgment obtained, lot 100 was put up for sale, and was bought by the present respondent, Dhur. Bharut Chunder, and after him Dhur, made, it appears, various endeavors to obtain possession of this disputed land in execution of the decree which had been obtained on the 30th August 1862; but, without going into these proceedings, it is enough to say that the Courts appear to have refused to allow them to obtain possession of the disputed land in execution of the decree, on the ground that the question of parcel or no parcel was pending before the Privy Council in the appeal of Tiery, or his representatives, against the decree obtained by Nund Lall Ghose.

That being the state of things in 1872, Dhur applied to be admitted in that appeal as a party respondent to it, and he filed an affidavit in which, after stating

the greater part of the facts which have been related, he averred that the interest of the original respondents in the lands in dispute had ceased. He went on to say, "Bharut Chunder Roy was, and I am now, the only person, as purchaser of the tenure of Bharut Chunder Roy, interested in lot 100;" and that under the execution orders referred to he was precluded from enforcing his right during the pendency of the appeal in the Privy Council. Then followed this statement, "That, owing to the respondents in the said appeal being quite uninterested in the lands in dispute in said appeal, they have not taken any active measure to bring it to a speedy hearing; that the said 8,050 beegahs of land, the subject matter of the said Privy Council appeal, are jungle lands of Soonderbunds, and are likely to relapse into jungle unless properly banded and taken care of. I am informed, and verily believe, that during the pendency of the said Privy Council appeal the clearance and cultivation of the said land are very much neglected, and the greatest portion thereof has relapsed into jungles." Then he said:—"I am advised that unless I am allowed to appear in the said Privy Council appeal, and support the judgment of the High Court, my interest in the said land is likely to be materially affected by the result of the said appeal;" and he applied to be heard to support the judgment of the High Court in that case, on the ground that his interest would be affected.

His application was granted by this Board; he was admitted as a respondent to the appeal; and he afterwards filed a case in which he alleged as his reasons:—"Because the said Lewis Tiery trespassed beyond his boundary, and the land in dispute formed part of lot 100, and not of lot 104." This case he filed jointly with one Gobind Chunder, a representative of Ghose, although Ghose, as he contended, had no interest in the land, and that joint case was argued for both respondents by the same Counsel, who contended that the disputed land formed part of lot 100, and not of lot 104. Their Lordships, upon hearing the case, came to the conclusion that the plaintiff had not proved that the land in dispute belonged to lot 100; and, in fact, their decision was,—for that is the effect of it,—that the land in dispute belonged to lot 104. Inasmuch, however, as there appeared some obscurity in the case as to the title to lot 100; as Gobind Chunder appeared, who claimed, or who originally claimed at all events, under Nazir Ali; and as Dhur claimed by what he alleged to be a paramount title under the Nawab Nazim, their Lordships thought it well to explain that they did not adjudicate upon any question of title either between the respondents, or between the Nawab Nazim, or Nazir Ali, or any other persons who might be interested in lot 100. It was enough that in that appeal it was taken as admitted that the respondents and the appellants respectively were in rightful possession of lots 100 and 104, and the sole question was to which the disputed land appertained. It was therefore that their Lordships observed, "It is scarcely necessary to say that this judgment can only in this case affect the parties to it,"—that is, the parties to the judgment, of which undoubtedly Dhur was one,—and cannot give any other persons any rights, or impose upon them any liabilities." If, indeed, Dhur, in the present action, had claimed by some superior or paramount title the 8,050 beegahs, he might have been heard to set it up, but he claims simply and solely in this action the 8,050 beegahs on the ground that they were parcel of lot 100, and not of lot 104. That is the very question on which he invoked their Lordships' decision. If the decision had been in his favor, undoubtedly he would have availed himself of it, and, the decision being against him, he must be bound by it.

Their Lordships regret that an expression in their judgment which was intended to prevent misapprehension should have apparently led to it, and that the High Court should have interpreted the above passage as meaning that their Lordships did not intend to decide the only point which they did decide. The Chief Justice makes an observation,—that their Lordships did not impose costs upon Dhur. With regard to that, it is only necessary to say that it is manifest that a direction with regard to costs can have no effect whatever upon the judgment given in the issue raised between the parties to the appeal.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court be reversed, and that the suit be dismissed with costs in both the Courts below. The appellant will also have the costs of this appeal.

The 22nd June 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Jurisdiction—Dwelling—Act VIII of 1859 s. 5—Construction—Co-sharers—
Manager's Commission upon Income—Private Expenses, etc., of Manager—
Interest (up to Date of Decree)—Act XXIII of 1861 s. 10.*

On Appeal from the High Court at Allahabad.

Sophia Orde and another

versus

Alexander Skinner.

In a suit for accounts against the manager of a family estate consisting of landed property in several places at each of which a house was maintained at the expense of the estate, where not only no particular place for rendering the accounts had been fixed either by contract or practice, but the accounts had been rendered and examined at different times in different places : **Held** that the defendant's occasional residence, for periods of time more or less considerable, at one of such places constituted a dwelling at that place within the meaning of s. 5 Act VIII of 1859.

The testator having dealt with the income of his several estates as one fund, and given that income to his five sons in equal shares with a commission of 10 per cent. from the whole income to the one who was to be manager : **Held** that this commission was to be calculated, not upon the gross collections, but upon the net income of the whole of the estates, being the fund which, subject to that commission, was divisible amongst the co-sharers.

Disallowance of sums laid out by the manager on his own account and of expenses incurred for his own private purposes, and charging him with rent of a house which was occupied by him as his own exclusive residence, but which the will directed should, if not sold, be let, approved by the Privy Council.

The Court must exercise a judicial discretion in giving effect to s. 10 Act XXIII of 1861, so as not to grant an inordinate and unusual rate of interest. The rate of interest to be allowed on a principal debt up to date of decree ought to be that, if any, which has been fixed by contract, express or implied, between the parties. Accordingly, in this case, the rate of interest allowed among the sharers themselves, which was the rate prevailing in the mofussil, *viz.*, 12 per cent., was approved of.

This was an appeal from a decree of the High Court of the North-West Provinces of the 5th April 1877, reversing a decree of the Subordinate Judge of Meerut.

*Mr. Leith, Q.C., Mr. Doyne, and Mr. Ingram for Appellants.
Mr. Cowie, Q.C., and Mr. Graham, Q.C., for Respondent.*

The suit was instituted against the respondent, Mr. Alexander Skinner, by the appellants, Mrs. Orde and Mr. James Skinner, who are relatives of his, to obtain from him an account of his management from 1863 to 1874 of the joint estate of the Skinner family, to which all the parties belong, and to enforce payment to the latter of their one-fifth share of the rents and profits. The estate in question belonged to the late Colonel James Skinner, and consisted, besides much landed property, of valuable indigo factories, and also a fortress, in which all his trophies and presents were retained. The whole property was bequeathed to his family, which consisted of five sons ; but he declared that none of them should have the power of selling or dividing it, and he directed that one of them should manage the whole concern, receiving 10 per cent. of the income for his trouble

and "showing a faithful account current yearly to his brothers." The Local Court at Meerut held that it had jurisdiction to try the suit; and, on doing so, decided in favor of the appellants, to whom it awarded Rs. 92,250. The High Court, consisting of Pearson and Turner, JJ., decided that no ground of jurisdiction existed in the Meerut Court within s. 5 Act VIII of 1859, and without touching the merits, dismissed the suit.

Their Lordships, having heard Counsel on both sides, but without calling on the appellants to reply, intimated that, as far as the jurisdiction of the local tribunal was concerned, the decree of the High Court would be reversed, and the appeal allowed. The question of accounts was then gone into.

Sir James Colville delivered judgment as follows:—

This appeal is one of several which have come before this Board in suits concerning the estate of the well-known Colonel James Skinner, the construction of his will, and the somewhat peculiar relations of his descendants *inter se*. Colonel Skinner died in 1841, leaving five sons, besides other children. His public services had been rewarded by a large *altamgha* grant of land in the district of Bulandshahar, which lies within the local jurisdiction of the Judge of Meerut, in the North-Western Provinces; and he had also considerable landed and other property at Delhi and other places which are now, for all civil purposes, annexed to the Punjab, and notably an estate called Haryana, in the district of Hissar, of which the chief or *sudr* station is Hansi. Upon the lands constituting the *altamgha* he built a fort, and that estate seems to have thereafter acquired, if it did not before possess, the name of Bilaspur. At the time of his death he was resident at Hansi, where the corps of cavalry which he commanded was stationed.

His will bears date the 10th May 1841. The material passages of it are the following:—"I leave and bequeath the income of my *altamgha*, *zemindary*, and *thika* villages, gardens, and houses to my five sons herein named, Joseph, James, Hercules, Alexander, and Thomas Skinner, to share alike, none of them to have the power or option (even if they all agree) to sell or divide any landed property of the *altamgha* or *zemindary*. One of my sons, whichever is most fit, or whoever I may name hereafter, is to manage the whole concern, for which trouble he is to get 10 per cent. from the whole income; and he is bound to show a faithful account current yearly to his brothers. Should they like to live together they may live at Bilaspur, and build houses with mutual consent in the *altamgha* or *zemindary*. Should my personal property not pay off all my debts, they may sell my house at Delhi, and my garden at Trevillian Gunj, but should the personal property pay the debt, the house to be rented, and the rent, after paying for the yearly repairs, to be divided amongst my five sons."

Then follows a clause providing for the event of any of the sons dying under age and without issue, and the next material clause is: "I will and declare that it is my intention and meaning that, in the event of all or any of my aforementioned sons, Joseph, James, Hercules, Alexander, and Thomas Skinner, dying and leaving issue or children, the shares of the fathers shall devolve on the issue or children, to be by them divided in equal shares." And in a subsequent part of the will is this clause: "All my trophies and presents given by my commanders to be retained by the manager of the estate at Bilaspur, as remembrance of me to the survivors of the family."

The appellants, the plaintiffs in the suit, are children of James, one of the sons who are now deceased; and whatever doubts may at one time have been raised as to their title, it has now been conclusively determined, by the decision of this Board in *Barlow v. Orde* (13 Moore's Indian Appeals, p. 227*) that they are entitled in equal moieties to the share and interest of their father under their grandfather's will. The respondent, Alexander, is one of the surviving sons of the testator, and the present manager of the estate under the terms of the will.

* 13 W. R. P. C. 41; 2 Suth. P. C. R. 324.

There can, therefore, be no doubt that in a suit instituted in the proper *forum* he is accountable to the plaintiffs for their father's one-fifth share in the net income of the whole estate.

The suit, which may be taken to be one to enforce this accountability, was instituted in the Court of the Subordinate Judge of Meerut on the 8th August 1874. It claimed an account from February 1863 to 1874, the whole period of the defendant's management.

The defendant, by the written statement first filed by him, objected that the plaintiffs had not observed the provisions of ss. 12 and 13 of Act VIII of 1859, which relate to suits for land lying within different jurisdictions, and also that the suit was triable only by a Revenue Court,—objections now admitted to be futile; and on the merits, not disputing his general liability to account, he insisted that the accounts had been settled up to the year 1280 Fusli. (1872-3), and that the subsequent accounts were then lying for inspection by the sharers in the estate, in the manager's office, which would remain at Bilaspur from the 2nd January to the 2nd February 1875.

After the issues had been settled a further objection to the jurisdiction of the Court was taken. In what precise form it was originally taken does not appear, except by the statement of the then Subordinate Judge in his proceeding, at p. 265 of the Record. That statement is as follows: "Among those pleas there was one to the effect that, as the head office of the estate was at Hissar, in the Punjab, the suit for the rendition of accounts could not be laid in the Meerut Civil Court. On the date fixed, the evidence offered by the parties on that point was received, and after a consideration of the evidence so tendered and received, my predecessor, Mr. Smith, came to the finding that, to quote his words, 'the Hansi office is apparently a mere depôt for the custody of the old accounts and papers relating to the estate. The managers appear to be peripatetics, carrying with them their office, and transacting the business of the estate from wherever they happen to be. A manager may choose to store his books wherever he pleases; but the founder of the family specified Bilaspur as the family home, and where all insignia of the family are still kept, and consequently a suit for settlement of any account relating to the general estate must fall within the jurisdiction of the Meerut Court, under which Bilaspur is included.' The above decision was come to on the 20th April 1875, and after the determination of that and other preliminary points, the accounts of the estate were examined by a Commissioner appointed for the purpose, and when, after the lapse of several months, and at heavy costs to the plaintiffs, the examination of the accounts was nearly over, a petition was filed on the part of the defendant, tendering in evidence a copy of a vernacular proceeding dated 13th October 1860, and a perwannah in original from the Deputy Commissioner of Hissar, addressed to Khyali Ram, agent of the Skinner estate, stationed at Hansi, dated the 16th October 1860, and referring to a book in which copies of perwannahs addressed to Khyali Ram were kept, and which had been produced in a suit between the parties, or at least some of them, and contending that, as those documents would show that the head office was at Hansi, the suit for rendition of accounts could not lie in the Civil Court of Meerut.

The petition here referred to is at pages 3 and 4 of the Record, and the effect of the final judgment of the then Subordinate Judge upon it, on the 27th March 1876, was to affirm the decision of his predecessor, Mr. Smith, upon this objection to the jurisdiction. The suit accordingly proceeded before him, the accounts taken being, apparently, by force of the Statute of Limitations, limited to the six years immediately preceding the institution of the suit; and on the 27th June 1876, the Subordinate Judge gave his judgment upon the merits. From this it appears that on the face of the accounts rendered there was due to the plaintiffs, deducting the payments made on account to them, an admitted balance of Rs. 7,462 2 4; that the plaintiffs, having been allowed to surcharge and

falsify the accounts, had succeeded in raising that balance to the principal sum of Rs. 61,427 11 10, for which with the further sums allowed for interest and costs, amounting in all to Rs. 94,957 15 10, a decree was passed against the defendant. From this decree he appealed to the High Court of the North-West Provinces. The first of his grounds of appeal was that, with reference to s. 5 of Act VIII of 1859, the Lower Court was wrong in holding that it had jurisdiction to hear the cause. There were 11 other grounds of appeal, some of which it will be necessary to notice hereafter; but the appeal was heard by the High Court upon the first alone, when, holding that the Lower Court had no jurisdiction to entertain the suit, it reversed the decree and dismissed the suit.

The sole question argued in the first instance before their Lordships was that of jurisdiction; they have already intimated that their opinion upon it is adverse to that of the High Court, and their reasons for that conclusion will now be stated.

It is conceded on both sides that the question turns on the construction to be put upon the 5th Section of Act VIII of 1859; and that it lay on the plaintiff to show that either the cause of action arose, or the defendant at the time of the commencement of the suit was dwelling, within the limits of the jurisdiction of the Meerut Court, within the meaning of that enactment.

Their Lordships will first consider whether the defendant was subject to the jurisdiction of the Court by reason of his dwelling within its local limits. "Some evidence was given on this point, and the conclusion of the High Court upon it is thus expressed: "It is admitted that Alexander Skinner, at the time the suit was brought, was actually residing at Mussuri, in the district of Saharanpur. He has there a private house, in which he resides during the whole of the hot weather, and during the cold he travels through the estate, sometimes putting up at Hansi, sometimes at Delhi, and sometimes at Bilaspur, in one of the houses which have been maintained at the expense of the estate." One of the witnesses, indeed, went so far as to affirm that the defendant's sole permanent residence on the plains was at Hansi; but the High Court has not acted on that evidence, which their Lordships think is untrustworthy. It is not contended that the proper *forum* for the trial of this suit for account was at Saharanpur, by reason of the defendant's residence, at the time of its commencement, at the hill station of Mussuri. Such residence was obviously more or less of a temporary character, like that of a man in this country who lives in a house of his own at a watering-place during a portion of the year. And if the defendant can be said to have had any permanent dwelling-place on the plains and within the ambit of the Skinner estate, he would not the less dwell there, according to the proper and legal construction of the word, because for health or pleasure he was passing the hot season on the hills when the plaint was filed. The question then is, did he not "dwell" at Bilaspur within the meaning of the Section?

He was not a mere manager, though in this suit he is accountable in that character. He was one of the five original sharers in the estate, and as such he was one of the proprietors of the fort and residence at Bilaspur. Their Lordships cannot doubt on the evidence that there was a place of residence there, and are of opinion that the clauses in the will which have been cited show that the testator and founder of the family contemplated that it might be the principal place of residence of his family. He undoubtedly treated it as the place in which the honorable memorials of himself and his services were to be permanently preserved. Again, their Lordships think it is sufficiently shown upon the evidence that an establishment of some kind was kept there, and that the defendant himself, though travelling for the most part during the cold weather about the estate, occasionally resided there, as he had an unquestionable right to do, for periods of time more or less considerable. In his own notice of the 13th October 1874, he called upon the other sharers to come and examine the accounts in the manager's office, which

"would remain at Bilaspur from 2nd January to 2nd February." A man, however, may have more than one dwelling-place ; and it is unnecessary to consider whether the defendant may not have also such a dwelling-place at Hansi as would subject him to the jurisdiction of the Courts of the Punjab. It is sufficient to decide, as their Lordships do decide, that the defendant so dwelt as Bilaspur as to make himself subject to the jurisdiction of the Meerut Court in this suit.

This being so, it is unnecessary to consider whether he is also subject to the jurisdiction of that Court by reason of the cause of action having arisen within the local limits of that jurisdiction, a question which upon this record presents some difficulty.

Their Lordships, however, deem it right to say that they cannot agree with the High Court in its conclusion that the sharers had recognised a particular office for the general business, that office being the one at Hansi ; and that accordingly the cause of action must be taken to have arisen in the district of Hansi, and in the division of Delhi. They think that, on the contrary, no particular place for rendering the accounts has been fixed either by contract or practice, and that the evidence, confirmed by the defendant's own written statement, shows that they were rendered and examined at different times in different places, including Delhi and Bilaspur, Hansi being shown to be, as Mr. Smith found, only the repository of the older and settled accounts.

It follows from their Lordships' decision on this question of jurisdiction, that the decree of the High Court cannot stand. It seemed, however, to them that the defendant was entitled to have the other objections to the decree of the Lower Court which had been taken by his grounds of appeal, argued and determined ; and that it would be most convenient to have them, if possible, determined here. Counsel have accordingly been heard upon such of them as have not been abandoned ; and their Lordships have now to decide whether, in respect of any of them, there is any sound reason for reversing or varying the decree of the Lower Court.

These objections are comprised in the fifth, sixth, seventh, eighth, ninth, tenth, and eleventh of the grounds of appeal.

The fifth, which is the first of those which have been argued, is perhaps the most important. It is, in terms, that the Lower Court is wrong in holding that the defendant is not entitled to charge commission upon the gross income of the estate.

The question between the parties was, whether the 10 per cent. commission to which the defendant was unquestionably entitled, was to be calculated upon the gross collections, or upon some larger collections, or, as the Judge has found, and as the plaintiffs contend, upon the net income of the estate, being the fund which, subject to that commission, was divisible amongst the co-sharers.

The judgment of the Subordinate Judge (which, their Lordships have no hesitation in saying, is an extremely careful and well-considered one) has decided that point in favor of the plaintiffs. He has considered the question with reference both to the construction of the will, and to the practice which has prevailed, with more or less variation, during the time of the present and the former managers.

Their Lordships think that, if the question is clear one way or the other upon the construction of the will, that construction should prevail, whatever variations there may have been in practice ; and they are of opinion that the construction for which the plaintiffs contend is the true one. The clause which has already been read deals with the income of the altamgha zemindary and the rest of the estate as one fund. The testator gives that income to his five sons, there named, to share alike. It is obvious, therefore, that the word "income," as used in that passage, means the divisible fund. It was a fund to arise from the net returns from the different estates, on some of which were indigo factories, which were in

the nature of trading concerns. An increased profit on one estate might be met by a loss on another; but the profits and losses were all to enter into one account, the balance of which was to constitute the divisible income or fund.

Then that portion of the clause which relates to the manager is as follows:—“One of my sons, whichever is most fitted, or whoever I may name hereafter, is to manage the whole concern,”—that is, the whole of the estates, whatever was to contribute to the divisible fund,—“for which trouble he is to get 10 per cent. from the whole income, and he is bound to show a faithful account current yearly to his brothers.” Their Lordships think there are no grounds for construing the word “income” in this passage in a sense different from that in which it is used in the other; and that there is nothing to support the contention that the manager was entitled to charge commission upon each sum which came to his hands from each separate estate or source of income; still less to charge it upon the nominal rents payable by the tenants or cultivators, irrespective of the costs of collection. They are of opinion that the only way to make the whole will consistent is to hold that the commission was to be calculated upon the net fund divisible among the five sharers. Therefore, upon this item their Lordships agree entirely with the finding of the Subordinate Judge.

The sixth ground of appeal related to the disallowance of certain sums, amounting in all to Rs. 2,41,475, being expenses incurred by the manager which the Judge held he was not entitled to charge against the plaintiffs, as representatives of one of the co-sharers. The defence of the items impeached which was set up by the defendant was that the expenses in question, or the major part of them, consisted of the cost of the establishment kept up for the purposes of the estate, the user of which was incident to his office of manager. But the learned Judge has found upon the evidence that the defendant entirely failed to make out that defence as a matter of fact; and that the greater part of those expenses would never have been incurred but for his choosing, for his own convenience and enjoyment, to reside during the greater portion of the year at the hill station of Mussuri.

Their Lordships, therefore, think there is no ground for interfering with the learned Judge's disallowance of these items.

The seventh and eighth grounds of appeal relate to the house at Delhi. The first of them objects to the disallowance of a large sum of money as expenses improperly incurred, so far as the estate was concerned, in repairing, altering, and furnishing that house. The house was the well-known house of the testator at Delhi. In his will he directs that, if it should be necessary for the purposes of paying his debts, the house should be sold; but if it were not sold, it should be let on account of the estate. Upon the evidence it would seem that up to the time of the Mutiny the house was neither sold nor let, but, by the common consent of the co-sharers, was kept up more or less for their common benefit as a mansion at Delhi. After the Mutiny, during which it had been looted and greatly injured, the estate received from the Government, by way of compensation in respect of it, a sum of Rs. 18,000. That sum they seem to have agreed, not to lay out upon the house, but to divide as part of the profits of the estate. The house, however, must have been put into some sort of tenantable repair, since it was let, first as a mess house, and afterwards as a hotel for several years. The defendant then saw fit to put an end to the lease of the keepers of the hotel, and to lay out a very considerable sum of money upon the house in repairs, alterations, and furnishing; and from that time he appears to have occupied it, whenever he was at Delhi, more as his own residence than as anything common to the family at large. At all events, no authority whatever has been shown for the very considerable expenditure incurred upon it, as before mentioned. In these circumstances the Judge below has allowed all that was expended upon necessary repairs, and has disallowed the considerable sums spent in excess of that, treating

them as having been laid out by the defendant on his own account. He has also disallowed whatever expenses of the establishment are attributable to the private purposes of the defendant, as contrasted with the establishment which would necessarily be kept up in the house to protect and preserve it whilst unlet. In that allowance, and that disallowance, their Lordships think he was right.

But then the question is raised by the eighth ground of appeal whether he is right in charging the defendant with an occupation rent of the house, as if it had been let to him. Their Lordships think that this is consistent with the will, which directs that the house, if not sold, should be let, as was done for a considerable period, and with the justice of the case.

There is nothing in the will which gives the manager the power of taking this house out of the general estate, in order to occupy it as his own exclusive residence.

They are therefore not disposed to allow this objection.

The objections raised by the ninth and tenth grounds of appeal have not been pressed.

The objection, however, to the amount decreed on account of interest, which is raised by the eleventh ground of appeal, has been strongly pressed. That interest should be allowed, to some amount, their Lordships have no doubt. The suit is for an account of what is due to the plaintiffs in respect of their share. The defendant has to account for all his receipts on account of the estate, and has a right to set up by way of discharge whatever he can properly claim under that head.

It appears that when the suit was instituted a very large sum was due from him to the plaintiffs, even upon his own mode of stating the accounts. After the suit was instituted he paid into Court a considerable sum, and reduced the admitted debt to Rs. 7,000 odd; but if he has during all this time kept the plaintiff out of her share, he ought, upon every ground of justice and equity, to pay some interest upon it; and if the admitted debt would carry interest, so the sum of Rs. 61,000, to which that debt has been swollen by the disallowance of items of discharge improperly claimed, ought also to carry interest.

Their Lordships can make no distinction between the claim for commission and the other sums which have been disallowed.

The defendant was bound to know how his commission was to be calculated.

But then it is contended that the rate of interest allowed is excessive.

What the Judge has done has been to give 12 per cent. interest up to the date of the suit, to give 12 per cent. interest on the principal amount from the date of the institution of the suit up to the date of the decree, and to direct that the decree, when compounded of the principal, interest, and costs, should carry interest only at 6 per cent. It has been argued that the Court rate of interest is now 6 per cent., and that the interest decreed should have been calculated throughout at that rate. The only rule or enactment regulating the conduct of the Judge in respect of the allowance of interest to which their Lordships have been referred is the 10th Section of the Act (XXIII) of 1861, which says: "When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum, adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of the suit; with further interest on the aggregate sum so adjudged, and on the costs of the suit from the date of the decree to the date of payment." Of course, the Court must exercise a judicial discretion in giving effect to this Section, and would not be justified in granting an inordinate or unusual rate of interest.

Up to a certain time, however, 12 per cent. was notoriously the rate of interest prevalent in the mofussil wherever interest was allowed by the Court, and it has not been shown that there has been any enactment which absolutely

controls the discretion given by this Act of 1861. to the Judge. A practice, indeed, of giving upon the aggregate sum decreed for principal, interest, and costs, interest at only 6 per cent., does seem to have grown up; but that may have been in order to prevent the parties from abstaining from enforcing their decree, and allowing their demand to roll on at 12 per cent. The rate of interest, however, to be allowed on the principal debt up to the date of the decree ought to be that, if any, which has been fixed by contract, express or implied, between the parties; and it appears upon the accounts that the rate of interest allowed among the sharers themselves was that prevalent in the mofussil, viz., 12 per cent. Hence their Lordships are of opinion that the Judge, in calculating the interest as he has done, has done nothing which he was not entitled to do.

It seems, therefore, to their Lordships that, the objections argued having all failed, they must humbly advise Her Majesty to reverse the decree of the High Court, and to confirm the decree of the Subordinate Judge, with the costs incurred in the High Court; and that the plaintiffs are also entitled to the costs of this appeal.

The 24th June 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Hindoo Law of Inheritance—Widow of Paternal First Cousin—More Remote
Collateral Male Line.*

On Appeal from the High Court at Bombay.

Lulloobhoy Bappoobhoy and others

versus

Cassibai and others.

HELD, after an exhaustive review of the authorities and precedents bearing on the question, that, by the Hindoo law of inheritance prevailing in Western India, the widow of a pre-deceased collateral relative (a paternal first cousin in this case) is entitled to succeed in preference to a more remote collateral male relative of the propositus.

This was an appeal from a judgment of the High Court of Bombay of the 29th April 1876.

Mr. Cowie, Q.C., and Mr. Graham, Q.C., for Appellants.

Mr. Leith, Q.C., Mr. Scoble, Q.C., and Mr. Mayne for Respondents.

The question involved in the suit was whether the appellants were the next heirs, according to the Hindoo law of succession prevalent in Western India, of one Mouljee Nundlall, a wealthy Hindoo inhabitant of Bombay, who died in January 1840, or whether one Mancooverbai, now deceased, and of whom the respondents are now the representatives, was entitled, as the widow of a nearer heir, to succeed to the estate. Bayley, J., before whom the case originally came, at first decided in favor of the right of the widow, but afterwards, upon review, he reversed that judgment. A Full Bench of the High Court, consisting of Westropp, C.J. and Sargent and West, JJ., on appeal concurred in the learned Judge's original finding; and from their decision the appellants now sought relief from Her Majesty in Council.

Sir Montague Smith delivered the judgment of the Judicial Committee as follows :—

The question which arises in this appeal relates to the succession to the estate of Mouljee Nundlall, a Hindoo inhabitant of Bombay, which opened on the death of his widow Surusvuthebai. Mouljee died in 1840, leaving as his only child a daughter, who died childless in the lifetime of his widow. The widow died in 1862.

At the time of Mouljee's death, his paternal first cousin, Gungadass Vizbhoo-cundass, was his nearest male relative. He died in the lifetime of Mouljee's widow, leaving no son, but leaving a widow Mancooverbai, the original defendant in this suit, and two daughters, who all survived Mouljee's widow. Mancooverbai died during the progress of the suit, and the respondent Cassibai is her executrix.

The first and second plaintiffs in the suit claim to be entitled to the estate of Mouljee, as being his nearest male heirs when the succession opened on the death of his widow.

Their relationship is clearly stated in the following passage of the judgment of Chief Justice Westropp:—

"It has not been denied that, according to the law, which under the Mitacshara and Mayukha prevails in this Presidency, Lulloobhoy and Mulchund (the father of Cassidass, the second plaintiff) were gotraja sapindas of Mouljee; the common ancestor of them and of Mouljee was Motilall, who, counting inclusively, was sixth in ascent from Mouljee, and the brothers Lulloobhoy and Mulchund were seventh in descent from Motilall. They are therefore on the extreme verge of sapinda relationship."

The other plaintiffs are purchasers from the first two plaintiffs.

Several of the issues raised in the suit have been finally disposed of by the Courts in India, and the single question to be now decided is, whether by the Hindoo law of inheritance prevailing in Western India, Mancooverbai, the widow of Gungadass, who as paternal first cousin was related in the third degree to Mouljee, became by her marriage with Gungadass a gotraja sapinda of Mouljee, and as such entitled to succeed to his estate in preference to the first and second plaintiffs, who were related to him only in the remote degree above indicated.

Mr. Justice Bayley, sitting as a Judge exercising the original jurisdiction of the High Court, on his first hearing of the cause, decided in favor of the right of the widow, following the decision of a Division Bench in the case of *Lakshmibai v. Jayram Hari* (6 Bombay High Court Reports 152). Upon a remand of the case on other points, Mr. Justice Bayley, acting on his own opinion, came to an opposite conclusion upon the question of the widow's right from that arrived at in the decision he had before followed, and gave a decree in favor of the plaintiffs. On appeal, this last decree was reversed by the unanimous judgment of a Full Bench of the Bombay High Court, and Mr. Justice Bayley's original judgment was restored.

It is fully acknowledged by the learned Judges of the High Court that the law prevailing in Bengal and Southern India is opposed to the right claimed by the widow; but they arrived at the conclusion that a different interpretation of the law has been accepted in Western India, and the elaborate judgments of the Chief Justice (in which Mr. Justice Sargent concurred) and of Mr. Justice West are directed to elucidate the grounds on which the distinction rests.

The books whose authority is principally followed in Western India are Menu, the Mitacshara, and the Mayukha. These are stated by the Chief Justice, and, no doubt, correctly, to be "the reigning authorities" in the Presidency of Bombay. The learned Judges have sought to support their decision in favor of the widow from passages found in these works. It is acknowledged that the rule of succession to which they have given effect is but dimly enunciated in these passages, but the Judges have considered that the interpretation which has been given to them in Western India, evidenced by decisions and the opinions of Shastras, has fixed and determined the law for that part of India.

A text of Menu was cited, which is supposed to affirm the right of women to inherit:—"To the nearest sapinda, male or female, after him in the third degree, the inheritance next belongs; then, on failure of sapindas and their issue, samano-daka or distant kinsmen shall be the heir." (Cap. IX. pl. 187.) The words "male or female" appear to have been imported into the text by Sir W. Jones and Mr. Colebrooke on the authority of a commentator, Kalluka Bhatta. Even if it be assumed that these words are rightly introduced, the text, though it sanctions the principle that women may inherit as sapindas, and so is consistent with the right of the widow to inherit as a sapinda of her husband's family, does not affirm that right.

According to the received doctrine of the Bengal and Madras schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of Bandhayana which declares that "women are devoid of the senses, and incompetent to inherit." The same doctrine prevails in Benares; the author of the Viramitrodaya yields, though apparently with reluctance, to this text. (Chap. 3, part 7.)

The principle of the general incapacity of women for inheritance, founded on the text just referred to, has not been adopted in Western India, where, for example, sisters are competent to inherit. That principle, therefore, does not stand in the way of the widow's claim in the present case. She still, however, has to establish that she is a gotraja sapinda of her husband's family, and as such entitled by the law prevailing in Bombay to inherit the estate of one of its members.

It is not disputed that on her marriage the wife enters the gotra of her husband, and it can scarcely be doubted that in some sense she becomes a sapinda of his family. It is not necessary to cite authorities on this point. But a statement of the doctrine in a note by Mr. Borradaile to his reports may be referred to. He says, "Because a woman on her marriage enters the gotra of her husband, so respondents, being sugotras of Pitambur, are sugotras of his wife also" (1 Borr. 70. n. 2). Whether the right to inherit follows as a consequence of this sapinda relationship is the question to be considered.

The following passage from the Achara Kanda of the Mitacshara was cited to show that sapinda relationship depends on having the particles of the body of some ancestor in common, and not on the connection derived from the capacity of making funeral offerings. It was also cited for the declaration that husband and wife and brother's wives are sapindas to each other:—

"(He should marry a girl) who is non-sapinda, i.e.,* a sapinda (with himself). She is called his sapinda who has (particles of the body) (of some ancestor) in common (with him). Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda relationship) to his paternal grandfather and the rest, because, through his father, particles of his (grandfather's) body have entered into (his own). Just so is (the son a sapinda relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in sapinda relationship) to his maternal grandfather, and the rest through his mother. So also (is the nephew) a sapinda relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in sapinda relationship) with paternal uncles and aunts and the rest. So also the wife and the husband are sapinda relations to each other, because they together beget one body (the son). In like manner brother's wives also are (sapinda relation to each other) because they produce one body (the son), with those (severally) who have

sprung from one body (*i.e.*, because they bring forth sons by their union with the offspring of one person, and thus their husband's father is the common bond which connects them). Therefore, one ought to know that wherever the word *sapinda* is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent."

A translation of some passages in the *Sanskara Mayukha* to the same effect will be found in the judgment of Chief Justice Westropp, of which the following is an extract:—

"Therefore (to explain the different parts in the formation of the word '*Asapinda*' by dissolving the compound '*Asapinda*,') she is *sapinda* who has one and the same *pinda* (body) (*i.e.*) *Dehavayava* (constituent atoms) *na* (not) *sapinda* is *Asapinda*. Thus, therefore, the father's constituent atoms, *viz.*, blood, fat, etc., directly enter into the body of the son, and (the constituent atoms) of the paternal grandfather (enter the son's body) through the medium of the father. In the same manner with reference to (the constituent atoms of) the paternal great grandfather, etc., also somehow the transmission of constituent atoms mediately exists. So with the mother, etc., also so the wife has *sapindya* from the husband, because they are the generators of one body. In some instances, *sapindya* exists by reason of being the holders of the same constituent atoms. Thus, the wives of brothers are *sapindas* to each other for they hold the constituent particles of the same father-in-law through the media of their husbands. In this way somehow the *sapindya* in other cases also should be inferred."

Vijnanesvara and *Nilakantha* were, no doubt, treating in these passages of *sapinda* relationship in connection with marriage; but no further definition of *sapindas* is given in those parts of their respective books which treat of inheritance. The learned Judges below have inferred, in the absence of any indication to the contrary, that the above-mentioned definitions were intended by the authors of the *Mitacshara* and the *Mayukha* to apply wherever in those books *sapindaship* was treated of, and consequently where it was treated of in relation to the right to inherit.

In addition to the above-mentioned authorities, the Chief Justice (Record 103) refers to the *Dattaka Mimansa*, as strongly maintaining the doctrine that *sapindaship* depends upon community of corporal particles, and not upon the presentation of funeral offerings to the *pitris*.

It was contended by the learned Counsel for the respondents that, even if *sapindaship* for the purpose of inheritance had to be determined by the efficacy of funeral oblations, the widow would be entitled as a *gotraja* to succeed, because her offerings would benefit the manes of her husband's grandfather *Kissoredasa*, the common ancestor (in the third degree) of her husband and *Mooljee*. Their Lordships do not think it necessary to consider the authorities on which this contention was supported (though they may observe that a judgment of Mr. Justice Mitter affirming that a sister's son is, under the *Mitacshara*, as interpreted in Benares, entitled to succeed, throws great light on the subject, 2 Bengal L. R. F. B. R. 28);* since they are prepared to assent to the conclusion to which the Judges of the High Court, upon consideration of the authorities, arrived, that by the law of the *Mitacshara*, as interpreted and accepted in Western India, the preferential right to inherit in the classes of *sapindas* is to be determined by family relationship or the community of corporal particles, and not alone by the capacity of performing funeral rites. It may happen that, in some instances, the same person would be the preferential heir, whichever of these tests was adopted.

If then, as already pointed out, the wife upon her marriage enters the *gotra* of her husband, and thus becomes constructively in consanguinity or relationship with him, and through him, with his family, there would appear to be nothing

incongruous in her being allowed to inherit as a member of that family under a scheme of inheritance which did not adopt the principle of the general incapacity of women to inherit. But, though it may be consistent with this theory of sapinda relationship to admit the widow so to inherit, the existence of the right has still to be established.

It is acknowledged that the widow of a collateral relative is nowhere specified and named as heir to members of her husband's family; she must therefore come into the succession, if at all, as one of the class of gotraja sapindas, and it is in this way that her claim has been put forward at the Bar.

The author of the Mitacshara, after discussing in detail the series of heirs first entitled to inherit down to brother's sons, proceeds in cap. 2 s. 5 to treat of the succession of Gentiles. Extracts from this section are given in the judgment of the Chief Justice, the translation of Mr. Colebrooke being amended by substituting for the English rendering of the names of the various classes of kindred, the Sanskrit names given in the original.

The first six slokas are thus rendered :—

"1. If there be not brother's sons, gotrojas* share the estate. Gotrajas are the paternal grandmother and sapindas† and samonodaka.‡

"2. In the first place the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before§ cited. And the mother also being dead, the father's mother shall take the heritage.|| No place, however, is found for her in the compact series of heirs from the father to the nephew, and that text ('the father's mother shall take the heritage') is intended only to indicate her general competency for inheritance; she must, therefore, of course succeed immediately after the nephew; and thus there is no contradiction.

"3. On failure of the paternal grandmother, gotraja sapindas ¶—namely, the paternal grandfather and the rest—inherit the estate.

"For binnagotra sapindas** are indicated by the term bundhoo.††

"4. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

"5. On failure of the paternal grandfather's line, the paternal great grandmother, the great grandfather, his sons and their issue inherit. In this manner must be understood the succession of samangotra sapindas.‡‡

"6. If there be none such, the succession devolves on samanodakas §§, and they must be understood to reach the seven degrees beyond sapindas |||, or else as far as the limit of knowledge and name extend. Accordingly Vhrat Menu says, 'The relation of the sapindas ceases with the seventh person, and that of samanodakas ¶¶ extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by gotra ***.'

It cannot be said that these passages contain direct authority for the admission of a widow of a collateral relative to inherit as a sapinda to a member

* Trans. by Colebrooke, "Gentiles."

† Trans. by Colebrooke, "relation connected by funeral oblations of food."

‡ Trans. by Colebrooke, "relations connected by libations of water."

§ Mitac. ch. ii. s. 1 pl. 7.

|| Menu ch. ix. pl. 217.

¶ Trans. by Colebrooke, "kinsmen sprung from the same family with the deceased, and connected by funeral oblations."

** Trans. by Colebrooke, "kinsmen sprung from a different family, but connected by funeral oblations."

†† Trans. by Colebrooke, "Cognate."

‡‡ Trans. by Colebrooke, "kindred belonging to the same general family and connected by funeral oblations."

§§ Trans. by Colebrooke, "kindred connected by libations of water."

||| Trans. by Colebrooke, "the kindred connected by funeral oblations."

¶¶ Trans. by Colebrooke, "those connected by a common libation of water."

*** Trans. by Colebrooke, "the relation of family name."

of her husband's family; but they were cited to show that women are entitled to inherit as sapindas, the paternal grandmother being named as the first sapinda for this purpose. There is a passage also to this effect in the *Mayhuka*, c. 8 s. 8 pl. 18.

That the mention of certain members of the family as gotraja sapindas is not exhaustive, and that others than those expressly mentioned may be included in the class, may be inferred from the following passage in pl. 3 of cl. 2 s. 5 of the *Mitacshara* cited above:—"On failure of the paternal grandmother, gotraja sapindas, namely, grandfather *and the rest*, inherit the estate." It would seem, also, though the grandmother and great grandmother are alone expressly mentioned, that the wives of the remoter ancestors in the direct ascending line up to the seventh degree would likewise succeed to their descendants as sapindas. Moreover, it has been decided by this Board that the enumeration of bundhoos contained in the *Mitacshara* is not exhaustive.—(*Gridhari Lall v. The Bengal Government*, 12 Moore I. A., 448*). The reasons for so holding are applicable to the enumeration of sapindas, though, as Mr. Graham observed, the step from the wives of paternal ancestors to the wives of collaterals is a long one.

Mr. Justice West, after discussing the *Mitacshara* and some of its commentators, came to the conclusion that "upon the whole it would appear more probable than not, upon the text of the *Mitacshara* and its recognized exponents, that it did intend widows to be included among the gotrajas." Perhaps the most that can be said is, that the text of the *Mitacshara* is not inconsistent with the claim of the widow, and allows of an interpretation favorable to her right to inherit. The important point for consideration remains, namely, whether such an interpretation has been given to the *Mitacshara* by its expounders and the lawyers of the Bombay School, and has been so sanctioned by usage and decisions as to have acquired the force of law.

The *Mayukha* is also very fully discussed in the judgment of Mr. Justice West, and his consideration of it led him to the conclusion that, "if the foundation of the rights of widows of gotrajas under the *Mitacshara* is slender, under the *Mayukha* it may be called almost shadowy." After this appreciation of the two leading authorities by a Judge who has much studied them, it is obvious that the right of the widow must be mainly rested on the ground of positive acceptance and usage.

Commentators on the *Mitacshara* are referred to in the judgments below who have interpreted its text in a sense highly favorable to women. Two of them, whose opinions are closely applicable to the point under discussion, are thus referred to by Mr. Justice West:—

"Visvesvara, the author of the *Subobhini*, the chief commentary on the *Mitacshara*, says that 'gotraja' may properly be taken to include both males and females; and Balambhatta insisting on the same view, applies it to the determination of the right of a predeceased son's widow, whom he places next after the paternal grandmother."

The author of the *Vaijayanti*, a commentary on *Vishnu*, appears to have held that the son's widow would succeed in preference to the daughter. This opinion is referred to in the remarks of Mr. Colebrooke upon a case in the Appendix to *Strange's Hindoo law* (2 Vol. 234). Mr. Colebrooke thinks that it is opposed to the prevalent doctrine of the school of the *Mitacshara*, which is that the daughter inherits in preference to the son's widow. He does not appear to question the right of the widow to inherit as a sapinda, though no doubt it was unnecessary to do so in discussing the question of preference.

Their Lordships will now pass to the recorded answers of the *Shastras*, and the decisions of the Courts, bearing on the question.

The answers of the *Shastras*, which have been referred to at the Bar, will be

found in a Digest of the Hindoo Law of Inheritance by Messrs. West and Buhler compiled from the replies of the Shastras recorded in the Courts of the Bombay Presidency. Mr. West is the Judge of the High Court, whose judgment has been already adverted to. These replies are in many cases unsatisfactory and incorrect, but they are numerous, and the series taken as a whole undoubtedly recognizes and affirms the right of the widow to inherit as a gotraja sapinda to members of her husband's family. It is not necessary to refer to these answers in detail. Many of them are cited and commented upon in the judgment of Mr. Justice West (Record, p. 115), and among these are answers which affirm that a sister-in-law inherits in preference to distant cousins, and even to first cousins, of the propositus.

Some early decisions of the Sudder Adawlat reported by Borradaile are to the same effect. In the case of *Dhoolubh Bhaee and others* against *Jeevee* (A.D. 1813) it was held that Jeevee, the widow of the son of a brother of Pitamber, the propositus, was entitled (on the death of Pitamber's widow) to succeed to his estate, and to hold it for her life in preference to a great grandson of another brother of Pitamber (1 Borr. 87). It is not, however, stated in the Report when Jeevee's husband died.

In another of the cases cited from Borradaile (*Muhalukmee v. the Grandsons of Kripastrookul*, 2 Borr. 510), the Sudder Court held that a predeceased son's widow was entitled to succeed in preference to the sons of a daughter. This case, however, seems to have been decided upon a custom of the caste of Oudeech Brahmins. As a decision on the general law, apart from custom, it may not be capable of support, a sister's son being specially provided for by the Mitacshara (cl. 2 s. 3 pl. 6).

In a later case reported in Borradaile (1824), it was held that the widow of a predeceased son was entitled to inherit in preference to the brother of the propositus (*Roopchund Talukchund v. Phoolchund Dhurmchund and another*, 2 Borr. 610). This seems to be a direct decision on the right of the widow to inherit, though, whether in the order of heirs, the preference was rightly accorded to her in this case may be questioned.

In the case of *Lukshmibai v. Jayram Hari and others*, the High Court of Bombay (Justices Lloyd and Melville) gave a clear and unqualified judgment in favor of the right of the widow of a predeceased collateral relative to succeed in preference to a more remote collateral male relative of the propositus. The High Court expressly found that this order of succession was in accordance with the law of inheritance prevailing on the Bombay side of India.

The High Court in the present case, after an exhaustive review of the authorities and precedents bearing on the question, have unanimously arrived at the same conclusion. Great weight is undoubtedly due to this decision, not only from the learning and research displayed in the judgments separately delivered by Chief Justice Westropp and Mr. Justice West, but also from the circumstance that both these learned Judges have had great and peculiar opportunities of becoming acquainted with the law of inheritance prevailing in Western India. The Chief Justice has passed a long judicial career in the Courts of Bombay, and Mr. Justice West is one of the compilers of the Digest of the Law of Inheritance to which reference has already been made. Their Lordships do not find any satisfactory grounds which should induce them to dissent from the conclusion of the High Court that the doctrine which has actually prevailed in Bombay is in favor of the right of the widow; nor any sufficient reason for holding that the doctrine which has so prevailed should not have the force of law. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, with costs.

The 29th June 1880.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Hindoo Law (Inheritance)—Illegitimate Son—Chhedra Raj—Family Idols
(Worship of)—Puchsi Sowal.*

On Appeal from the High Court at Calcutta.

Juggarnath Bhramarbar Roy

versus

Ram Gobind Juggodeb.

HELD that it was not proved that the *sevas* in dispute were appurtenant to the Chhedra raj. Even if the question had been one of succession to the raj, treating the Puchsi Sowal as a rule of inheritance applicable to the raj and not to the family, and assuming that, according to that compilation, an illegitimate son may succeed to the raj in the absence of other relatives, **HELD** that it was not proved in this case that there was that absence of other relatives which would entitle an illegitimate son to succeed.

This was an appeal from a decree of the High Court of Calcutta, of the 12th September 1877, reversing a decision of the Subordinate Judge of Cuttack.

Mr. Cowie, Q.C., and Mr. Doyne for Appellant.

The subject matter of the suit was a claim by the respondent to be the custodian and to perform the worship of an idol called Buldeb Jeo, and to receive the offerings made by the worshippers. This he claimed as the son and heir of the last shebait or custodian. The idol, however, and the offerings had formerly been made over by deed to the appellant by the widow of the late shebait by a maid-servant of inferior caste, and the question that remained for decision was whether the High Court, in opposition to the view of the original tribunal, but not without some hesitation, had rightly established from the evidence the existence of a family custom, opposed to the ordinary Hindoo law, under which an illegitimate son of a shebait, who had died without legal male issue, was entitled to succeed to his father's rights, and to set aside an alienation of them made by his father's childless widow in pursuance of her husband's injunctions.

Sir Barnes Peacock delivered the judgment of their Lordships as follows:—

The plaintiff in this case, who sues by his guardian, claims to be entitled to certain *sevas* described in the plaint "as the *sevas* of the idol Buldeb Jeo, situate in Mouzah Samgoodia, Pergunnah Tikun." He claims them as his ancestral property, and says that his father Doorga Persad Norendro, "died on the 4th Jeyt 1278, leaving him, according to the custom of the family, as his successor to the guddi and rajgi, and his lawful heir to and owner of all his moveable and immoveable property, inclusive of that under claim. Accordingly, the minor was the owner, and held possession of the estate under claim, along with all other property, through his mother and step-mother, who are defendants in the present suit."

Certain issues were fixed for trial: one was, whether the plaintiff was the legitimate son of Doorga Persad Norendro. He claimed to be the legitimate son upon the ground that his father was married to his mother; but both the Lower Courts have found that no marriage took place, and that he was a son by a maid servant to whom his father was never married, and consequently that he was not legitimate. The next issue was, of what caste was the minor? The first Court found as to that, that he was clearly of the Ugra caste. Then another issue was, "Can he claim to inherit the offices held, and privileges enjoyed, by his father in connection with the worship of the idols Sri Buldeb and Gopal Jeo?" The Judge,

having found that he was illegitimate says:—"I am of opinion that he cannot; because, under the Hindoo law, illegitimate children do not inherit except where the father has been a Sudra; and that, Doorga Persad admittedly was not. The Puchis Sowl"—that is, the answers which were given by certain Rajahs to questions which had been put to them by the superintendent of the tributary mehals—"I consider to be no authority in the matter; for the temple, I remark, was no appurtenant to the rajgi of Chhedra, and, as such, the succession to any office connected therewith would not be governed by the special rules laid down in that compilation, but by the ordinary law of inheritance; and that I find is altogether against the claim." Now did the answers which were given to the superintendent of tributary mehals prove that, according to the custom of the family, the minor was the successor of the father "to the guddi and rajgi, and his lawful heir to and owner of all his moveable and immoveable property, inclusive of that under claim"? It appears to their Lordships that the questions put by the superintendent of the tributary mehals were for the purpose of ascertaining who were to be recognised by the Government as the successors to the different killas which are described in the questions, and not with reference to the right to all the other property belonging to the owners of them. Under the first column of the questions is the name of the killa; then the name of the rajah; and then the question. The learned Judge of the High Court, after referring to other questions, says: "A much more difficult question is as to the rule of inheritance applicable to this particular family." In this passage he considers the question as a rule of inheritance, applicable to the family, not merely as applicable to the raj or killa. Then he proceeds: "I understand it to be admitted that the plaintiff's father's ancestors had been titular Rajahs of Chhedra, and there is undoubted evidence that in the absence of certain other male relatives the illegitimate son by a maid servant, and even of a concubine, may claim the succession to what is called the raj. The compilation which goes by the name of the Puchis Sowl, and which has always been received as an authority on these matters, shows this." There the learned Judge treats the rule of inheritance as applicable to the raj, not to the family. But assuming that the compilation shows that an illegitimate son may succeed to the raj in the absence of other relatives, it is not found in this case that there was that absence of other relatives which would entitle an illegitimate son to succeed; indeed, it was proved that a male relative of the father of the plaintiff had performed his sraddh, thus raising a presumption that there was a relative who was entitled in preference to the plaintiff to perform it. Their Lordships think that, even if this had been a question of succession to the raj, the plaintiff has failed to give sufficient evidence to prove that he was the heir.

The First Judge, treating the compilation as evidence with reference only to the raj, says it is not proved that the sevas in question were appurtenant to the raj. If they were not, then the rule of succession applicable to the raj would not necessarily apply to them, and the plaintiff would have further to establish that the rule was the rule of succession, not only to the raj, but to all the other property of the plaintiff's father.

Mr. Justice Markby having held that the compilation proved that an illegitimate son may, in the absence of certain other relatives, succeed to the raj, says with reference to the question whether it proved his right to succeed to the sevas: "The Subordinate Judge gets rid of this question by the observation that the temple is not appurtenant to the raj, and that therefore the succession to any office therein is not governed by the special rules of the Puchis Sowl, which relate only to the succession to rajahs. I do not think this view to be quite correct. It may be that the temple is not appurtenant to the raj, but the right to perform the sevas is certainly claimed to be so. That appears to be the view taken by other rajahs of the district enjoying similar privileges, and, as it appears to me, ordinarily the person entitled to succeed as rajah would be entitled to perform these sevas, both

rights being hereditary in the same line." It does not follow, as of course, that the sevas were appurtenant to the raj because they were claimed to be so, and the reasons of the learned Judge are based rather on assumption than on evidence of facts.

The sevas and the raj in this case were acquired by the ancestors of the plaintiff at different times, and there is no evidence to show that the sevas were ever appurtenant to the raj. The raj was sold in 1840 by Srinibash, the father of Doorgapersad Narendro, the plaintiff's father; but the sevas did not pass with it. These facts lead to the conclusion that the sevas were not appurtenant to the raj.

For these reasons it appears to their Lordships that there is not sufficient evidence to prove that the plaintiff was the heir to the sevas; and, consequently, that the Judge of the First Court was right in dismissing his claim.

They will therefore humbly recommend Her Majesty to reverse the judgment of the High Court, and to affirm the judgment of the Subordinate Judge. The respondents will pay the costs of this appeal. There were no costs given in the High Court; and their Lordships do not think it right to give the costs in that Court. They only give the costs of this appeal.

The 1st July 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

*Mahomedan Law—Verbal Gift (by Husband to Wife)—Lunatic—Documentary
Evidence—Consideration—Dower—Change of Possession.*

On Appeal from the High Court at Allahabad.

Mussamut Kamarunnissa Bibi

versus

Mussamut Husaini Bibi.

HELD that the donor in this case, although he may have been a lunatic at an earlier period of his life, appears to have recovered afterwards, and to have been competent to deal with the ordinary affairs of life, and perfectly able to comprehend such a transaction as a gift of his property to his wife; that not only was a verbal gift made by him in the most formal way, but that soon after an instrument was executed by him to carry the gift into effect; that though the dower agreed upon by him may have been only nominal at the time of marriage, he may have chosen a large dower to be the consideration for the gift; that it is not necessary by Mahomedan law that dower should be agreed upon before marriage, but that it may be fixed afterwards; that the sum itself, although a large one, was not excessive compared with the property of the donor; that the precise amount of dower mentioned was not material to sustain the gift, because any amount would be a sufficient consideration for that purpose; and that there was a change of possession in conformity with the terms of the gift, which, even without consideration, would be sufficient to support the gift.

This was an appeal from a decision of the High Court of the North-West Provinces of the 2nd March 1877, reversing a decree of the Subordinate Judge of Jounpore.

Mr. Doyne for Appellant.

Mr. Leith, Q.C., and Mr. C. W. Arathoon for Respondent.

The suit was instituted by the appellant as the niece of one Mehdi Ali, deceased, and as his heiress under the Mahomedan law of the Sheah or Imamea sect, to recover all his immoveable property from the respondent, who was the widow of the deceased, and who claimed it in accordance with an oral gift made to her by him three years before his death. The appellant questioned the making

of the gift, and alleged that, if it was ever made, the donor was insane at the time. The Subordinate Judge held that Mehdi Ali had no knowledge of the pretended gift, and that the transfer of possession to the respondent had not been proved. The High Court, however, held that the deceased did make the gift; that he was, without doubt, sane when he did so; and that possession had been transferred to the donee.

Their Lordships, without calling upon the Counsel for the respondent, proceeded to pass judgment, which was delivered as follows by *Sir Montague Smith*:—

The suit out of which this appeal arises was brought by Kamarunnissi Bibi, one of the heirs and a niece of Mehdi Ali, who died on the 24th April 1873, to recover a landed estate described in the plaint as the half of certain talooks and mouzahs in the districts of Jounpore and Azimgurh, against the widow of Mehdi Ali, who claims to hold the estate under a gift made to her by her husband in her lifetime. Mehdi Ali died childless. The state of the family, so far as it is material, is this: The father of Mehdi Ali was Shere Ali, who died on the 20th December 1830, leaving two sons and a daughter, the sons being Ali Naqui and Mehdi Ali, and the daughter Amani Bibi. The appellant, Kamarunnissa, is the only daughter of Naqui. It appears that the daughter of Shere Ali, Amani Bibi, had three children, all daughters. Two of the daughters were living at the time of the commencement of the suit; the other was dead, leaving a son, Mohamed Hassan. The Court thought it right that those three persons should be made defendants in the suit, Kamarunnissa remaining the sole plaintiff. The addition of these defendants, however, did not change the main issue, which is whether Mehdi Ali made a gift of the estates in question, or of his share of those estates, to his wife. On the part of the plaintiff, the fact of the gift is denied. It was alleged to be made orally, and the plaintiff asserts that no such gift was ever made. But the plaintiff further contends that, if it were made, Mehdi Ali was in a state of mind in which he could not comprehend the full effect of the act he was doing, and that, in fact, he was imposed upon by his wife, and by her brother, Ghulam Abbas, who, it appears, had for some time managed the estate.

Before going to the evidence relating to the gift itself, it may be convenient to refer to what appears upon the Record as to the state of Mehdi Ali's mind. Undoubtedly it appears that at one time, if not a lunatic, he was treated by his family as being one, and that he was confined in a lunatic asylum at Benares, his mother, Chand Bibi, being appointed guardian. That state of things continued during the lifetime of Ali Naqui, his brother, who managed the whole estate until his death. Upon the death of Ali Naqui it appears that the Government took charge of the property. It does not appear that there was any regular attachment, but it was taken into the charge of an officer of the Government. Mehdi Ali complained of his being kept out of possession of his share of the property. It may be as well here to state that Shere Ali had in his lifetime made a gift of his property to his two sons, Naqui and Mehdi, in equal shares. On finding the Government in charge, Mehdi Ali petitioned the Government, and prayed that he might be allowed to go and live upon his estate; and thereupon an investigation was made by Mr. Best, the Judge of the district. The following is his report of an interview he had with Mehdi Ali:—"To-day, Syud Mehdi Ali, and Jai Mangal Lal, his karindah, having appeared, caused their respective statements to be taken down. It does not appear *prima facie* from the manner of Syud Mehdi Ali's conversation that he is unable to do his work, though his intellect, owing to his retirement, may not be mature and keen, like the intellect of those who are continually engaged in transacting worldly business." That being his finding, he comes to this conclusion: "As it is necessary to enquire under what law the Revenue Court has thus interfered, it is ordered that a copy of this proceeding be sent to the officiating Collector, with a request that he will inform me of this after

enquiring into the matter. After inspecting the house, he should make such arrangements for the residence of Mehdi Ali that he may not be subjected to any inconvenience." It appears that he was permitted to take possession of his property and to reside in his own house. Mehdi Ali then applied for a mutation of names; to which the present appellant objected, stating that he was of unsound mind; but the officiating Collector, and the Commissioner upon appeal to him, ordered the mutation as prayed. The present appellant then appealed to the Sudder Board of Revenue, who made this order: "The Board observe that the report of the Commissioner received lately shows that each party is at liberty to manage that portion of the estate of Syud Ali in respect of which his name has been entered in the proprietary column. Kamarunnissa has no right to manage the estate of Mehdi Ali, because under Act XXXV of 1858, no application has been filed to prove that he was not qualified to manage his estate." The appellant, upon that, took no further step; but Mahomed, the great-nephew of Mehdi, and grandson of his sister, took proceedings under Act XXXV of 1858 to obtain a certificate of his lunacy. Without going into the evidence that was then given as to the state of his mind,—indeed, our attention has not been called to it by Mr. Doyne, who evidently felt that any Court which had now to decide upon the question of sanity would be very much guided by the reports then made,—their Lordships will proceed to consider what it was that was found upon these enquiries.

The first investigation was made by Mr. Currie. After going through the history of the case, he says: "On the evidence before it the Court cannot adjudge Syud Mehdi Ali to be a lunatic, and incapable of managing his affairs; and this application is, therefore, rejected." Mahomed, not satisfied with Mr. Currie's decision, appealed to the High Court; and the High Court directed a further investigation, which was made by Mr. Edwards, the then Judge of the district. In his judgment, Mr. Edwards enters very fully into the evidence, describes an interview with Mehdi Ali, and gives the result on his own mind of the evidence, and of his interview with Mehdi Ali. The material part of his judgment is this: "It is clear from the statements of the witnesses that they had free access to him, yet the only acts they speak to are very trivial, and would be taken as idiotcy rather than insanity; and that he is no idiot is fully proved by reports of both medical men who had full opportunity of judging. No one who saw Mehdi Ali could ever declare him to be an idiot. Agreeing in the suggestion in the proceeding of the High Court, I directed the attendance of the alleged lunatic at my house for a personal interview. The Civil Surgeon was present. I conversed with Mehdi Ali for a considerable time on various subjects, avoiding those on which he was likely to have been tutored. Neither in appearance, manner, nor conversation did he show any unsoundness of mind. He talked sensibly and to the purpose on any subject introduced, and replied to questions in a way which showed he fully understood them. His memory is evidently good, as he described matters which took place many years ago, such as Mr. William Frazer's murder at Delhi, as well as matters of later date. He is now an old man, of upwards of 60 years of age, I believe; and though he may have no pretensions to be an able or clever man, he is assuredly not a lunatic, nor is he in any way to be termed incapable of managing his own affairs." That is a very strong opinion, not only that Mehdi Ali was at the time of sound mind, but that, though he was not of strong capacity, he was competent to manage his affairs and was fairly intelligent upon the subjects on which he had spoken. It is to be observed that their Lordships' attention has been called to no evidence which in any way contravenes this report. It may be that at an earlier period of his life he was a lunatic, but he had apparently recovered at the time of his brother's death, and in the early part of 1869 he appears to be a man, if not of strong mind, yet competent to deal with the ordinary affairs of life. The sub-registrar who took his acknowledgment of the

mookhtarnamah, to be hereafter referred to, describes him as whimsical. It appears that he lived a secluded life; that he was a great student of the Koran; and that he did not attend to the practical management of his affairs, but left them very much to be conducted by his managers, the last of whom appears to have been Ghulam Abbas, his wife's brother. On the whole, their Lordships have come to the conclusion that he was perfectly able to comprehend such a transaction as a gift of his property to his wife.

We now approach the transaction in question. It is said that on the 1st May 1870, Mehdi, in the presence of seven witnesses, made, in the most formal way in which a verbal gift could be made, a gift of the property in question to his wife, who was present at the time. It is said that the words of gift were repeated three times—that is said by some of the witnesses, though not by all,—and the wife in a formal manner expressed her acceptance of the gift. The words said to have been used are formal, and probably were purposely formal. It is not alleged that, if what is said to have passed really took place, the gift was not a valid one, supposing that there was either consideration for it, or a transfer of possession. But the fact of the gift was denied, and it was strongly contended that if it had been intended by Mehdi Ali to give what is, no doubt, a considerable property to his wife, he would have taken the proper and ordinary precaution of having some document in writing as evidence of the gift, and that the fact that there was no such instrument was in itself a strong circumstance against the probability of the gift having been made. It was also said that no relatives were present, and that none of the neighbours in an independent position were called in to witness and sanction the transaction. However, there were seven persons present, including two mookhtars and some karindahs. These persons were, no doubt, more or less dependent on the family, but no serious effort was made to impeach their evidence except so far as the credibility of it is affected by their position. Their Lordships are quite prepared to agree with the Subordinate Judge that the Court is bound to watch with the greatest care, perhaps even with suspicion, the case of a verbal gift set up after the alleged donor's death; and if the case had rested upon the oral testimony alone, their Lordships probably might not have had this appeal before them. It may have been that, in that case, the High Court would not have dissented from the view of the oral evidence which had been taken by the Subordinate Judge. But the case does not rest on this evidence alone, and it is not a case where an oral gift is set up, after a man's death, which had not been heard of in his lifetime. An instrument was executed by Mehdi Ali, a mookhtarnamah, to carry the gift into effect; and publicity was given to the fact of the gift having been made, which drew forth, from the present appellant and others, opposition in the lifetime of the donor. The gift was made on the 1st May 1870, and about six weeks afterwards a mookhtarnamah was executed which contains a reference to the gift, and appoints a mookhtar to effect a mutation of names. The terms of the mookhtarnamah, and the way in which the gift is referred to, are worthy of great consideration. The gift is not cursorily mentioned, but is described so much in detail, that if the document was read to Mehdi Ali, and if he had intelligence enough to comprehend it, it is impossible that he should not have known that it was intended to carry into effect the gift which it alleged that he had made a short time before. The recital in the instrument is this: "Whereas I have made a final verbal gift of all my estates mentioned above, which are my own property and possession, without the partnership of any other person, to Mussumat Hussein Bibi alias Mehdi Bibi, my lawful wife, with all the rights appertaining thereto, and subject to all the liabilities for debts due to the creditors and chargeable on the said property; and whereas I have caused the said donee to be put in proprietary possession of the whole of the said property as my representative, under the managership of Syud Gholam Abbas, my manager and general attorney and brother of the said Mussumat; it is necessary that my (the executant's)

name, should be expunged from the Government papers, and that the said Musumat be entered therein as proprietor and possessor of the said property. I accordingly, for the purpose of filing petitions for the mutation of names in respect of the above-mentioned properties, hereby appoint Lalla Jassoda Nund, a vakeel of the Court and Revenue Agent, and Mir Sabit Ali, Revenue Agent, my mookhtars," in order to obtain the mutation of names. This document is proved in as satisfactory a manner as one can possibly expect. The writer of it is examined as a witness. One of the attorneys mentioned in it, who is also called, is a vakeel of the Court, and is treated by the High Court as a respectable man. He proves that the mookhtarnamah was executed. The sub-registrar went to the house of Mehdi Ali, and obtained from him verification of the instrument. His evidence has also been given. The respondent did not rely upon the formal endorsement of registration on the document, but examined the sub-registrar, who proved the manner in which it was taken, and in his evidence states: "The document was read to him by me; he heard it, and said, 'Yes, I have executed it.' His conduct at that time did not show that he was not in his senses. I stayed only so long as was necessary for the purpose of registration. Mehdi Ali himself signed the registration endorsement; he did so after having read it." Unless it be held that the sub-registrar is not entitled to credit, or that Mehdi Ali was a man incompetent to understand what he heard and read, it is impossible not to perceive that this document confirms, in the strongest way, the evidence of the witnesses who say that the gift was made.

The gift is stated to have been made in consideration of a dower of Rs. 51,000, which remained unpaid. It is said that that dower is exorbitant, and there is positive evidence that the dower actually agreed upon at the time of the marriage was a much less sum; indeed, of a sum which appears to be almost nominal, little more than Rs. 100. In the first place, the Courts do not appear to have given credit to the witnesses who have stated that the dower was settled at that small sum; and if the persons who proved the gift are worthy of credit, they are entitled to receive credit as to what they proved to have passed with reference to the consideration, as well as with reference to the gift itself. Their Lordships cannot come to the conclusion that dower was not mentioned, or that the sum which the witnesses state was not that which was mentioned. It is unnecessary to affirm that that amount of dower had been agreed upon prior to the marriage. It may be that Mehdi Ali, though the dower might be only nominal at the time of his marriage, may have chosen to declare this large dower to be the consideration for the gift. He may have thought that it would give validity to the gift to declare that the dower was of that amount. It is not necessary by Mahomedan law that dower should be agreed upon before marriage; it may be fixed afterwards. Again, the sum itself, although a large one, is not excessive compared with the property of the donor. That some dower had been agreed upon is acknowledged; and the precise amount, as the High Court says, is not material to sustain the gift, because any amount would be a sufficient consideration for that purpose. No doubt, if their Lordships were satisfied that Mehdi Ali had not mentioned that sum of Rs. 51,000, it would go far to destroy the credit of the witnesses as to the rest of the transaction. They cannot, however, come to the conclusion that that sum was not mentioned by Mehdi Ali, whether it was the real amount of dower which had been previously agreed upon or not. But if the possession was changed in conformity with the terms of the gift, that change of possession would be sufficient to support it, even without consideration.

It appears that the application for mutation of names was opposed by the present appellant, and that ultimately there was an appeal to the Board of Revenue. The appellant in that appeal was the present respondent, the revenue officers having decided against her. The opinion of the Board of Revenue is this: "The point to be decided is, Is appellant in possession or not? It appears to me

that the proofs of her possession are many and strong. She has filed dakhilas for payment of Government money given in her name as far back as November 1870. She paid income tax in 1871 and 1872, for which she holds receipts. She sued a tenant for ejectment in 1871, and obtained a decree. The Civil Court of Jaunpur, on the 19th February 1869, found that her husband was of sound mind," and so on. The Board allowed the appeal. Then the present respondent granted a zur-i-peshgee lease of part of the property to secure a sum of Rs. 2,000, which she did as owner, and being dealt with as owner. Their Lordships have come to the clear conclusion that there was a change of possession, which, even without consideration, would be sufficient to support the gift.

Various proceedings afterwards took place upon the objection of the appellant. The officers, perhaps with reasonable suspicion, declined to effect the mutation of names unless Mehdi Ali came before them and authenticated the mookhtarnamah, and the petitions presented in his name praying that the mutation might be made. While, undoubtedly, an inference might not unnaturally arise from his non-appearance, either that he did not choose to come forward to support the gift, or that those who had put forward a false gift prevented his appearing, there are circumstances which may explain his absence without making an inference so hostile to the case of the respondent. It is evident that Medhi was an infirm man, and that he suffered from a painful complaint which made any exertion difficult to him; and, in addition to his physical ailment, he was a man of retired and secluded habits, who would be very reluctant to come before a Court and be examined. On the whole, therefore, their Lordships think that no inference sufficient to overturn the strong case which has been made on the part of the respondent in favor of the gift arises from Medhi not having appeared before the officers when summoned on the application referred to. It is further to be observed that there is nothing improbable in the fact that Medhi Ali should make a gift of his property to his wife in his lifetime. His father had made such a gift to his two sons, and Naqui, his brother, had given his property in his lifetime to his wife. Moreover, it was natural that Medhi should prefer that his property should go to his wife rather than to the members of his own family who had taken or sanctioned the proceedings in lunacy against him.

For these reasons, their Lordships think that the judgment of the High Court is right; and they will therefore humbly advise Her Majesty to affirm it, and with costs.

The 6th July 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Bheel—Right of Fishery—Title—Adverse Possession—Onus Probandi—
Limitation.*

On Appeal from the High Court at Calcutta.

Radha Gobind Roy Saheb Roy Bahadoor

versus

Inglis and another.

Even if the settlement papers of a pergunnah show that all which at the time of the permanent settlement had been settled for with the then zemindars of the pergunnah, was a right of fishery, that might afford an inference that the soil of the bheel remained in the Government, or that at all events any land reclaimed therefrom would be subject to a fresh assessment of revenue; but that circumstance

would give no title to the proprietor of one part of the pergunnah against the proprietor of another part of it. If what was originally settled was the land covered by the water treated as a mouzah, the title to that land would pass under the term Julkur Khuluk Shajai to whomsoever that portion of the pergunnah might thereafter be transferred.

Plaintiff having proved his title to the land, defendant was bound to prove that plaintiff has lost it by reason of his (the defendant's) adverse possession for twelve years, which burden, it was held, the defendant had not satisfied.

This was an appeal from a judgment of the High Court of Calcutta of the 4th April 1878, reversing a decision of the Subordinate Judge of Dinagapore.

Mr. Leith, Q.C., and Mr. Graham, Q.C., for Appellant.

Mr. Cowie, Q.C., Mr. Macnaghten, Q.C., and Mr. Doyne for Respondent.

The question at issue between the parties was as to the ownership of certain narrow strips of land in the Purneah district on the margin of a bheel or lake which had partially dried up; and the point for decision, upon which the Courts below differed, was whether those lands, which might originally have formed part of the bed of the bheel, belonged to the respondent, who was the admitted owner of the fishery there, or whether the appellant to whom the contiguous land on the borders of the bheel belonged, was not entitled to the property in dispute by reason of his possession and cultivation of it for more than twelve years before the institution of the suit.

The judgment of the Privy Council was as follows:—

The suit out of which this appeal arises was brought by John Taylor, the owner of a talook called Khaneh Alumpore, who sought a declaration of his right to and to be restored to possession of a certain quantity of land appertaining to a mouzah named Julkur Khuluk Shajai, part of the talook, his case being that this was a mouzah originally covered with water, and so forming a large bheel or lake; but that in recent times a portion of the land so covered had become dry and cultivable during, at least, a part of the year; and he sought to set aside certain orders of Magistrates whereby the question of possession had been decided against him. The defendant, who is the owner of a neighbouring talook called Gobindpore, denied the plaintiff's title to the soil of this Julkur Khuluk Shajai; he made some claim to it himself; he disputed that the land in question had ever formed a portion of the mouzah, if it was one; he also relied upon adverse possession for more than twelve years before the bringing of the suit. The Subordinate Judge decided all the points in favor of the defendant; his judgment was reversed by the High Court, who found that the plaintiff had a title to the soil of the bheel, and, therefore, to the land reclaimed therefrom; that the Statute of Limitation did not bar him; and gave to the plaintiff, though not the whole of the relief which he sought, the land within a certain line which will be hereafter referred to.

From this decision the present appeal has been brought. During the proceedings Mr. Taylor has died, and he has been succeeded on the record by Mr. Inglis, and Mr. Inglis again by his vendee Ghose, who is now the only respondent.

The first question is that of the title to the soil of Julkur Khuluk Shajai. With reference to the plaintiff's title to talook Khaneh Alumpore there appears to have been no question, for Mr. Justice Morris, in his judgment, says that it is admitted that he is recorded as the owner of that talook. He appears to have obtained it—we do not know quite how and when, but it must be assumed rightly—from one Bibi Luchmi, who, in 1853, was recorded as the possessor of it.

But then comes the question whether the right of the plaintiff in this Julkur Khuluk Shajai—the ordinary meaning of Julkur being fishery—was, as the defendant contends, merely a right of fishery in the bheel, or whether it was, as the plaintiff contends, the right to a mouzah covered with water. Certain but-warra papers were put in as old as 1799, whereby this Julkur, which was certainly then called a mouzah, was described as belonging to Pergunnah Bhatia Gopalpore; but inasmuch as no area is given to it in the description, it is contended that it

was treated merely as a fishery right. The original settlement papers of Pergunnah Bhatia Gopalpore are not on the Record. If it had appeared therefrom that all which at the time of the perpetual settlement had been settled for with the then zemindars of the pergunnah was a right of fishery, that might afford an inference that the soil of the bheel remained in the Government ; or that, at all events, any land reclaimed therefrom would be subject to a fresh assessment of revenue. But that circumstance would give no title to the proprietor of one part of the pergunnah against the proprietor of another part of it. It is not suggested that the law relating to land gained from a river by gradual accretion applies to land left dry by the partial recession of the waters of the bheel. Again, if what was originally settled was the land covered by the water, treated as a mouzah, the title to that land would pass under the term Julkur Khuluk Shajai to whomsoever that portion of the pergunnah might thereafter be transferred. In the present case, it seems that this pergunnah, including the mouzah, was divided among three persons, and that one of them was an ancestor of the defendant, and another a person through whom the plaintiff derives his title. An argument has been founded on the fact that one of these persons made a sale some time afterwards of her share of this mouzah. It is contended that the selling only her share of it indicated that it was impartible, and this contention is said to be strengthened by the fact that she appears to have sold the entirety of a certain other mouzah. It may not be easy to find a satisfactory explanation of this circumstance upon this Record ; but their Lordships think it is of little weight when set against the other facts proved in the cause. From the early part of the present century down to 1853 the history of this mouzah is a blank ; but it appears to their Lordships enough, for the purpose of proving the plaintiff's title to the soil, that there is an extract from the Mehalwari Register in that year, in which Bibi Luchmi, from whom he derives his title, is entered by the Government as possessor of the talook Khaneh Alumpore, and this same Julkur Khuluk Shajai is described as one of the mouzahs of that talook and containing an area of 6,275 acres. This Mehalwari Register was made in pursuance of and in accordance with a survey in 1847, one of the maps of which is before their Lordships, in which this very mouzah is laid down as containing an acreage corresponding with the statement of acreage in the Mehalwari Register. It would therefore appear that, as between him and the Government, Mr. Taylor has clearly a title to the soil of the bheel ; he has also a title as against the defendant. It is stated by Mr. Justice Morris that at the time of the survey the defendant made no claim whatever for this mouzah, and the entries of the Mehalwari Register which follow that which has been read show that in 1847 and 1853 no part of it appertained to the talook of Radha Gobind Roy, the defendant.

A word must be said upon the question of boundary. When the case was before the Subordinate Judge, an Ameen was directed to make a map laying down the boundaries of the disputed lands. It seems, indeed, that the map of the Ameen gave no great satisfaction to the Judge or to either of the parties. But he was not examined in Court, nor was he directed to make a new map, nor was he superseded by the appointment of another Ameen. This map has been taken as, at all events, some evidence in the cause. According to the statement of the Ameen, he intended the black line drawn upon this map to be in accordance with the survey line of 1847. He states that, the defendant not being satisfied, and contending that he based the line upon erroneous data, he took the data given him by the defendant, and thereupon drew a yellow line which is drawn further in towards the lake, and would therefore be more favorable to the defendant ; and the High Court state in their judgment that the plaintiff, by way of concession, agreed to take the yellow line as his boundary, thereby relinquishing above half of what he originally claimed, and the High Court further state that that line had been assented to by the defendant. It is now, indeed, stated that that is not

so; but their Lordships cannot help observing that the High Court do not seem to have had their attention directed to any misapprehension, if there was one, as to what appears to have been conceded by the Counsel for the defendant, and under the circumstances they cannot but give credit to the statement of the High Court, that this yellow line was practically admitted by him to correspond with the boundary line of the mouzah as laid down in the survey map.

The question remains, whether the disputed land, which must now be taken all to lie within the yellow line, had or had not been occupied by the defendant for 12 years before the suit was instituted, so as to give him a title against the plaintiff by the operation of the Statute of Limitation. On this question, undoubtedly, the issue is on the defendant. The plaintiff has proved his title; the defendant must prove that the plaintiff has lost it by reason of his, the defendant's, adverse possession. The High Court came to the conclusion that the defendant had not satisfied the burden of proof thrown upon him, and their Lordships are not prepared to reverse that judgment.

There is undoubtedly some force in the observation of the High Court that most of the witnesses of the defendant proved too much; some of them a possession, not of 12 years, but of 20, 30, and even 40 years, and some possession from time immemorial. There were those who denied that there had been any change whatever in the boundaries of the lake. The Subordinate Judge does not appear to have had his attention directed to the very important question when the new land formed. He goes the whole length of finding that, for time very much beyond that required by the Statute of Limitation, the defendant and his ryots and his lessees had been in possession of the disputed land. The High Court suggested as an explanation of this, that a large portion of the evidence may apply to land outside the disputed land; but there is undoubted evidence on the part of the plaintiff, by witnesses who do not appear to be impeached by the Subordinate Judge, and have been believed by the High Court, that the land in question, that is, the land within the yellow line, has all been formed quite recently, within six or seven years, or at all events within less than 12 years, before the commencement of the suit; and if the High Court are right in that finding, of course the Statute cannot apply. On the whole, their Lordships have come to the conclusion that the High Court was right on both points,—on the question of title, and on the question of the application of the Statute.

On these grounds they will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

The 8th July 1880.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Hindoo Law and Usage—Seodras—Adoption (by Deed)—Giving and Taking—Construction.

On Appeal from the High Court at Calcutta.

Mahashoya Shosinath Ghose and others

versus

Srimati Krishna Soondari Dasi.

Their Lordships saw no reason to differ from the conclusion of the High Court that the intention of the parties at the time of their execution of the deeds of gift and acceptance was that the adoption

was not complete, but that the execution of them was to be a mere step towards a complete and full adoption.

The mode of giving and taking a child in adoption continues to stand on Hindoo law and on Hindoo usage. There cannot be such a giving and taking as is necessary to satisfy the law, even in a case of Soodras, by mere deed, without an actual delivery of the child by the father; and it would seem that, according to Hindoo usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption.

This was an appeal from a judgment of the High Court of Calcutta of the 5th February 1878, affirming a decree of the District Judge of Bhaugulpore.

Mr. Cowie, Q.C., Mr. Branson, and Mr. Evans for Appellants.
Mr. Doyle and Mr. Woodroffe for Respondent.

The suit was instituted by the appellant to establish the fact of his adoption by the respondent who was the widow of Dwarkanath Ghose, a wealthy zemindar living near Bhaugulpore, and a leading member of the caste of Northern Kaists, and to recover from her the possession of her husband's estate, to which, failing issue, she had succeeded. The litigation had been pursued for some considerable time, the case having, in one form or another, undergone—even before the present suit was commenced—enquiry and consideration by four different Courts in succession, beginning with the principal Sudder Ameen, and ending with the Judicial Committee. The suit in its existing shape had come before two Indian tribunals, one being the High Court, who had concurred in holding that the appellant had failed to establish his allegation as to the disputed adoption. Hence the present appeal to Her Majesty in Council.

Sir James Colville delivered judgment as follows:—

The question in this case is whether the plaintiff has been validly adopted as the son of Dwarkanath Ghose, who died on the 30th June 1863, by his widow, the defendant. It is admitted that she had authority from her husband for that purpose, and the adoption is alleged to have taken place on the 11th June 1864.

Their Lordships do not propose to go at any length into the facts of the case, which are fully and lucidly stated in the two able judgments that are the subject of this appeal. It is sufficient to refer to a few of them. It appears that the widow lost no time in seeking to carry out her husband's direction to adopt a son. A correspondence, which was carried on chiefly by Soorjonarain Singh, her brother, who took the principal part in all these transactions, began in January 1864; from which it appears that, whatever unwillingness Srinarain, the natural father of the plaintiff, may have felt at first to give his son in adoption, had been overcome before the end of the following May. The record contains only the letters written by Soorjonarain during this period; but from them it may be inferred that Srinarain, in one or other of his letters that are missing, had stipulated for the execution of deeds of gift and acceptance which, if witnessed as was contemplated by the reversionary heirs of Dwarkanath Ghose, would afford evidence against them of the adoption and of the authority under which it was made. It may also be inferred that at one time it was contemplated that the defendant should send persons to bring the boy, without his father, to her house at Bhaugulpore from Mahta, his father's place of residence, in order that she might see him before adopting him. Ultimately, however, Srinarain himself accompanied the boy, and came to Bhaugulpore on the 7th June 1864; and it may be that there was at that time some notion in the minds of all the parties that the adoption would then take place. However this may be, it is an undisputed fact that the deeds upon the construction of which the determination of this appeal must now depend were executed on the 11th June 1864. It is, on the other hand, equally clear, that the boy, instead of remaining with the defendant in her house, went back with his natural father to Mahta on the following day, the 12th June 1864. He afterwards returned to the defendant's house, together with his brothers, who,

at least, were only there on a visit in September 1864, whilst Srinarain was on a pilgrimage. The brothers went home in November, but the boy remained in the house of the defendant. There appears to have been on the part of the father some remonstrance as to this, or, at all events, the expression of a wish that the boy should be sent back to him; and accordingly the boy was sent back to his father's house, in December 1864, as it was expressly stated in the letter which accompanied him on his return, agreeably to his father's order. After that period he never returned to the defendant's house. Further correspondence ensued, and ultimately, on the 25th March 1865, Srinarain himself wrote a letter in which, after stating the boy's repugnance to leave his own home, the repugnance probably being that of his mother to part with him, and the general feeling of the family, he ends by saying: "In this I have no power, as I have already informed you in my previous letter; and now I positively inform you that you all, relinquishing this hope, in consideration of the future, for the preservation of the estate, should make dattak-grahan (accepting a son in adoption) or any other arrangement you think fit:" pointing evidently to the adoption of another child by the defendant.

In this the defendant appears to have acquiesced; but it was suggested on her part that the deeds which are in question ought to be cancelled, in order to remove the cloud which would otherwise rest on the title of any other boy whom she might adopt. For nearly a year Srinarain seems to have thought that this was the right and proper thing to be done, and to have been willing to concur in it; but in March 1866, he, having probably been advised, during a visit he was then paying to Calcutta, that his right to do so was at least questionable, refused to do it, and determined to leave things as they were; not, however, even then insisting on the adoption as complete and irrevocable. Thereupon the suit which has been before their Lordships on a former occasion was brought by the present defendant, seeking to have those deeds cancelled. In the course of that suit the validity of the adoption came in question; the Courts in India pronounced against it, and decided that the deeds should be delivered up to be cancelled. On appeal to her Majesty, their Lordships were of opinion that the suit was improperly brought, and could not be maintained, being one in the nature of a suit for a declaratory decree, and brought in the absence of the child said to have been adopted; and they finally dismissed it, leaving every question touching the validity of the adoption open.*

So matters remained until the plaintiff came of age, and he then brought the present suit to enforce his rights as an adopted son.

The case made by him, and the case tried in the Courts below, was not that he had a good title by adoption by virtue of the deeds in question alone; but treated the execution of those deeds as contemporaneous with the performance of all the ceremonies incident to an ordinary adoption. There was great conflict of evidence upon the case so set up; and ultimately both the Indian Courts, in extremely well-reasoned judgments, found that no such formal adoption, as was alleged, ever took place, and dismissed the suit. A suggestion, however, as appears at the end of the judgment of the High Court, was made by one of the Counsel for the plaintiff, to the effect that, even if there had been no such formal adoption as was alleged, the deeds themselves operated as a complete giving and taking of the plaintiff; that that was all that was essential in the case of Sudras; and that the adoption was completed by virtue of the deeds alone.

Their Lordships by their ordinary rule, are precluded from going into the correctness of the findings of the two Courts upon the fact of the formal adoption attempted to be proved. This has been fairly admitted by the learned Counsel for the appellants at their Lordships' Bar, who have accordingly argued only the latter point, namely, whether the effect of the two deeds was not to make the plaintiff fully and completely the adopted son of Dwarkanath Ghose.

* See 19 W. R. 133; 2 Suth. P. C. R. 774.

It seems to their Lordships that two questions arise upon this point: first, whether, according to Hindoo law, an adoption can be effected, even amongst Soodras, by the mere execution, without more, of such instruments as those in question; and secondly, whether it was the intention of the parties, when they put their hands to those two instruments, that such should be the case, or whether the execution of them was not intended to be a mere step in the proceedings which were to result at one time or another in a complete and full adoption? Their Lordships will deal with the last of those questions in the first instance.

The first thing that strikes them is the extreme improbability that it should have been the intention of the parties to make an adoption by the mere execution of the deeds. Yet that such must have been their intention, if there was then a complete adoption, follows from the findings of the Courts that nothing more was done, or, presumably, intended to be done. Such a course of proceeding seems to be in the highest degree repugnant to the ordinary habits, feelings, and usages of two Hindoo families both of considerable respectability. That this is so is shown by the circumstance that the plaintiff has thought (as the father in the former suit thought) it necessary to set up a case of formal and full adoption, with all ceremonies, whether necessary or not necessary; being the case which has been negatived by the two Courts. Nor does it appear to their Lordships that the terms of the deeds are necessarily inconsistent with the finding of the High Court that such was not the intention of the parties. The words of the deeds of acceptance, no doubt, are strong, and are, as translated, in the present tense. Those words, according to the translation on the present record, are these:—"I take in adoption Sreenain Nogender Chunder Mitter, the second son of your third wife, Srimati Monmohini, with the consent of all, and according to rule and usage." In the record of the former case before their Lordships there is a somewhat different and more expanded translation of the same passage, the terms of which are:—"I do, with the prescribed rights and ceremonies, adopt as my son Nogendro Chundro Mittro, your second son by your third wife, Sreemutty Monmohinee." The words "with the prescribed rights and ceremonies" are stronger than the words "according to rule and usage;" but even taking, as their Lordships do, the latter to be the correct translation, it seems to them that the words point to an adoption in the customary and formal manner, and to something being done *ultra* the mere execution of those two instruments.

Great stress has been laid, by Mr. Branson particularly, upon the immediate registration of the deeds. But as to that, their Lordships think that, although the circumstance of registration, as well as that of the execution, of the deeds would, of course, be very cogent evidence upon the main issue which was tried in the case, namely, whether there had been a formal and regular adoption; and might, if the other evidence that was given upon that point had been nicely balanced, have been sufficient to turn the scale; it is of far less weight upon the question whether it was the intention of the parties, without more, to treat the execution of the deeds as an adoption. It shows, no doubt, what is fully admitted, that both parties then supposed that the adoption would take place at some time.

Their Lordships, therefore, see no reason to differ from the conclusion to which the High Court came upon the whole case,—that it never was the intention of the parties that the deeds should operate in the manner contended for. That conclusion, they think, is very much fortified by the subsequent correspondence that took place; the mode in which the child was treated, going from one house to the other; and the clear willingness of the father at one time to treat the adoption as simply inchoate, and something which could be given up, so that the defendant might carry out her purpose of performing the wishes of her husband by adopting another child. The circumstance, moreover, which the Courts have laid great stress upon,—that on the occasion of Dwarkanath's *sradh* the boy supposed to be adopted was not present, and took no part in the ceremony—is strongly con-

firmatory of the notion that all parties then considered that at that time the adoption was not complete, but remained, to some extent, still *in fieri*.

That being so, it is unnecessary for their Lordships positively to decide the first question; namely, whether there can be, according to Hindoo law and usage, an adoption simply by deed, and without that corporeal delivery and acceptance of the child which is almost universally treated as the essential part of an adoption in the Dattaka form. They desire, however, to say that they are very far from wishing to give any countenance to the notion that there can be such a giving and a taking as is necessary to satisfy the law, even in a case of Soodras, by mere deed, without an actual delivery of the child by the father. There is no decided case which shows that there can be an adoption by deed in the manner contended for; all that has been decided is that, amongst Soodras, no ceremonies are necessary in addition to the giving and taking of the child in adoption. The mode of giving and taking a child in adoption continues to stand on Hindoo law and on Hindoo usage, and it is perfectly clear that amongst the twice-born classes there could be no such adoption by deed, because certain religious ceremonies, the data homam in particular, are in their case requisite. The system of adoption seems to have been borrowed by the Soodras from these twice-born classes; whom in practice, as appears by several of the cases, they imitate as much as they can: adopting those purely ceremonial and religious services which it is now decided are not essential for them, in addition to the giving and taking in adoption. It would seem, therefore, that according to Hindoo usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption.

For these reasons, their Lordships think that no ground has been laid for disturbing the judgment of the High Court; and they will, therefore, humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal, with costs.

The 14th July 1880.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Limitation—Title by Prescription—Act IX of 1871, ss. 24, 27, Sch. 2 Art. 31
—Easement—Watercourse (Obstruction of)—Continuing Nuisances—Practice (Privy Council)—Special Appeal.*

On Appeal from the High Court at Calcutta.

Maharanee Rajroop Koer

versus

Syed Abdool Hossein.

The Limitation Act IX of 1871 contains two distinct sets of provisions, one relating to the limitation of suits, and the other to the manner of acquiring title and rights by possession and enjoyment. The object of the latter (s. 27) was to make more easy the establishment of rights of this description by allowing an enjoyment of 20 years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements.

Where, therefore, an artificial pyne was constructed by the plaintiff's ancestors on the defendant's land for the purpose of irrigation more than 20 years ago, any Court which has to deal with the subject ought to refer such long enjoyment to a legal origin, and the right so created is not in any degree interfered with by the said s. 27.

Article 31 of the 2nd Schedule, which limits the time for bringing suits for the obstruction of watercourses to two years "from the date of the obstruction," does not apply to continuing nuisances, as to which the cause of action was renewed *de die in diem* so long as the obstructions were allowed to continue, as is expressly provided by s. 24.

This case having been heard on special appeal, the Privy Council refused to modify the language of the First Court's decree with regard to the enjoyment by the defendant of the water in a certain *tal*, leaving the defendant's exercise of such right, if wasteful or improper, to be the subject of a future enquiry.

Mr. Woodroffe for Appellant.

Mr. C. W. Arathoon for Respondent.

The facts of the case are sufficiently stated in the judgment of the Judicial Committee, which was delivered as follows by *Sir Montague Smith* :—

This was a suit brought by Maharajah Ram Kissen Singh Bahadur to establish an asserted right to a pyne or artificial watercourse, and also to a tal or reservoir, and the water flowing from them through another estate to his own, and to obtain the removal of certain obstructions in the pyne. The Maharani, the present appellant, is his widow. Several questions arising in the suit have been finally disposed of in the Courts below, leaving for the decision of their Lordships the main question, which arose on the special appeal before the High Court, as to the effect of the Statute of Limitations upon two of the obstructions complained of.

The facts necessary to raise this question may be shortly stated: The Maharajah and his ancestors were the owners of Mehal Sunout Purwurya, in the district of Gya; and the defendants were the owners of an estate called Mouzah Mora. The system of irrigation claimed by the plaintiff embraces an artificial pyne which is fed by a natural river at a point to the south of the defendant's mouzah. The pyne, which runs from the south in a northerly direction, after traversing other estates, enters Mouzah Mora, and runs through it, and afterwards through other lands to the defendant's mehal. There is, branching from the main pyne, a channel or smaller pyne which helps to feed the tal claimed by the plaintiff. The tal lies near the foot of some hills, and is fed partly by the water which runs through the channel connected with the pyne, and partly by the rainfall from these hills. It appears that there is another channel in a lower part of the tal, which runs from it and joins the pyne at a point near a bridge, described in the Moonsiff's map. It is said there were doors or sluices in the bridge by which the flow of the water had been to some extent regulated, but no question now arises with regard to them. The obstructions complained of were twelve in number, consisting of dams, cuts, and other modes of obstructing or diverting the water from the pyne.

The general result of the litigation below is, that the plaintiff succeeded in establishing his right to the pyne as an artificial watercourse, and to the use of the water flowing through it, except that which flowed through the branch channel, but failed to establish his right to the water in the tal, except to the overflow after the defendant, as the owner of mouzah Mora had used the water for the purpose of irrigating his own land. That, generally stated, is the result of the finding as to the rights of the plaintiff.

It was found in the Courts below that all the obstructions were unauthorised; and the plaintiff has succeeded below as to all the obstructions, except two, which are numbered No. 3 and No. 10. No. 3 is a khund or channel cut in the side of the pyne at a point below the bridge which has been spoken of. No. 10 is a dhonga, also below the bridge, and consists of hollow palm trees so placed as to draw off the water in the pyne for the purpose of irrigating the defendant's land. No question arises here as to the fact that those two works are an interruption of the plaintiff's right; and he would be entitled to succeed as to them, as he has succeeded as to the other obstructions, unless he is prevented from so doing by the operation of the Statute of Limitations.

The Moonsiff has found that the Statute opposes a bar to his claim. The

Subordinate Judge was of a different opinion, and reversed the Moonsiff's decree. On special appeal to the High Court, the Judges of that Court concurred with the Moonsiff, and, reversing the decree of the Subordinate Judge, affirmed the Moonsiff's judgment.

Before advertng to the Statute, it is necessary to see upon what facts the Courts based their decisions. It appears that the Moonsiff found that these obstructions had been made more than two, but less than twenty, years before the institution of the suit. The Subordinate Judge found that the two obstructions were recently made; and it may be inferred, from his disagreeing with the inferences which the Moonsiff drew from certain accounts which were produced, and the comments he made upon the latter's judgment in dealing with those accounts, that he meant to overrule the finding of the Moonsiff that the obstructions had existed for two years. If they had not existed for that period, no question on the Statute can arise. The High Court, without going into the facts, construed the judgment of the Subordinate Judge as not overruling the Moonsiff on the question of fact, and, therefore they assume that these obstructions had existed for more than two years before the institution of the suit.

Their Lordships are disposed to dissent from the view of the High Court, and to come to the conclusion that the Subordinate Judge really did intend to overrule the finding of the Moonsiff upon the fact of the length of time during which these obstructions had existed; but, assuming the fact to be as the Moonsiff and the High Court have regarded it, namely, that these obstructions had existed for more than two but for less than twenty years, they think that no provision of the Statute of Limitations interferes with the plaintiff's right to recover in respect of them.

The Limitation Act, No. IX of 1871, contains two sets of provisions, which are in their nature distinct. One relates to the limitation of suits, and prescribes the limitation of time for bringing suits after the right to sue has arisen. The other set relates to the manner of acquiring title and rights by possession and enjoyment. The latter provisions are contained in Part 4 of the Act, and are introduced under the heading "Acquisition of ownership by possession." They enact a mode of acquiring ownership by possession or enjoyment. Section 27 is as follows:—"Where any way or watercourse, or the use of any water or any other easement (whether affirmative or negative), has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption and for twenty years, the right to such access and use of light or air way, watercourse, use of water, or other easement shall be absolute and indefeasible." Then there is this provision, on which the judgment of the Moonsiff certainly proceeded; though whether the High Court proceeded on that, or on the part of the Act which relates to limitation properly so called, may be open to doubt. The clause is this: "Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

On the assumption of fact made by the Moonsiff that these obstructions had existed for more than two years before the suit, he might be right in finding that the plaintiff had not had peaceable enjoyment for twenty years, ending within two years before the institution of the suit, and, therefore, that the plaintiff had acquired no title by virtue of this Statute. The object of the Statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the Statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that in this case there is abundant evidence upon the facts found by the Courts for presuming the exist-

ence of a grant at some distant period of time. The result of the facts which appear in evidence, and the effect of the judgments of the Moonsiff and of the Subordinate Judge, are thus stated in the judgment of the High Court: "The evidence shows, and the Courts appear to have found, that the pyne was constructed by the ancestors of the plaintiff a great many years ago, possibly 50 or 60 years—certainly more than 20 years—for the purpose of irrigation; and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the defendants, which compensated them for any injury or inconvenience caused by the construction of the pyne." This being an artificial pyne, constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since, or at least down to the time of the obstructions complained of by the plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought, to refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff's mehal and the defendant's land by which the right was created. That being so, the plaintiff does not require the aid of the Statute; and his right, therefore, is not in any degree interfered with by the provision in the 27th Section, upon which the Moonsiff decided.

This being their Lordships' view of the case, it becomes unnecessary to consider the argument addressed to them by Mr. Woodroffe upon the effect of the Clause in the same 27th Section under the head "explanation," which defines what is to be considered an interruption. Nor is it necessary to consider the doctrine laid down in *Thomas v. Flight* in the Court of Exchequer Chamber, and afterwards in the House of Lords, with reference to a similar clause in the English Prescription Act.

Their Lordships have already observed that it appears to be open to doubt whether the High Court did not base its judgment on the part of the Statute which relates to limitation properly so called; namely, on Art. 31 of Part V. of the Second Schedule, which limits the time for bringing suits for the obstruction of watercourses to two years "from the date of the obstruction." The judgment contains this passage: "We find that the plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time when such infringement took place." If the Judges really meant to apply the limitation of Art. 31 above referred to, their decision is clearly wrong; for the obstructions which interfered with the flow of water to the plaintiff's mehal were in the nature of continuing nuisances, as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue. Indeed, s. 24 of the Statute contains express provision to that effect. For these reasons, their Lordships are of opinion that the judgment of the High Court with regard to the two obstructions in question cannot be sustained, and that the judgment of the Subordinate Judge, as regards these obstructions, ought to be restored.

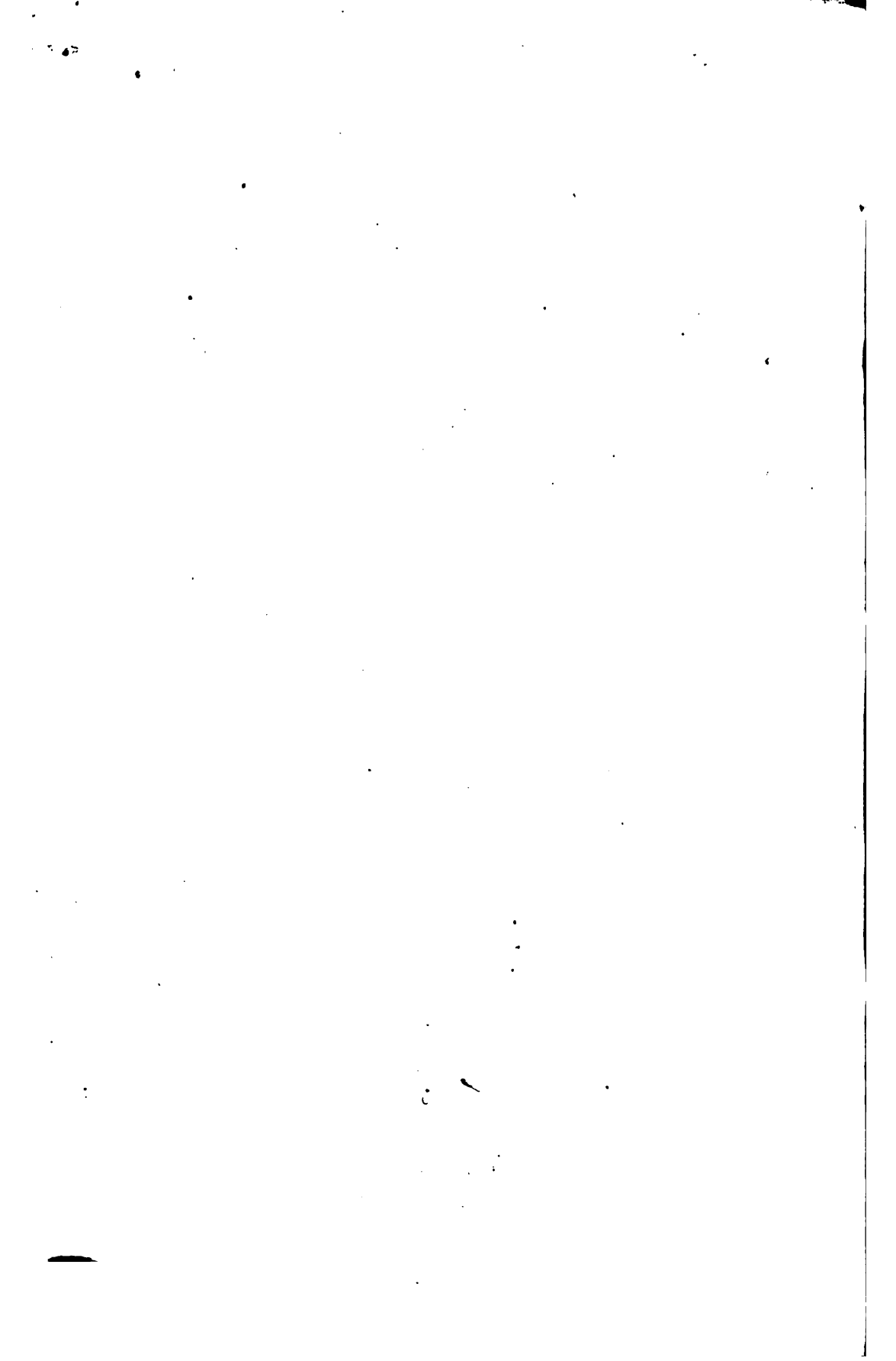
There remains to be noticed the contention raised as to the tal. Mr. Woodroffe has strongly argued that the findings as to the tal in favor of the defendant are wrong, and he further endeavored to show by reference to the judgments that they were not conclusive on that part of the case. Their Lordships, however, find that there are distinct judgments of the Moonsiff and of the Subordinate Judge to the effect that the defendant had a proprietary right in the tal and to the use of the water in the tal, and that the plaintiff had no right to the tal, or to the water in it, except to so much as flows out of it in a natural course to the plaintiff's pyne. To that over flow they considered him to be entitled, but to no more. Their Lordships, therefore, have come to the conclusion that, this case being heard only on special appeal, it is not open to the appellant to impeach those findings; and that, there-

fore, so far as this part of the case is concerned, they must dismiss the appeal. The result is, that their Lordships will humbly recommend Her Majesty that both the decrees of the High Court be reversed; that the decree of the Subordinate Judge be affirmed; and that the decree of the Moonsiff be modified in accordance therewith.

Mr. Woodroffe desired that the language of the Moonsiff's decree with regard to the enjoyment of the water in the tal should be modified. Their Lordships, having considered what was addressed to them on that subject, and the language of the Moonsiff's decree, are not disposed to interfere with it. The plaintiff having claimed the whole of the water in the tal, they think that the Moonsiff had to determine upon that claim; and that, having given only a qualified enjoyment of the water to the plaintiff, it was necessary, in order to arrive at what that qualified right was, to define the prior right of the defendant. He has done this in language which their Lordships, perhaps, would not have used themselves, but which is sufficiently intelligible. The Moonsiff having gone to the spot, and having taken apparently great pains with his decision, their Lordships are not disposed to alter or interfere with this part of his decree. Substantially, it amounts to a declaration that the defendant is entitled to use the water of the tal for the irrigation of his estate. If this should be wastefully or improperly done with reference to the right declared to belong to him, it may be the subject of a future enquiry. Their Lordships will, therefore, humbly advise Her Majesty to the effect above stated.

Their Lordships have considered the question of costs. The plaintiff having failed as to part of his appeal, they will follow the course which the High Court took, and give no costs to either party.





Stanford Law Library



3 6105 062 855 676

